Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

NAVAS CASTILLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER
ON CASE MANAGEMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Isavella Maria Vasilogeorgi, DAS/ALD/OHR, UN Secretariat

Introduction

1. By Order No. 019 (NY/2023) dated 3 May 2023, the Duty Judge ordered the Applicant to file a rejoinder to the Respondent's reply and state whether he wished to adduce any further evidence.

2. On 23 May 2023, the Applicant filed the rejoinder and appended a number of additional documents.

3. On 21 July 2023, the present case was assigned to the undersigned Judge.

Consideration

The issues of the present case

4. 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.

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

a. Did the Under-Secretary-General for Management Strategy, Policy and Compliance ("the USG/DMSPC") lawfully exercise her discretion when imposing the disciplinary measure of separation from service, with compensation in lieu of notice and with termination indemnity, in accordance with Staff Rule 10.2(a)(viii), against the Applicant?

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

The Tribunal's limited scope of review of disciplinary cases

6. Under "the settled case law" of the Appeals Tribunal, "judicial review of a disciplinary case requires [the Dispute Tribunal] to examine i) whether the facts on which the disciplinary measure is based have been established; ii) whether the established facts amount to misconduct; iii) whether the sanction is proportionate to the offence; and iv) whether the staff member's due process rights were respected. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable" (see para. 51 of *Karkara* 2021-UNAT-1172, and similarly in, for instance, *Modey-Ebi* 2021-UNAT-1177, para. 34, *Khamis* 2021-UNAT-1178, para. 80, *Wakid* 2022-UNAT-1194, para. 58, *Nsabimana* 2022-UNAT-1254, para. 62, and *Bamba* 2022-UNAT-1259, para. 37). The Appeals Tribunal has further explained that 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 para. 30 of *Molari* 2011-UNAT-164). 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" (see para. 32 of *Turkey* 2019-UNAT-955).

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* 2010-UNAT-084, 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).

Case management

Agreed and disputed facts

9. When studying the parties' submissions on facts, it is 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 disputed and relevant (in line herewith, see *Abdellaoui* 2019-UNAT-929, para. 29, and *El-Awar* 2019-UNAT-931, para. 27).

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

Evidence

11. To start with, the Tribunal notes that neither party has requested production of any additional evidence, either written or oral. If either of the parties wishes such evidence to be produced, 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.

12. As the present case is a disciplinary case, the Tribunal notes that evidence is only relevant in the judicial review of the Applicant's claim regarding whether the facts of the contested decision have lawfully been established—the disciplinary

findings on misconduct and proportionality are legal rather than factual determinations.

13. The factual background of the contested decision is set out in the sanction letter dated 19 July 2022 where it is alleged that the Applicant:

> a. "Convinced [BB] that [AA] was the best option for the position of IC [Individual Contractor] with FTS [Field Technology Service], despite [BB's] knowledge that [the Applicant] and [AA] were in or had been in a relationship, on the basis of [the Applicant's] assurances that [he] and [AA] could be objective and professional and because, in any case, since [BB] was leaving the mission, he had informally delegated responsibility for the recruiting process to [the Applicant]";
>
> b. "Recommended hiring [AA] as an IC with FTS, even though [the Applicant] knew she did not fulfil the requirements for the position";
>
> c. "Recommended hiring [AA] as a Trygin employee to [CC], while failing to disclose [the Applicant's] relationship with [AA] or her lack of English, and despite the fact that she would remain part of [his] reporting line";
>
> d. "Acted as [AA's] direct supervisor, while [AA] was working as IC-FTSUNVMC [United Nations Verification Mission in Colombia] and as Trygin employee, despite the fact that [he was] in a relationship [with her]".

14. As a mitigating factor, the USG/DMSPC referred to the Applicant's "22 years of service in different mission settings, including hardship duty stations". As aggravating factors, it is stated that the USG/DMSPC "considered" the following:

> a. The Applicant "remained unremorseful and refused to acknowledge any fault on [his] part regarding the creation and maintenance of a conflict of interest affecting the interests of the Organization;"

b. His "misconduct compromised the objectivity and integrity of the selection process and damaged the reputation of the Organization in matters relating to selection processes amongst FTS staff members"; and

c. The Applicant "had multiple opportunities to disclose [his] relationship with [AA] to [his] supervisor, [CC], during the prolonged material period of time, and failed to act on them."

15. Regarding written documentation, when perusing the case file, the Tribunal finds that it needs to understand the case better before deciding whether all relevant materials have been submitted. The parties are also instructed to indicate what, if any, further documentation they wish to produce and, if possible, submit the relevant material(s).

16. As for oral evidence, the Tribunal notes that arts. 16.1 and 16.2 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 thereof (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.

Legal representation

18. The Tribunal observes that whereas the Applicant is self-represented in the present case, it follows from the Applicant's submissions and the sanction letter that the Applicant was represented by the Office of Staff Legal Assistance during, at least part of, the disciplinary process.

19. In light of the above,

IT IS ORDERED THAT:

20. By **4:00 p.m. on Friday, 25 August 2023**, 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);

21. By **4:00 p.m. on Friday, 25 August 2023**, each party is to submit whether it requests to adduce any additional evidence, and if so, state:

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

b. The identity of the witness(es) the party wishes to call, if any, and what disputed fact(s) each of these witnesses is 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.

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

(Signed)

Judge Joelle Adda
Dated this 25th day of July 2023

Entered in the Register on this 25th day of July 2023

(Signed)

Isaac Endeley, Registrar, New York