UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2019/083
Order No.:	141 (NY/2020)
Date:	24 September 2020
Original:	English

Before: Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

MALHOTRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
Monika Ona Bileris

Counsel for Respondent:
Kevin Browning, UNICEF

Introduction

1. On 21 November 2019, the Applicant, a staff member with the United Nations Children's Fund ("UNICEF"), filed an application to contest the decision to place her on administrative leave with full pay pending the completion of an investigation and the subsequent decisions to impose on her a disciplinary measure of a written censure to be placed in her official status file for five years and to take an administrative measure of a removal of all supervisory functions from her for two years.

2. On 20 December 2019, the Respondent filed a reply submitting that the Applicant's appeal of the decision to place her on administrative leave is not receivable and that the application is otherwise without merit.

3. On 30 December 2019, the Applicant filed a motion for leave to file a response to the Respondent's reply to address arguments and alleged inaccuracies contained in the reply.

4. By Order No. 1 (NY/2020) dated 2 January 2020, the Tribunal granted the Applicant's motion for leave to file a response to the Respondent's reply.

5. After having been granted an extension of time, the Applicant filed her response to the Respondent's reply on 16 March 2020.

6. On 18 September 2020, the case was assigned to the undersigned Judge.

Consideration

The issues of the case

7. The Appeals Tribunal has consistently held that the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member,

in determining the contested or impugned decisions to be reviewed" (see *Fasanella* 2017-UNAT-765, para. 20).

8. In the present case, the Tribunal defines, on a preliminary basis, the issues to be adjudicated upon as follows:

a. Was the decision to place on the Applicant on administrative leave receivable, and if so, lawful?

b. Was it legal to impose the disciplinary sanction of placing a written censure against the Applicant for five years in her official status file?

c. Was the administrative decision to impose an administrative measure of removal of all supervisory functions from her for two years lawful?

d. Should any of the contested decisions be unlawful, what relief, if any, is the Applicant entitled to?

The decision to place the Applicant on administrative leave

9. The Respondent, in essence, submits that the decision to place the Applicant on administrative leave is not receivable as it was taken during a disciplinary process and not following it as per staff rule 11.2(b).

10. In response, the Applicant submits that the relevant decision "made up part of the investigative process, which was only concluded with the transmission of the disciplinary sanction, and as such is receivable". The Applicant further contends that she "did, in fact, request a management review of the administrative leave and noted explicitly the damage the administrative leave was doing to her career viability and reputation" in an email exchange on 21 October 2018.

11. The Tribunal notes that under staff rule 11.2(a) a staff member who wishes to "formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment … shall, as a first step, submit to the

Secretary-General in writing a request for a management evaluation of the administrative decision". This requirement does, however, not apply to "a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process".

12. In the present case, it is evident that the decision regarding placing the Applicant on administrative leave was taken during—and not following—the disciplinary process. Under staff rule 10.2(a) and (b), the Applicant was therefore required to file a request for management evaluation, but when closely perusing the email correspondence of 21 October 2018 to which the Applicant refers, it is clear the Applicant did not do so.

13. Accordingly, the Tribunal preliminarily finds that the Applicant's appeal against the decision to place her on administrative leave is not receivable pursuant to staff rule 11.2(a).

The remaining issues

14. The Appeals Tribunal has consistently held the "[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration". In this context, [the Dispute Tribunal] is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". In this regard, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred", and when "termination is a possible outcome, misconduct must be established by clear and convincing evidence". Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it "means that the truth of the facts asserted is highly probable". See, for instance, para 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted

Molari 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT0-1024.

15. The Appeals Tribunal has generally held that the Administration enjoys a "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

16. The Appeals Tribunal, however, underlined that "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" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40). In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

17. Among the circumstances to consider when assessing the Administration's exercise of it discretion, the Appeals Tribunal stated "[t]here 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" (see *Sanwidi*, para. 38).

18. In the present case, the parties appear to agree that the sanction was based on three incidents that took place on 13 March 2018, 12 April 2018 and 25 May 2018,

respectively. These incidents were recorded in the contested decision of 21 November 2019 by the acting Deputy Executive Director, Management, who further stipulated that these facts were "not in dispute", as follows:

> (i) At the times in question, you acted in a supervisory capacity to [Mr. B (name redacted)] and [Mr. C (name redacted)];
>
> (ii) For several months prior to the meetings of 13 March 2018 and 12 April 2018, [Mr. B] had been experiencing performance-related issues and engaged in conduct, including communicating with colleagues on matters that were outside his purview, that caused confusion and stress in your office and exposed your office to reputational risks;
>
> (iii) You told investigators that, during the 13 March 2018 meeting, you may have "expressed irritation" toward him;
>
> (iv) On 12 April 2018, you witnessed [Mr. B] having a conversation with [Ms. H (name redacted)], then serving in the Office of the Executive Director, and that, given his history of causing confusion and stress by communicating with colleagues on matters outside his purview, this concerned you;
>
> (v) Later that day, you called for a meeting with [Mr. B and Ms. J and Ms. K (names redacted)];
>
> (vi) [Ms. J and Ms. K] were both present during the meeting of 12 April 2018 with [Mr. B];
>
> (vii) During the meeting of 12 April 2018, "the issue (i.e., [Mr. B's] communications with colleagues on matters outside his purview) became contentious";
>
> (viii) While you had not anticipated that the matters discussed in the 12 April 2018 meeting would become contentious, you "appreciate … it was not good to be making this a group conversation";
>
> (ix) In the summer of 2017, [Mr. C] enrolled in a Master's degree program requiring him to travel to Europe for one (1) week each month and did not notify UNICEF of this fact in October 2017 when he began his appointment with UNICEF;
>
> (x) Shortly after his appointment, without consulting or informing you, [Ms. J, Mr. C's] first-reporting officer, agreed to a flexible-working arrangement allowing [Mr. C] to spend one (1) week per month outside of the office;
>
> (xi) You did not learn about [Mr. C's] extended absences from the office or his flexible working arrangements until you noticed that he was not copied on several important matters relevant to his duties;

> (xii) [Mr. C's] extended absences and flexible working arrangements affected the work of the section; and
>
> (xiii) On 25 May 2018, you held a telephone meeting with [Mr. C] and [Ms. J] after learning of his flexible working arrangements and absences from the office during which you admittedly "lost (your) cool" and "spoke sharply" to him.

19. In the contested decision of 21 November 2019, concerning the two incidents involving Mr. B, the acting Deputy Executive Director refers to witness statements provided by Mr. B, Ms. J and Ms. K. Further reference is made to seven other witness statements, and it was noted that "[w]hile not directly testifying to the three (3) incidents at issue here, these witness statements do indicate that the alleged misconduct was consistent with a pattern of behaviour observed and experienced by many of your colleagues". It was, however, also indicated that "in contrast to these witnesses, four (4) witnesses stated that they had never witnessed you engage in such conduct".

20. In the contested decision of 21 November 2019, the Applicant's comments, and the acting Deputy Executive Director's observations thereon, were summarized as follows:

> On 24 July 2019, you provided 25 pages of comments on the charges of misconduct. You dedicated a considerable portion of your comments to detailing the various work-related disagreements and performance-related shortcomings of the complainants and the negative impact these shortcomings had on your professional relationship with them and on the office as a whole. I have accepted the veracity of your comments in this regard. In your comments, you also provided contrasting accounts of the three (3) incidents at issue and suggested that the work-related disagreements and performance-related shortcomings are to blame for the 'disparate accounts' put forward by you and the complainants. In view of the multitude of examples of your conduct provided by other witnesses, and the consistency of the described conduct with the allegations of misconduct at issue in this matter, I do not accept your assertion that these disagreements and shortcomings can fully, or even mostly, explain the disparate accounts between you and the complainants. I do, however, find the performance shortcomings and work-related disagreements described by you, and the impact these had on you and your office, to be mitigating circumstances in the instant matter.

21. Appended to the application, the Applicant files the investigation report of Office of Internal Audit and Investigations ("OIAI") dated 24 May 2019 and her comments thereon dated 24 July 2019. As annexes to the reply, the Respondent files the complaints against the Applicant made by Mr. B, Ms. J and Ms. K, as well as a number of witness statements, including those of Mr. B and Mr. C.

22. It therefore appears to the Tribunal that the only evidence missing to make a judicial determination of the pending issues are those witness statements that were made in the context of OIAI's investigation that have not been produced, including those of Ms. J and Ms. K, as well as any possible documentation of the Applicant's injuries. The main questions to be decided thereafter are of legal nature, namely whether the facts established by OIAI amounted to misconduct and the sanctions were proportionate to the offences.

Further case management

23. The Tribunal will allow the parties to comment on the Tribunal's preliminary findings, and if no more evidence is requested, file written closing statements.

24. If any of the parties wishes that further evidence be produced, s/he is to specifically refer to the relevant documentation/witness and clearly indicate what disputed fact the relevant evidence is intended to corroborate. In this regard, the Tribunal notes that the Appeals Tribunal has prohibited a so-called "fishing expedition", whereby one party requests the other party to produce evidence in "the most general terms" (see, for instance, Rangel Order No. 256 (2016)). A party requesting certain evidence must therefore be able to provide a certain degree of specificity to her/his request.

25. If no further evidence needs to be produced, the Tribunal will request each of the parties to indicate whether s/he finds that an oral hearing is necessary and indicate the purported objective therewith. In line herewith, reference is made to the Appeals Tribunal in *Nadasan* 2019-UNAT-918, para. 39 (affirmed in *Ganbold* 2019-UNAT-976, para. 28), in which it held that:

> … There may be instances, where [the Dispute Tribunal] will come to the conclusion that the facts on which the disciplinary measure was based have been established, where necessary by clear and convincing evidence, during the investigation proceedings. In such cases, [the Dispute Tribunal] will normally undertake an oral hearing as provided for in disciplinary cases under Article 16 of [the Dispute Tribunal's] Rules of Procedure, but the Tribunal may decide not to (re)hear witnesses or gather additional evidence.

26. Finally, the Tribunal notes that the Respondent's reply indeed exceeds the ten-page limit as indicated by the Applicant in her 16 March 2020 response to the reply and that the Respondent has unduly failed to request permission to do so. Considering the Tribunal's instructions made in the present Order, it does, however, not find that the Applicant has suffered any prejudice by this procedural breach and will allow the reply in its entirety.

IT IS ORDERED THAT:

27. The Respondent's reply is allowed in its entirety even though it exceeds the ten-page limit;

28. By **4:00 p.m. on Wednesday, 7 October 2020**, the Respondent is to file all remaining witness statements made in the context of OIAI's investigation;

29. By **4:00 p.m. on Wednesday, 14 October 2020**, each party is to file a submission responding to the following questions:

a. What additional evidence, if any, is to be produced? If so, the requesting party is to indicate:

i. What documentation is needed and what specific disputed fact(s) is/are this/these document(s) to corroborate?

ii. If oral evidence, who is to give testimony and what specific disputed fact(s) is/are this/these witness/es to corroborate? A

succinct summary of each proposed witness statement is to be produced;

b. If no oral evidence is requested, should the Tribunal hold a hearing and what would be the purported objective therewith?

30. By **4:00 p.m. on Wednesday, 21 October 2020,** if neither of the parties request a hearing to be held, each of them is to file a written closing statement responding to each of the issues outlined in the present Order. As no new submissions or evidence are allowed at this stage, the closing statement is solely to summarize the submissions already on record. The closing statement is to be seven pages maximum, using Times New Roman, font 12 and 1.5 line spacing. Unless otherwise directed, the Tribunal will thereafter proceed to adjudicate the matters before it.

(Signed)

Judge Joelle Adda

Dated this 24th day of September 2020