



**Before:** Judge Sean Wallace  
**Registry:** Nairobi  
**Registrar:** René M. Vargas M., Officer-in-Charge

NGUETO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON  
THE RESPONDENT'S MOTION  
FOR SUMMARY JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Francisco Navarro, UNHCR  
Charlotte Servant-L'Heureux, UNHCR

## **Introduction**

1. The Applicant in this case is a former Senior Protection Officer of the Office of the United Nations High Commissioner for Refugees (“UNHCR”). He challenges the decision, dated 17 August 2023, to
  - a. Add his name and a “Final Determination of Sexual Harassment” note to the ClearCheck database, which is accessible to participating UN entities and may prevent future recruitment by these entities; and
  - b. Include a redacted copy of the 17 August 2023 letter in his personal file.
2. Currently pending is a Respondent’s Motion for summary judgment arguing that the application is not receivable *ratione materiae* because the Applicant failed to submit a request for management evaluation.
3. The Applicant filed a response to the motion, and thus the issue is ripe for ruling.

## **Consideration**

4. The requirement for management evaluation is found in staff rule 11.2, which provides:
  - (a) Staff members wishing to formally contest an administrative decision alleging non-compliance with their contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.
  - (b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from a duly designated technical body, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 (Disciplinary measures) following the completion of a disciplinary process is not required to request a management evaluation.

5. Additionally, staff rule 10.3(c) provides that a “staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the United Nations Dispute Tribunal, in accordance with chapter XI (Appeals) of the Staff Rules.”

6. The Dispute Tribunal’s Statute and Rules of Procedure accord with these provisions. See, Statute, art. 8 and Rules of Procedure, art. 7.

7. In this case, the Respondent argues that “the contested decision was not a disciplinary or non-disciplinary measure imposed following the completion of a disciplinary process .... as UNHCR lacked capacity to complete a disciplinary process following the Applicant’s separation from UNHCR at the expiry of his fixed-term appointment on 8 December 2022”.

8. Although this argument may be technically correct, it ignores the unique facts of this case.

9. The contested decision is set out in the 17 August 2023 letter, which is titled “Conclusion of the disciplinary process and entry in the ClearCheck database”. Consistent with this title, the letter recounts the procedural history of the allegations, summarizes the evidence, finds that the alleged facts are established by clear and convincing evidence, and concludes that the conduct constitutes misconduct within the meaning of the Staff Rules.

10. The letter goes on to describe how the High Commissioner examined the practice in similar disciplinary instances and weighs aggravating and attenuating circumstances “in order to determine what would have been an appropriate disciplinary measure” (translated from French). It thus states that, “had [the Applicant] been in the service to the Organization, the High Commissioner would have decided to impose the disciplinary measure of termination of service with compensation in lieu of notice and without [termination indemnity] in accordance with staff rule 10.2(a)(viii)”.

11. It then states that the Applicant's "name and a 'Final Determination of Sexual Harassment' note will be added to the ClearCheck database, which is accessible to participating UN entities and may prevent future recruitment by these entities. In addition, a redacted copy of this letter will be inserted in your personal file".

12. The letter then adds: "Please note that, notwithstanding your status as a former staff member, you may contest the measure in accordance with the provisions of Chapter XI of the United Nations Staff Regulations and Rules" (translated from French).

13. Clearly, by both its title and substance, the contested decision letter recounts that the disciplinary process had been completed and resulted in a non-disciplinary measure being imposed. This would bring the case within the exception to the general management evaluation requirement as described in staff rules 10.3(c) and 11.2(b).

14. This was later confirmed four days later in an email to the Applicant dated 21 August 2023. In that email, the UNHCR Director of Human Resources (and author of the contested decision letter) stated "I would like to emphasize that the High Commissioner and I are satisfied that the investigation and disciplinary process has been completed in compliance with the applicable rules, and that all relevant evidence has been considered" (translated from French).

15. With regard to the argument that UNHCR lacked the capacity to complete a disciplinary process after the Applicant's separation, this evidence leads to two possibilities. Either UNHCR acted when it admittedly lacked the capacity to complete a disciplinary process, or the disciplinary process was completed in a legally timely manner before the Applicant's separation at the expiry of his fixed-term appointment, and UNHCR took at least eight months to act upon it. Under either possibility, the Respondent is estopped from arguing that the Applicant failed to request management evaluation.

16. The doctrine of estoppel is a well-recognized legal principle precluding a party from asserting something contrary to what is implied by a previous action or statement of that party. The International Court of Justice long ago observed that “in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity.” See *Delimitation of the Maritime Boundary of the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246, para. 130 cited with approval in *Tolstopiatov* UNDT-2011-012, para. 82.

17. This Tribunal more recently noted that “it is well-settled jurisprudence that for there to be an estoppel, there would have to be a representation made by one party, which the other party reasonably relied upon, to his or her detriment”. *Fernandez* UNDT-2023-106, para. 50, citing *Newland* 2018-UNAT-820, para. 35; *Kortes* 2019-UNAT-925.

18. The doctrine has been applied by the Appeals Tribunal to bar the Respondent from arguing non-receivability *ratione materiae* for failure to request management evaluation. *Simmons* 2012-UNAT-221; para. 61.

19. UNHCR said (twice) that it had completed the disciplinary process and the inclusion in ClearCheck decision is based on evidence reviewed in that process. Any reasonable person would conclude that this was a non-disciplinary measure imposed upon completion of that disciplinary process and thus not subject to the management evaluation requirement. The record shows that the Applicant reached this same conclusion and, relying on the Respondent’s statements, filed directly with this Tribunal. It would be detrimental to the Applicant to dismiss the application as not receivable under these circumstances.

20. The Respondent also relies on three cases from the Appeals Tribunal, but those cases are inapposite. In the first two, *Kennes* 2020-UNAT-1073 and *Mugo* 2023-UNAT-1314, the subjects of misconduct allegations challenged the Organization’s decision to suspend disciplinary processes after the Applicant resigned or retired. That is certainly not the situation here. And the holding of these cases, “that the Administration has no duty to proceed with, and lacks capacity to

conduct, a disciplinary measure once a staff member has left the Organization” is not an issue in this case.

21. The Respondent also relies on language in a third case, *Appellant* 2022-UNAT-1216, which says that “the decision to post the Appellant’s information on the Screening Database was a final administrative decision in and of itself, which was distinct from the dismissal decision. As such, if the Appellant sought to challenge it, he should have first submitted a request for management evaluation”. *Id.* at para. 61.<sup>1</sup>

22. First, it is important to note that this language is *obiter dicta*. It immediately follows the Appeals Tribunal’s observation that “it [is] unnecessary to examine the Appellant’s request to remove his name from the Screening Database, which came as a result of his dismissal from service for engaging in the sexual harassment of a colleague”. *Id.*

23. Second, the cases are factually distinguishable. In *Appellant*, the staff member was sanctioned with summary dismissal by the Deputy Executive Director, Management, UNICEF, after conclusion of the disciplinary process. *Id.* at para 12. More than three weeks later, the Chief, Policy and Administrative Law Section, UNICEF, informed the Appellant of the inclusion of his details in “an electronic database (Screening Database) that is accessible by other entities participating in the United Nations System”. *Id.* at para 13. Clearly those were two separate and distinct decisions taken by different people on different days.

24. In contrast, in this case there was only one decision: to place the Applicant in the ClearCheck database, made by the Director, Human Resources, UNHCR, following completion of the disciplinary process. Thus, *Appellant* does not support the Respondent’s motion.

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<sup>1</sup> The Respondent’s motion incorrect cites this as para. 45.

25. In summary, the Tribunal finds that the Respondent is estopped from arguing that the application in this case is irreceivable for failure to request management evaluation.

**Conclusion**

26. In view of the foregoing, it is ORDERED THAT:

- a. The Respondent's Motion for Summary Judgment is denied; and
- b. The Respondent shall file his reply on the merits of the application by **Tuesday, 13 August 2024.**

*(Signed)*

Judge Sean Wallace

Dated this 29<sup>th</sup> day of July 2024

Entered in the Register on this 29<sup>th</sup> day of July 2024

*(Signed)*

René M. Vargas M., Officer-in-Charge, Nairobi