UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2024/006
Order No.:	050 (NY/2024)
Date:	9 May 2024
Original:	English

Before: Duty Judge

Registry: New York

Registrar: Isaac Endeley

WOJCIECHOWSKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Miryoung An, DAS/ALD/OHR, UN Secretariat
Halil Göksan, DAS/ALD/OHR, UN Secretariat

Introduction

1. On 6 February 2024, the Applicant, a former Senior Investment Officer with the United Nations Joint Staff Pension Fund ("UNJSPF"), filed an application in which he challenges his "separation from service with compensation in lieu of notice and without termination indemnity".

2. On 7 March 2024, the Respondent filed a reply in which he contends 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. Did the Under-Secretary-General for Management Strategy, Policy and Compliance lawfully exercise her discretion when imposing the disciplinary measure of separation from service, with compensation in lieu of notice and without 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

5. Under the recently adopted art. 9.4 of the Dispute Tribunal's Statute, in conducting a judicial review of a disciplinary case, the Dispute Tribunal is required to examine (a) whether the facts on which the disciplinary measure is based have

been established; (b) whether the established facts amount to misconduct; (c) whether the sanction is proportionate to the offence; and (d) 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. (In line herewith, see the Appeals Tribunal in 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).

6. 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).

7. 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

8. 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).

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

Evidence

10. 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.

11. 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.

12. The contested decision, including the factual background, is set out in a letter dated 17 January 2024 from the Assistant Secretary-General for Human Resources ("the ASG") to the Applicant. In this letter, it was found that some of allegations set out in the "Allegations Memorandum" dated 31 July 2023 had been established by clear and convincing evidence, whereas some other allegations or aspects thereof had been dropped. In the 17 January 2024 letter, it was, however, not specified exactly which of the allegations were therefore maintained.

13. 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 further documentation, if any, they wish to produce and, if possible, submit the relevant material(s).

14. 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 judge to whom a case is assigned to determine whether a hearing is necessary and that in a disciplinary case like the present one, this shall normally be done.

15. 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-UNAT976, para. 28). This could, for instance, be for the parties to present their legal contentions directly to the Judge, although it is noted that the parties would, in any case, also need to file written closing statements summarizing all their submissions.

16. At the same time, the Tribunal is mindful that art. 9.4 of the Statute of the Dispute Tribunal provides that whereas "the Dispute Tribunal *shall* consider the record assembled by the Secretary-General", it "*may* admit other evidence" (emphasis added).

17. In light of the above,

IT IS ORDERED THAT:

18. By **4:00 p.m. on Thursday, 13 June 2024**, the Respondent is to file a submission in which he specifically lists all of those allegations stated the "Allegations Memorandum" dated 31 July 2023, which have been maintained in the contested decision, as stated in the letter dated 17 January 2024 from the ASG to the Applicant;

19. By **4:00 p.m. on Thursday, 27 June 2024**, 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);

20. By **4:00 p.m. on Thursday, 27 June 2024**, each party is to submit whether it requests to adduce any additional evidence, and if so, state, also addressing the necessity of each specific piece of evidence under art. 9.4 of the Dispute Tribunal's Statute:

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

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.

21. Upon receipt of the above-referenced submissions and when the case has been assigned to a Judge of the Dispute Tribunal, relevant instructions for further case management will be issued.

(Signed)

Judge Joelle Adda
Dated this 9th day of May 2024

Entered in the Register on this 9th day of May 2024

(Signed)

Isaac Endeley, Registrar, New York