UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2025/006
Order No.: 055 (NY/2025)
Date: 9 June 2025
Original: English

Before: Duty Judge

Registry: New York

Registrar: Isaac Endeley

WILKINSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
Aly Ahmed, OSLA

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

Introduction

1. The Applicant is a former staff member of the Office of Investment Management ("OIM") in the United Nations Joint Staff Pension Fund ("the Pension Fund" or "UNJSPF"). On 11 March 2025, he filed an application contesting the "decision to impose [on him] a disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity and the decision to include his name in [the] ClearCheck" database.

2. On 10 April 2025, the Respondent filed his reply in which he contends that the application is meritless.

Considerations

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 deciding (a) to impose the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity pursuant to staff rule 10.2(a)(viii), and (b) to enter the Applicant's name in the ClearCheck database?

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

The Tribunal's limited scope of review of disciplinary cases

5. Pursuant to 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. (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 evidence "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 Appeals Tribunal explained that "the Dispute Tribunal is not conducting a 'merit-based review, but a judicial review'" and 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 that "[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 reviewing 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.

General observations on evidence

10. The Tribunal notes that in disciplinary cases like the present one, 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). Also, 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 any evidence must therefore be able to provide a certain degree of specificity to his or her request.

11. As the present case is a disciplinary matter, 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 is set out in a letter dated 2 December 2024 from the Assistant Secretary-General for Human Resources to the Applicant, conveying the conclusions of the Under-Secretary-General for Management Strategy, Policy and Compliance. Therein, the factual allegations on which the contested decision was based, were presented as the following:

> a. "[The Applicant] attempted to meet and eventually met, without authorization, with representatives of a Member State and discussed without authorization internal matters concerning OIM, including [the Applicant's] grievances and complaints against the then OIM management, including [the former Representative of the Secretary-General—"the former RSG", name redacted for privacy reasons]";
>
> b. "[The Applicant] sought, without authorization, support of a Member State in furtherance of [his] continued appointment at OIM";
>
> c. "Together with [EH, name redacted for privacy reasons], and in opposition to [the former RSG], [the Applicant] participated in discussions suggestive of collaborative efforts and/or contemplations to disclose, without

authorization, sensitive information relating to OIM to a Permanent Mission"; and

d. "In doing so, [the Applicant] used [his] personal e-mail address in violation of the OIM policy "Information sensitivity, Classification of Documents and Records Management Policy", with which [he] had undertaken to comply".

Production of additional written or oral evidence

13. At the outset, the Tribunal observes that neither of the parties has requested any additional evidence, written or oral, to be produced.

14. Concerning production of additional written evidence, the Tribunal notes that in art. 18.2 of the Dispute Tribunal's Rules of Procedure, it is stated that the Dispute Tribunal "may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings".

15. As for possible oral evidence, meaning the examination of witnesses at a hearing before the Tribunal, the Tribunal refers to arts. 16.1 and 16.2 of the Rules of Procedure that 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 will be assigned to determine whether a hearing is necessary and that in a disciplinary case like the present one, this shall normally be done.

16. Accordingly, the Tribunal will allow the parties to indicate what, if any, additional written or oral evidence they request to be produced.

17. In light of the above,

IT IS ORDERED THAT:

18. By **4:00 p.m. on Wednesday, 9 July 2025**, the parties are to file a jointly-signed statement providing, under separate headings, the following information:

a. A consolidated list of 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 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);

19. By **4:00 p.m. on Wednesday, 9 July 2025**, each party is to submit whether he requests to adduce any additional evidence, and if so, state:

a. What additional documentation he requests to be disclosed, also indicating what disputed fact(s) this is intended to substantiate and referring to the relevant paragraphs in the consolidated list of disputed facts; and/or

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

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

(Signed)

Judge Margaret Tibulya
Dated this 9th day of June 2025

Entered in the Register on this 9th day of June 2025

(Signed)

Isaac Endeley, Registrar, New York