



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-745

**Ouriques
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Deborah Thomas-Felix Judge Richard Lussick
Case No.:	2016-974
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Mr. Ouriques:	Robbie Leighton, OSLA
Counsel for Secretary-General:	Wambui Mwangi

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/109, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 16 August 2016, in the case of *Ouriques v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 17 October 2016, and Mr. Reinaldo Ouriques filed his answer on 9 December 2016.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant joined the Organization in June 1999, as a Messenger (G-3) with the United Nations Office at Geneva (“UNOG”), where he worked until the contested decision was implemented on 7 May 2015. There is no record of any previous disciplinary incident.

... From late August to early October 2014, the Applicant was in Brazil, his home country, visiting his father who was then gravely ill and passed away on 12 February 2015. Upon his return to Geneva, in October 2014, the Applicant’s wife told him that she had been advised in September that she had a suspected tumour requiring surgery. The Applicant visited his treating doctor, who advised him to go on sick leave to avoid a breakdown, as he was suffering from loss of appetite and sleeplessness. The Applicant did not follow this advice.

... On 5 November 2014, while driving to work on his motorcycle, the Applicant had a verbal dispute with another motorcyclist who allegedly insulted and criticised him for driving on French and not Swiss plate numbers. This motorcyclist happened to also be a staff member and the Applicant recognized him in the course of their argument.

... Upon arriving at the UNOG premises drive-in entrance, the Applicant stopped in front of the security guard posted there and stepped off his scooter. The other motorcyclist arrived at the entrance moments later and also stopped behind the boom gate and in front of the gate’s guard. The Applicant approached the other staff member, who was wearing a helmet, and punched him repeatedly in the head. Several security guards immediately intervened to stop the altercation. The incident at the gate, which lasted approximately four seconds, was recorded by security cameras.

... Shortly after the incident, the other staff member complained by email to the Security and Safety Service (“SSS”) and, following instructions received, he provided a description of the incident by email of the same day.

¹ Impugned Judgment, paras. 3-25.

... After talking with him at his workplace, SSS took the Applicant's official statement on the very same afternoon. He described the traffic altercation that occurred prior to his arrival at the United Nations premises gate, and stated that his recollection of the incident itself was blurred and that he believed that he had hustled the complainant without injuring him.

... The complainant went to the Medical Service Section ("MSS"), UNOG, which certified that he had a swollen cheek and a small laceration in the internal face of the cheek. The following day, 6 November 2014, an external doctor certified that he had a bruise on his right cheek and a laceration of approximately one centimetre in the buccal mucosa [i.e., the inner lining of the cheeks and lips].

... After the incident, the Applicant saw his doctor and was prescribed antidepressants.

... On 7 November 2014, the complainant reported the incident to the Swiss police.

... By letter of the Director, Division of Administration, dated 7 November 2014, the Applicant was informed that an investigation of the incident had been launched and that he was placed, with immediate effect, on administrative leave with pay pending the investigation.

... On 11 November 2014, SSS rendered its preliminary investigation report. It concluded that the Applicant had physically assaulted the complainant within the United Nations territory and that both had previously engaged in a verbal altercation on the road to the United Nations on their respective motorcycles, during which the complainant had insulted the Applicant. The conclusions of the preliminary investigation were based on: the initial report of the complainant, the Applicant's statement, the medical certificates provided by the complainant, the video footage, and the statement of one of the guards who witnessed the incident.

... On or about 13 November 2014, the Applicant provided the investigators with a medical certificate indicating that he had been under treatment for two months due to a particularly difficult family situation, which could justify a possible loss of self-control. It further stated that the Applicant had been advised, before the incident, to go on sick leave, which he had declined out of commitment to his work.

... On 20 November 2014, the Chief, Human Resources Management Service, UNOG, requested the Applicant to undergo an examination by MSS to assess his ability to return to work without endangering third persons' security. He was examined on 21 November 2014, and MSS concluded that he represented no risk and that he could return to work.

... On 23 November 2014, the Applicant sent a written apology to the complainant.

... The Applicant produced a medical certificate, dated 24 November 2014, stating that he was fit to resume full time work, and that he would remain under psychotherapeutic treatment.

... The Applicant returned to work on 25 November 2014.

... On 25 November 2014, the Officer-in-Charge, Division of Administration, UNOG, transmitted the 11 November 2014 report on the incident, with supporting documents, to the Office of Human Resources Management (“OHRM”) for appropriate action.

... By memorandum dated 11 December 2014, the Chief, Human Resources Policy Service, OHRM, issued formal charges of misconduct against the Applicant and requested him to provide comments on them, which he did on 19 January 2015.

... On 24 April 2015, the Swiss judicial authorities decided not to press charges following the criminal complaint lodged by the staff member who sustained the assault. This decision was reiterated and made known to the Applicant by an order (*Ordonnance de non-entrée en matière*) dated 25 June 2015.

... By letter dated 29 April 2015, the Applicant was informed of his separation from service with compensation in lieu of notice and with termination indemnities, as a disciplinary measure for assault. The letter read, in relevant part:

In determining the appropriate sanction, the Under-Secretary-General for Management, on behalf of the Secretary-General, has considered the nature of your actions, the past practice of the Organization in matters of comparable misconduct, as well as whether any mitigating or aggravating factors apply to your case. The Under-Secretary-General for Management, on behalf of the Secretary-General, has noted, among other things, that conduct of the nature in which you engaged usually results in dismissal. However, your long, satisfactory service with the Organization, your personal circumstances (namely, the exceptional amount of stress that you are experiencing at the time due to the illness of your father and wife), and the fact that the victim of the assault may have directed abusive language towards you prior to the assault, operate as mitigating factors in your case.

3. On 16 August 2016, the UNDT rendered its Judgment. It found that, while the facts imputed constituted a violation under Staff Rule 1.2(f), Mr. Ouriques had been disciplined on the basis of “a significantly incomplete preliminary investigation, which [had been] deemed as a complete investigation”.² In its view, the Administration had not been in a position to adequately weigh all the mitigating factors present in the case, particularly Mr. Ouriques’ mental health, the alleged provocation and his expression of remorse. The UNDT further held that the sanction

² *Ibid.*, para. 54.

imposed was disproportionate to the nature and gravity of the behaviour triggering it. The UNDT ordered (i) rescission of the disciplinary measure of separation from service with compensation in lieu of notice and replaced it with a two-year deferment of eligibility for consideration for promotion; (ii) compensation in lieu of rescission in the amount of 24 months' net base salary, corresponding pension fund contributions and medical insurance less the termination indemnity paid; and (iii) three months' net base salary in moral damages on the basis of medical evidence that the sanction "had a direct and serious impact on [Mr. Ouriques'] mental health state".³

Submissions

The Secretary-General's Appeal

4. The UNDT erred in law by concluding that the disciplinary measure imposed was disproportionate to the nature and the gravity of the misconduct. It is established jurisprudence that the Administration has broad discretion in disciplinary matters, that the Tribunals will not lightly interfere and, furthermore, that they will only review the level of the sanction imposed in cases of misconduct where there is obvious absurdity or flagrant arbitrariness. The UNDT itself found that the fact that Mr. Ouriques assaulted another staff member had been established. In view of the seriousness of the misconduct, the disciplinary sanction imposed was clearly reasonable and proportionate and was not the most severe of the available sanctions. He received both termination indemnity and compensation in lieu of notice upon his separation.

5. The UNDT erred by substituting the Secretary-General's sanction with its own lesser measure. The Administration considered the entirety of the record before it and determined the appropriate sanction. The UNDT did not establish that the sanction was blatantly illegal, arbitrary, absurd, excessive or otherwise warranted a different sanction.

6. The UNDT erred in law and in fact when finding that there were fundamental mitigating factors that had not been considered. The decision-maker did properly consider the entirety of the record, including the verbal altercation preceding the assault, Mr. Ouriques' medical information as provided by him, and the e-mail apology and expression of remorse. The pre-assault abusive language was considered a mitigating factor in Mr. Ouriques' favor. His mental health status was also considered and it is not the role of the Administration to "inquire

³ *Ibid.*, para. 62.

further” upon receipt of the information provided. The absence of an express reference to the apology and remorse in the 29 April 2015 letter does not mean they were not taken into account.

7. The UNDT erred in law and in fact awarding compensation. There was no basis for the award because the sanction was proportionate. Furthermore, the UNDT’s award was excessive and the UNDT failed both to provide adequate justification for awarding the maximum amount permissible and to establish the evidentiary basis of the harm suffered. The fact that Mr. Ouriques was out of work for 16 months is not, in and of itself, sufficient justification.

8. The UNDT also erred in awarding moral damages solely on the basis of the physician’s note, in the absence of any additional evidence such as medical bills. The UNDT also did not provide any reasoning as to how it arrived at the figure awarded.

9. The Secretary-General requests that the impugned Judgment be vacated and the original sanction imposed be reinstated.

Mr. Ouriques’ Answer

10. There was no reversible error made by the UNDT. It correctly concluded that the decision-maker’s exercise of discretion was vitiated because of the inability to adequately weigh all mitigating factors as they either were not properly or at all established or brought to the decision-maker’s attention. The Secretary-General’s claims are without merit.

11. With respect to provocation, the written record, the Secretary-General’s pleadings before the UNDT and the sanction letter all show that this was not investigated, in part because it was temporally impossible given the timing of events. In addition, the Secretary-General’s assertion that the Organization was under no obligation to inquire further into Mr. Ouriques’ mental state runs counter to its duty to ensure the health and security of its staff members, due process and to explore both inculpatory and exculpatory evidence. The UNDT correctly identified that the medical report was not before the decision maker; that its content was relevant to the sanction decision; that reliance on the preliminary investigation report meant that the decision maker lacked a complete picture of the incident; and, that Mr. Ouriques’ apology and remorse had not been considered by the Secretary-General as a mitigating factor. The UNDT Judgment can be upheld either on the basis of its finding that relevant factors were not considered or on the grounds that the sanction was disproportionate.

12. There was no error by the UNDT in its award of compensation, which correctly took into consideration the relevant factors and provided its reasoning and evidentiary support. The Secretary-General conflates compensation under Articles 10(5)(a) with 10(5)(b) of the Dispute Tribunal Statute (UNDT Statute), advancing arguments clearly contrary to the plain wording and intention of those provisions. Neither harm nor evidence thereof is required for an award under Article 10(5)(a) as it obligates the UNDT to order compensation as an alternative to rescission. Damages under Article 10(5)(b) do require harm supported by evidence, which the UNDT had before it in the form of the physician's note, and moral damages not relating to financial loss can be awarded under Article 10(5)(b) on the basis of a physician's report alone.

13. Mr. Ouriques respectfully submits that the appeal be dismissed and the impugned Judgment be upheld in all respects.

Considerations

The scope of judicial review

14. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first Session in 2010 establishing that:⁴

... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But 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. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more

⁴ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 40 and 42.

concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

15. In disciplinary cases, the role of the Dispute Tribunal is established by the consistent jurisprudence of the Appeals Tribunal. As set out in *Applicant*:⁵

... Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT 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". And, of course, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred". "[W]hen 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".

Was the administrative decision lawful?

16. In the present case, the Dispute Tribunal held that due process was not fully followed before the disciplinary measure was imposed. Although it is an incontrovertible fact that Mr. Ouriques committed an act of physical assault in violation of Staff Rule 1.2(f) and misconduct within the meaning of Staff Rule 10.1, the considerations upon which the Administration based its decision for imposing dismissal as the disciplinary measure under Staff Rule 10.2(a) were, among other things, the nature of the actions, the past practice of the Organization in matters of comparable misconduct and any mitigating or aggravating factors that applied to the case. Relating to the first two elements, the dismissal letter indicated that "conduct of the nature in which [Mr. Ouriques] engaged usually results in dismissal". The letter also mentioned the following mitigating factors: (i) Mr. Ouriques' long and satisfactory service with the Organization; (ii) his personal circumstances (namely, the exceptional amount of stress that he was experiencing at the time due to the illness of his father and his wife); and (iii) the fact that the victim of the assault may have directed abusive language at him prior to the assault.

⁵ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29 (internal citations omitted).

17. There is no dispute that those factors existed.

18. What is in contention is whether the Dispute Tribunal erred in fact and law when it concluded that the Administration's decision was unlawful and that the sanction imposed was disproportionate to the nature and gravity of the behaviour triggering it; and, further, whether it erred in law when it ordered rescission of the sanction and compensation in lieu thereof and substituted the sanction imposed for a lesser one. The majority, with Judge Halfeld dissenting, is of the opinion that the UNDT erred on all of these points.

19. The Secretary-General has broad discretion to determine whether Mr. Ouriques' uncontroverted physical assault amounted to serious misconduct and to determine the appropriate disciplinary measure. As noted above,⁶

[t]he Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But 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. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

20. We therefore disagree with the UNDT Judgment in this case and hold that (i) the Administration's decision to impose upon Mr. Ouriques the disciplinary sanction of termination with compensation in lieu of notice and termination indemnity for Mr. Ouriques' undisputed misconduct was lawful and (ii) the sanction imposed was not disproportionate.

21. Further, it is our finding that all the relevant facts on which the sanction was based in this case had been satisfactorily established such that the decision-maker was in a position to adequately weigh all of them. The Administration fully complied with its duty to investigate the facts, which were established in the preliminary report. Contrary to the UNDT's reasoning, and as the Secretary-General submits, the mental health status of Mr. Ouriques was considered upon receipt of the information provided and the Administration was under no duty to inquire further into his mental state.

⁶ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

22. Accordingly, we hold that the Administration's decision was lawful and that it exercised its discretion in a reasonable manner. As stated in *Toukolon*:⁷

... [T]he Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose. The Appeals Tribunal finds, again, that it was a reasonable exercise of his discretion to determine that assault, together with the other charges, rendered Mr. Toukolon unfit for further service with the Organization and is satisfied that separation from service with compensation in lieu of notice and with termination indemnity – which is not, after all, the most severe form of dismissal – was neither unfair nor disproportionate to the seriousness of the offences.

As in *Toukolon*, the sanction imposed on Mr. Ouriques was not the most severe sanction (he was dismissed with termination indemnity and with compensation in lieu of notice) and, as stated in its letter, the Administration took into account Mr. Ouriques long, satisfactory service, amongst other mitigating factors.

23. We find that the Secretary-General's decision was not unlawful nor was the sanction imposed disproportionate. The UNDT Judgment is thus vacated in its entirety and the original sanction imposed by the Administration is reinstated.

Judgment

24. The appeal is granted and Judgment No. UNDT/2016/109 is hereby vacated.

⁷ *Toukolon v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-407, para. 31.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Thomas-Felix

(Signed)

Judge Lussick

Entered in the Register on this 22nd day of June 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Judge Halfeld's Dissenting Opinion

1. I respectfully dissent from the majority opinion in this case, as I agree with the well-reasoned, comprehensive and meticulous judgment of the UNDT and find no error in law or in fact resulting in a manifestly unreasonable decision in the UNDT's conclusion that Mr. Ouriques "was disciplined on the basis of a significantly incomplete preliminary investigation, which was deemed as a complete investigation"⁸ and, in that respect, was unlawful; and, further, because all relevant facts, circumstances and mitigating factors were not properly before the decision-maker, the sanction imposed was disproportionate. I, therefore, would have affirmed the UNDT's Judgment, except insofar as it replaced the sanction imposed.⁹

2. Disciplinary cases deal with one of the most important areas in administrative law; namely, the scope of judicial review in administrative discretionary powers and raise issues going to the heart of the relationship between administrative authorities and staff members. As noted by the majority, the role of the Dispute Tribunal in disciplinary cases is established by the consistent jurisprudence of the Appeals Tribunal¹⁰ and the assessment is made on a case-by-case basis. While the Organization has broad discretion in disciplinary matters, it also has a duty of fairness in its discretionary powers and that includes responding to individual situations such that — in the language of Staff Rule 10.3(b) — "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the *nature and gravity* of his or her misconduct".¹¹

3. As reasonably found by the UNDT pursuant to the Tribunal's standard of review in these cases, an administrative decision tainted by procedural unfairness should be considered unlawful. The facts in this case show that some elements were not investigated, although they should have been. Like the UNDT, I would have held that the investigation was strictly limited to the assault itself, which lasted a few seconds, in disregard of the alleged surrounding circumstances that were relevant to determining the "nature and gravity" of

⁸ Impugned Judgment, para. 54.

⁹ Although there is precedent for this Tribunal to replace one disciplinary measure for another. See, e.g., *Doleh v. Commissioner-General of the United Nations Relief Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-025 and *Abu Hamda v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-022.

¹⁰ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084; *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302.

¹¹ Staff Rule 10.3(b), emphasis added.

Mr. Ouriques' misconduct.¹² In this way, although the decision-maker mentioned some of the mitigating factors, he was not aware of the whole context of the situation, as the investigation did not probe all the elements to appropriately assess the specific situation.

Unlawfulness: the Administration's failure to investigate the surrounding circumstances

4. There is no evidence that there was any investigation into the discrepancies between Mr. Ouriques' oral statements and the other staff member's e-mails regarding the origin of the confrontation that resulted in the physical assault. There is still doubt about which of the two staff members provoked the other and also about Mr. Ouriques' actions while the two were making their way to work. Besides, some other doubts remain after the event occurred and it was crucial to further investigate the parties' behaviour just after the event,¹³ in order to determine their state of mind and real intentions in the surrounding context of the assault. As both parties concerned were staff members, it would have been relatively easy for the Administration to clarify what had occurred. Witnesses could have been heard, for example. Simply put, all relevant facts and circumstances were not sufficiently established.

5. In addition, assuming that the Administration gave Mr. Ouriques the benefit of the doubt –by including the *possibility* of provocation among the mitigating factors (by the 29 April 2015 letter's reference to "may")– in my view a mere presumption carries less weight than an established fact when considering mitigating factors while deciding on an appropriate sanction.

Unlawfulness: the failure of the Administration to fulfil its duty of care

6. The Organization has a duty of care towards its staff members. This duty of care required the Administration in this case, as the UNDT concluded, to inquire further into the staff member's mental health once it was on notice of its possible relevance prior to concluding the disciplinary investigation and to making a final determination vis-à-vis the staff members' disciplinary sanction. It is not good practice to separate a staff member suffering from a mental health condition without first fully discharging its duty of care.

¹² Impugned Judgment, para. 47.

¹³ Controversy demonstrated in the preliminary report (see paras. 6 and 11).

7. The medical certificate presented by Mr. Ouriques in November 2014, while on administrative leave,¹⁴ clearly states that Mr. Ouriques at the time of the event had been undergoing psychotherapy treatment for two months due to a difficult family situation, which could explain a change of mood and a loss of self-control. It also states that it was no surprise that a simple provocation could have been misconstrued, which had not been the case until then. In addition, the medical certificate informs that prior to the incident the doctor had recommended to Mr. Ouriques that he take leave from work, “in order to avoid an additional emotional overload, whatever it be, but unfortunately he declined the offer, in favour of his professional commitment”.

8. In addition to this clear evidence presented during Mr. Ouriques’ administrative leave, the need for a proper investigation into Mr. Ouriques’ medical condition was corroborated by (i) the necessity to know which professional commitments led Mr. Ouriques to refuse to take medical leave, as recommended by his doctor and evidenced in the medical certificate, particularly when “[g]iven the nature of mental health conditions, it is not always possible for the individual concerned to recognize his/her need for assistance or treatment”;¹⁵ (ii) the fact that Mr. Ouriques was undergoing psychotherapy with anti-depressants¹⁶ and his possible involuntary loss of self-control; (iii) Mr. Ouriques’ unusual behaviour the day before the event, indicating that, in that whole context, something might have been wrong with the mental state of the staff member;¹⁷ and, (iv) the fact that a medical direction from the Organization was required for Mr. Ouriques to resume work after the administrative leave, demonstrating that there was doubt about his mental state during the investigation.

9. That medical investigation never took place. Although the Administration’s 29 April 2015 letter refers to “the exceptional amount of stress” Mr. Ouriques was experiencing, his mental health and state of mind were completely disregarded during the inquiry. As noted by the UNDT, “[i]t [was] noteworthy that the investigation conducted ... lacked any inquiry or step tending to substantiate the existence or the seriousness of [Mr. Ouriques’] state of mental health at the time of the assault”.¹⁸ As the UNDT noted, those

¹⁴ *Attestation medicale*, issued by the Swiss World Medical Center, page 58 of the record before the Appeals Tribunal; see also impugned Judgment, para. 14.

¹⁵ ST/IC/1999/111 (Mental health --- Medical and employee assistance facilities), Section II, para. 6.

¹⁶ Impugned Judgment, para. 43.

¹⁷ E-mail by Sargent Dominique, stating that Mr. Ouriques “had arrived very quickly at barrier n. 3 and ignored it (event of 4 November 2014, at 11:46)”, pages 42-43 of the record before the Appeals Tribunal.

¹⁸ Impugned Judgment, para. 44.

involved “failed in their duty to ensure the decision-maker had all relevant information upon which to base the decision”.¹⁹

10. It is not clear to me that, at the time of the event, Mr. Ouriques was able to understand the nature and quality of his actions. Obviously, this does not justify the deplorable assault by a staff member of another staff member. However, it means that a proper inquiry should have been carried out regarding Mr. Ouriques’ mental health after the presentation of the medical certificate²⁰ put the Administration on notice of Mr. Ouriques’ ongoing psychotherapy treatment—which it received just a day or two after the issuance of the 11 November 2014 preliminary report by the SSS—in order to establish what impact his medical condition had on his misconduct. This information—particularly if it substantiated a medical condition beyond “stress”—could have been a mitigating factor leading the Administration to choose a less severe disciplinary measure than termination for a staff member with long, satisfactory service and no prior history of misconduct.

Effect of the flaws on the administrative decision

11. Neither provocation nor Mr. Ouriques’ mental state had been properly investigated before the final administrative decision, although he was on administrative leave for an initial period of two weeks, subject to extension.²¹ There is no information on the record about what kind of investigation was conducted during this administrative leave. The preliminary report (and not a final report) appears to be the only basis for the termination decision.

12. Furthermore, I also agree with the UNDT’s consideration that some other significant factors should have been contemplated in the individual assessment to appropriately evaluate the misconduct within its context. One such factor was the minor nature of the injuries caused to the victim by Mr. Ouriques, to the extent that the first information was that there was no one injured.²² After the aggression, both staff members were free to enter the gate and proceed to their work normally. The Head of the *Chemin de Fer* Gate made no mention or report of the aggression and therefore the SSS only knew about it through the victim’s message.²³ Another was Mr. Ouriques’ explicit demonstration of regret and apology when he

¹⁹ *Ibid.*

²⁰ *Ibid.*, para. 14

²¹ Letter to Mr. Ouriques dated 7 November 2014, page 59 of the record before the Appeals Tribunal.

²² Reference to “aucun blessé” in the e-mail of Sargent Dominique, page 42 of the record before the Appeals Tribunal.

²³ Preliminary report, paras. 4 and 5.

gave his statements that same day, during which he expressed willingness to visit the victim in his office to apologize.²⁴ That reveals not only a willingness to fully collaborate with the investigation (which is a staff member's duty), but also a particular and quick expression of contrition for his misconduct.

13. It follows from the foregoing that all the relevant facts on which the sanction was based in this case had not been satisfactorily and/or fully established such that the decision-maker was not in a position to adequately weigh all mitigating factors.²⁵ The Administration failed in its duty to properly investigate the facts, which were only partially established in the preliminary report.

Proportionality

14. Even if I were to be persuaded of the lawfulness of the Administration's decision, I nonetheless agree with the UNDT's conclusion that the sanction imposed was disproportionate. The record does not persuade me that the above-mentioned factors and the totality of the facts and circumstances were taken into account by the decision-maker as mitigating factors.

15. With respect to the UNDT's observations regarding an apparent trend in misconduct cases suggesting that termination with indemnity is the Administration's minimum sanction acceptable for an act of physical assault,²⁶ I note the following: While the application of a "parity of sanctions" is in general appreciated, this cannot lead to a fixed and inflexible minimum sanction to certain types of misconduct—at least not without prior notice to that effect being given via administrative issuance. As the UNDT observed, such a practice "would be inconsistent with the duty to issue proportionate sanctions because it would mean that the general nature and characterization of the misconduct would almost exclusively dictate the penalty".²⁷

16. Here, I agree with the UNDT that the Administration did not apply the pedagogic principle of progressive discipline, since Mr. Ouriques had a long and unblemished career, with no unbecoming conduct during the 15 years of service to the Organization.

²⁴ E-mail dated 10 November 2014, page 57 of the record before the Appeals Tribunal.

²⁵ Impugned Judgment, para. 57.

²⁶ Impugned Judgment, paras. 39-40.

²⁷ *Ibid.*, para. 40.

Final remarks

17. This was a regrettable incident resulting from a set of negative elements that came together during the morning commute of two staff members and came to a head upon their arrival at the *Chemin de Fer* Gate on that particular morning – including provocations, insults, maybe aggressive driving on the way to work, flashbacks from post-traumatic stress on the part of the victim, and stress and momentary mental disorder on the part of Mr. Ouriques, who thereafter immediately demonstrated regret, but was not afforded the opportunity to personally apologize.

18. It seems to me that the ensuing criminal complaints the parties lodged against each other (ultimately dropped by the competent authorities) could have been avoided had the parties and/or interested persons undergone mediation;²⁸ and, the Organization's discretion would not necessarily have been exercised on such a flawed basis had it inquired further into the discrepancies and other relevant factors, particularly Mr. Ouriques' mental health condition that came to light after the preliminary report was issued.

²⁸ Mr. Ouriques manifested that interest during the preliminary investigation, in his e-mail dated 10 November 2014, page 57 of the record before the Appeals Tribunal.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Halfeld

Entered in the Register on this 22nd day of June 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar