Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
Ana Giulia Stella, OSLA

Counsel for Respondent:
Miryoung An, ALD/OHR/UN Secretariat
Romy Batrouni, ALD/OHR/UN Secretariat

Introduction

1. On 17 June 2021, the Applicant filed the application in which he contests the "Administration's finding of misconduct and imposition of a disciplinary sanction", namely "separation from service with compensation *in lieu* of notice and without termination indemnity".

2. On 16 July 2021, the Respondent duly filed the reply in which he submits that the application is without merit.

Consideration

The issues of the present case

3. 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". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

4. Accordingly, the basic issues of the present case can be defined as follows:

   a. Was it a lawful exercise of discretion to impose against the Applicant disciplinary sanction of separation from service, with compensation *in lieu* of notice, without termination indemnity?

   b. If not, to what remedies, if any, is the Applicant entitled?

The Tribunal's limited scope of review in disciplinary cases

5. 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-UNAT-1024.

6. 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".

7. 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).

8. Among the circumstances to consider when assessing the Administration's exercise of its 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).

Anonymity

9. The Applicant requests that "in light of the utmost sensitivity of the matter, for his name to be anonymized in any published court orders and judgments".

10. The Respondent seeks that this request is denied, because with reference to the Appeals Tribunal in *Servas* Order No. 127 (2013) and *Williams* Order No. 146 (2013), "[t]he names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability". In this regard, the Applicant provided no "greater need than any other litigant for confidentiality" as per *Williams* Order No. 146 (2013).

11. While recognizing the mentioned jurisprudence of the Appeals Tribunal, the Tribunal disagrees with the Respondent. The subject of the present case is indeed

particularly sensitive and could have a very damaging impact on the Applicant's reputation, even if he eventually should win the case. Until the Tribunal renders its final judgment on the merits, wherein this question might be reconsidered as relevant, the Applicant's name is therefore to be anonymized.

Case management

Agreed and disputed facts

12. The Applicant submits that the disciplinary decision against the Applicant was unlawful because (a) the facts on which the sanction is based have not been established; (b) the established facts do not qualify as misconduct under the Staff Regulations and Rules; (c) the sanction is not proportionate to the offence; and (d) due process was not respected throughout the process.

13. When studying the parties' submissions on facts, it is, however, not clear to the Tribunal on what facts they actually agree and disagree. In this regard, the Appeals Tribunal has held that the Dispute Tribunal is not to make its own factual findings if the parties have agreed on certain facts (see *Ogorodnikov* 2015-UNAT-549, para. 28). The Tribunal also notes that the very purpose of producing evidence—written or oral—is to substantiate the specific relevant facts on which the parties disagree. Accordingly, there is, in essence, only a need for evidence if a fact is relevant and disputed (in line herewith, see *Abdellaoui* 2019-UNAT-929, para. 29, and *El-Awar* 2019-UNAT-931, para. 27).

14. The Tribunal will therefore order the parties to produce a consolidated list of agreed and disagreed facts to be able to understand the factual issues at stake.

Evidence

15. To start with, the Tribunal notes that evidence is only relevant in the judicial review of the Applicant's claim regarding whether the facts have lawfully been established—the disciplinary findings on misconduct and proportionality are legal rather than factual determinations. Also, neither party has requested production of any additional either written or oral evidence, at least not explicitly.

16. When perusing the case file, the Tribunal finds that it needs to understand the case better before deciding whether all relevant written documents have been submitted. As for oral evidence, the Tribunal notes that arts. 16.1 and 2 of the Rules of Procedure provide that "[t]he judge hearing a case may hold oral hearings" and that "[a] hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure". It therefore follows that it is for the assigned judge to a case to determine whether a hearing is necessary and that in a disciplinary case like the present one, this shall normally be done.

17. If no oral evidence needs to be produced, the Tribunal will accordingly request each of the parties to indicate whether they find that an oral hearing is necessary and indicate the purported objective therewith (see, also *Nadasan* 2019-UNAT-918, para. 39, as affirmed in *Ganbold* 2019-UNAT-976, para. 28). This could, for instance, be for the parties to present their legal contentions directly to the assigned Judge, although it is noted that the parties would, in any case, also need to file written closing statements summarizing all their submissions.

18. If any of the parties requests the production of further evidence, they are 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.

19. In light of the above,

IT IS ORDERED THAT:

20. The Applicant's request to have his name anonymized is granted until the Tribunal renders its final judgment on the merits, wherein, as relevant, this question might be reconsidered;

21. By **4:00 p.m. on Monday, 7 February 2022**, the parties are to file a jointly-signed statement providing, under separate headings, the following information:

a. A consolidated list of the agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning;

b. A consolidated list of the disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex in the application or reply, as applicable. At the end of the disputed paragraph in square brackets, the party contesting the disputed fact shall set out the reason(s);

22. By **4:00 p.m. on Monday, 7 February 2022**, each party is to submit whether he requests to adduce any additional evidence, and if so, state:

a. What additional documentation they request to be disclosed, also indicating what fact(s) this is intended to substantiate; and/or

b. The identity of the witness(es), who the party wishes to call, and what disputed fact(s) each of these witnesses are to give testimony about, also setting out the proposed witness's testimony in writing. This written witness statement may also be adopted as the examination-in-chief at a potential hearing if the party leading the witness should wish to do so.

23. Upon receipt of the above-referred submissions, the Tribunal will issue the relevant instructions for further case management.

(Signed)
Judge Joelle Adda
Dated this 14th day of January 2022