UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2018/042
Order No.:	103 (GVA/2018)
Date:	11 June 2018
Original:	English

Before: Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON PRODUCTION OF EVIDENCE AND CASE MANAGEMENT

Counsel for Applicant:
Sètondji Roland Adjovi

Counsel for Respondent:
Miryoung An, ALS/OHRM, UN Secretariat
Matthias Schuster ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 19 April 2018, the Applicant, a Senior Trade Promotion Officer at the International Trade Centre, challenges the decision to separate him from service with compensation in lieu of notice and without termination indemnity for misconduct.

2. The Respondent filed his reply on 22 May 2018.

3. On 30 April 2018, the Respondent filed, *ex parte*, the investigation file in this matter maintained by the Office of Internal Oversight Services, as directed by the Tribunal in its Order No. 82 (GVA/2018) of 20 April 2018.

4. The Tribunal held a case management discussion on 6 June 2018.

Considerations

Scope of Review

5. Pursuant to a well-settled jurisprudence (*Haniya* 2010-UNAT-024, *Wishah* 2015-UNAT-537, *Portillo Moya* 2015-UNAT-423, Applicant 2013-UNAT-302, *Kamara* 2014-UNAT-398, *Walden* 2014-UNAT-436, *Koutang* 2013-UNAT-374, *Nasrallah* 2013-UNAT-310, *Mahdi* 2010-UNAT-018, *Abu Hamda* 2010-UNAT-022, *Aqel* 2010-UNAT-040, *Maslamani* 2010-UNAT-028), in cases concerning the imposition of a disciplinary measure, the Tribunal must verify if a three-fold test is met, to wit, whether:

a. The facts on which the disciplinary sanction was based have been established;

b. The established facts qualify as misconduct; and

c. The sanction is proportionate to the offence.

6. It is also incumbent on the Tribunal to determine if any substantive or procedural irregularity occurred (*Maslamani* 2010-UNAT-028, *Hallal* 2012-UNAT-207), either during the conduct of the investigation or in the subsequent procedure.

7. At the case management discussion, the Tribunal put the issue of the apparent conflict in respect of the nature of its review in disciplinary cases between the case of *Sanwidi* 2010-UNAT-084 and that of *Mbailgolmem* 2018-UNAT-819, particularly in respect of the first prong of the test above, which requires the Tribunal to determine whether the facts were established. The Tribunal heard submissions from both the Applicant and the Respondent.

8. The Applicant urged the Tribunal to follow *Mbailgolmem*, where the UNAT held that the Tribunal shall proceed by way of an appeal *de novo* and a redetermination of the merits of a case was the correct way to proceed:

> 27 In the present case, the UNDT followed a different approach. It essentially reviewed the investigative process, concluded that it resulted in an unreasonable determination and referred the matter back to the Administration for further investigation and fact-finding. The right of a staff member to "appeal" an administrative decision imposing a disciplinary measure, in terms of Article 2(1)(b) of the UNDT Statute, is not restricted to a review of the investigative process. On the contrary, it almost always will require an appeal de novo, comprising a complete re-hearing and redetermination of the merits of a case, with or without additional evidence or information, especially where there are disputes of fact and where the investigative body a quo had neither the institutional means or expertise to conduct a full and fair trial of the issues.
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> 28. However, that said, there will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand. Should the evidence be insufficient in certain respects, it will be incumbent on the UNDT to direct the process to ensure that the missing evidence is adduced before it.

> 29. Thus, while there may be occasions where a review of an internal investigation may suffice, it often will be safer for the UNDT to determine the facts fully itself, which may require supplementing the undisputed facts and the resolution of contested facts and issues arising from the investigation. The UNDT ordinarily should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and convincing evidence has been discharged on the evidence adduced.

9. The Respondent urged the Tribunal to follow *Sanwidi*. In *Sanwidi*, UNAT decided that the role of the UNDT was not to be undertaking a merits review and making a redetermination of a disciplinary matter to substitute its decision for that of the Secretary General:

> 38. Administrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.
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> 40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.
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> 42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

10. When there is a dispute as to the facts, both *Sanwidi* and *Mbaigolmem* are applicable. The Tribunal, insofar as is necessary, shall hear and review factual evidence, both in respect of facts determined by the decision maker and other relevant facts, if any, which were available at the time, but were not referred to in the decision. That being said, the Tribunal ultimately has to decide whether the facts forming the basis of the contested decision, more particularly those facts upon which the finding of misconduct have been reached by the decision-maker, have been established. Evidence on facts that have not been retained by the decision-maker to support the finding on misconduct is thus not relevant to the disposal of the case.

11. In the present case, the facts supporting the conclusion of the Assistant Secretary-General for Human Resources Management that the Applicant committed misconduct are set out in the contested decision, dated 6 April 2018, in the following terms:

> Based on a review of the entirety of the record, including your comments, the Under-Secretary-General for Management has concluded that you have not provided a satisfactory explanation so as to displace the other evidence on the record against you. In reaching this conclusion, the Under-Secretary-General for Management has had regard, among other things, to the following:

> The evidence establishes that you engaged in inappropriate conduct towards Ms. X by sending her text messages calling her a "BB" and a "hamster" and giving her a gift of scarf together with a love message. Your conduct may be viewed as one of a sexual nature because the content of your messages to her, i.e., "BB" may be read to mean "baby" and the love message in the card is sexually suggestive. Such conduct may have reasonably been perceived as humiliating and offensive and Ms. X stated that she was intimidated by your conduct.
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> With respect to the three photographs of you on a jetty, the forensic analysis indicated that it is most likely that the photographs were taken by the camera of Ms. X's mobile phone. As such, Ms. X's account that while she was a consultant, in October 2014, you sought to meet her outside office, and lured her to the meetings under the disguise of "office retreats" is credible. This provides a context to your subsequent conduct, for instance, sending her text messages and giving her a card with a love message.
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> Your comment that the card with a love message was meant for your daughter and was stolen from your office is not satisfactory. There is no evidence supporting your contention that you had placed the scarf and/or card in your office, or that you reported those items as being stolen from your office. Contrary to your claim that the Administration shifted the burden of proof by requesting you to prove your innocence, giving you an opportunity to justify the evidence produced during the investigation does not shift the burden of proof.
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> You were Ms. X's hiring manager and her first reporting officer. Additionally, the record indicates that Ms. X was under a precarious contractual condition as her temporary appointment had no guarantee of renewal, and that she was under the impression that you were in a position to renew her appointment. Given this imbalance in power between you and Ms. X, the substance of your text messages and the love message in a card exceeds the level of appropriate interactions, and may be reasonably perceived as humiliating and offensive. You knew or at least should have known that your conduct may be perceived as inappropriate and humiliating. Further, your conduct towards Ms. X exhibited your improper use of a position of influence, power or authority against her.

12. The complaints otherwise made against the Applicant, but not the subject of adverse decisions, shall not be considered by the Tribunal at the hearing of this case.

Production of documents

13. At the case management discussion, the Tribunal ordered the production of the following documents by the Respondent pursuant to art. 9 of its Statute:

a. The terms of reference for OIOS' activities;

b. ITC/AI/2012/22 (Detailed disciplinary measures and procedures); and

c. Any response from the Executive Director, ITC, to the letter of 14 June 2016 from the fact-finding panel.

14. The Tribunal also ordered the Respondent to identify the authors of the report produced by OIOS on 28 February 2017 in this matter.

Hearing

15. At the case management discussion, the Tribunal issued a number of orders, in consultation with the parties, for the preparation of the hearing on the merits of the case. These are recalled below.

16. To remove any doubt in respect of the procedures to be followed at the hearing, the following shall apply:

a. The Applicant and then the Respondent shall open their cases;

b. Relevant witnesses will be heard in the order set out by the Tribunal, commencing by those whose appearance was requested by the Applicant unless the Tribunal deems it necessary to do otherwise, in particular to accommodate availability constraints. Such witnesses shall be examined in chief by the party who had called them, and then cross-examined by the opposing party. A witness may be re-examined only upon matters arising from the cross-examination, and not otherwise, unless leave is sought and given. Pursuant to the jurisprudence of UNAT, the Applicant, although regarded as a party in the civil law system, is required to be sworn when giving evidence. The Applicant is to produce evidence of any alleged damages, including moral damages, as part of his evidentiary case (see, *inter*

alia, *Kallon*2017-UNAT-742; see also *Auda* 2017-UNAT-787, para. 64); and

c. Upon the closing of the evidence, the Applicant may make oral submissions on the facts and law, followed by the Respondent who may make like submissions. The Applicant shall have a right to reply to the submissions of the Respondent.

17. It is noted that where the Tribunal or the Applicant requires the attendance of witnesses who are or have been in the employ of the Organization, such witnesses are to be treated as if they were witnesses for the Respondent. Thus, the Respondent will examine them first, the Applicant will cross-examine, and the Respondent may re-examine.

18. It is further noted that the Applicant shall be forced to leave Switzerland due to the termination of his employment on 20 June 2018. The Respondent is urged, if possible, to make arrangements to facilitate the continued residence of the Applicant in Switzerland, until this Application has been heard. Should this not be possible, the Respondent is requested to assist in facilitating the issue of a visa for the attendance of the Applicant at the hearing of this matter.

Request for anonymity

19. Counsel for the Applicant requested that the name of the Applicant be redacted from orders and judgments issued in this matter. As an interim matter, the Tribunal shall refer to the Applicant by that name until a final decision is made in respect of the application for anonymity.

IT IS ORDERED THAT:

a. The parties are called to a hearing on the merits, to be held in Geneva from **Monday, 15 October to Friday, 19 October 2018, starting at 9.30 a.m. (Geneva time)** on the first day;

b. The Respondent shall file the documents listed and provide the information requested in paras. 13 and 14 above by **Friday, 15 June 2018**;

c. The documents filed by the Respondent *ex parte* are to be released to the Applicant subject to redaction. Therefore, by **Wednesday, 20 June 2018**, the Respondent shall file a redacted copy of the *ex parte* documents. The Tribunal shall then determine which redactions shall apply and release the said documents, under seal, to the Applicant, through those representing him;

d. By **Wednesday, 20 June 2018**, the Applicant may file a response to the Respondent's reply;

e. By **Wednesday, 27 June 2018**, both parties shall file a list of proposed witnesses including a short summary of the anticipated evidence to be given;

f. Pursuant to art. 36 of the Tribunal's Rules of Procedure, the parties to this application may, by **Friday, 7 September 2018**, seek the issue of a summons for a person, either named or identified by position held, to appear as a witness or to produce documents or information relevant to the consideration of the Application;

g. Both parties shall file with the Tribunal a list of authorities, including administrative issuances to be relied upon by **Tuesday, 4 September 2018**;

h. Any interlocutory motions are to be filed by **Monday, 17 September 2018**, although the parties may seek leave to file such a motion after that date;

i. Both parties are to provide oral closing statements at the conclusion of the hearing. Parties are at liberty to file a written outline of their closing submissions before they make their closing statements and may address it, but not read it, in their oral closing statements;

j. Liberty is reserved to both parties to request, on two working days' written notice, the resumption of the case management discussion in respect of the calling of witnesses or any other matters relating to the hearing on the merits;

k. Due to the time difference between Geneva and New York, where Counsel for the Respondent is located, the Respondent is to ensure that his Counsel appears in person at the hearing of this matter; and

l. The parties are reminded that matters before the Tribunal may be settled at any time until a judgment has been entered into the Register of judgments. Such settlement may be the result of this Tribunal's referral to a mediator or by direct negotiations between the parties.

(*Signed*)
Judge Rowan Downing
Dated this 11th day of June 2018

Entered in the Register on this 11th day of June 2018
(*Signed*)
René M. Vargas M., Registrar, Geneva