



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

Judgment No. 2013-UNAT-310

**Nasrallah
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Mary Faherty Judge Richard Lussick
Case No.:	2012-346
Date:	28 March 2013
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Self-represented

Counsel for Appellant/Respondent: Paul Oertly

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/072, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 17 May 2012 in the case of *Nasrallah v. Secretary-General of the United Nations*. The Secretary-General appealed this Judgment to the Appeals Tribunal on 12 July 2012, and Mr. Charbel Nasrallah answered on 5 October 2012.

Facts and Procedure

2. Mr. Nasrallah entered the service of the United Nations Interim Force in Lebanon (UNIFIL) as a Language Assistant on 23 July 2007.

3. On 28 April 2008, he was arrested by the Lebanese police for the illegal possession of 388 grams of hashish, and was remanded in custody. On 15 January 2009, he was convicted of illegal use of drugs, fined 3,000,000 Lebanese Lira and sentenced to nine months' imprisonment, against which he was given credit for time served. He was released from prison on 18 January 2009.

4. Throughout this period, Mr. Nasrallah was on special leave from UNIFIL, first with full pay (18 April to 17 July 2008); then with half pay (18 July to 17 October 2008); and, finally, without pay (as from 18 October 2008).

5. On 26 January 2009, he wrote to the Organization, explaining that he had undergone rehabilitation for his drug use whilst incarcerated and requesting to return to work.

6. On 30 June 2009, the Office of Human Resources Management (OHRM) advised him he was being charged with misconduct but could recommence his functions pending the outcome of the disciplinary process. Specifically, he was charged with violating Lebanese law as well as the standards of conduct expected of staff members of the United Nations by illegally possessing a controlled substance. Mr. Nasrallah returned to work, with positive evaluations, until 5 May 2011, when he was separated from service with compensation in lieu of notice and with termination indemnity.

7. Mr. Nasrallah appealed this decision to the UNDT, which, on 21 February 2012, held a hearing. Thereafter, on 3 May 2012, the Dispute Tribunal issued an “Order for Further Disclosure”,¹ requesting the Secretary-General to provide details of his treatment of all cases of illegal possession and/or use of illegal drugs by staff members between July 2006 and June 2012. In response to this Order, the Secretary-General provided details of six cases.

8. In its Judgment No. UNDT/2012/072, the Dispute Tribunal announced:

Clearly in the present case there is no dispute as to the facts. [Mr. Nasrallah] does not deny the conduct alleged, nor does he challenge the [Secretary-General’s] classification of the same as misconduct under the Regulations and Rules of the United Nations. The heart of the matter is, then whether or not the sanction imposed was proportionate, and whether or not there was a substantive or procedural irregularity.

9. When it comes to disciplinary matters, the UNDT recalled that the Secretary-General has broad discretion to determine what amounts to misconduct as well as the suitable sanction, and that the Dispute Tribunal was not charged with determining the fair or appropriate outcome of the disciplinary process but, rather, with determining whether the sanction imposed by the Secretary-General “was a proper and lawful exercise of the discretion conferred upon him ... [or] ... was so unfair and disproportionate as to amount to an improper exercise or abuse of [his] discretion”. The UNDT also recalled, “staff rule 10.3(b) requires that any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct” and held that proportionality and equality of treatment warranted a review of similar cases.

10. Accordingly, the UNDT undertook the following proportionality review:

... In response to Order No. 063, the [Secretary-General] informed the Tribunal of six cases where disciplinary sanctions were imposed between 2006 and 2011. This information is instructive. Besides [Mr. Nasrallah], in that period there was one other staff member who was separated from service for possession of illegal drugs. That staff member, in Sudan, was found with two kilograms of marijuana and was sentenced to 20 years’ imprisonment by the local courts, having admitted conspiracy to traffic the marijuana. This it seems to the Tribunal is a far more serious case than the present one, yet the sanction is almost the same.

¹ Order No. 063 (NBI/2012).

... A staff member in New York pleaded guilty to possession of khat and was sentenced to a year's probation, and fined USD 1000; he was also found guilty of having used the diplomatic pouch for personal reasons. Because of his long service record, he was not separated from service but was demoted by one grade with a deferral of eligibility for promotion for a period of two years, and a written [censure].

... Another case in Sudan involved a 'small piece' of hashish, for possession [of] which the staff member was sentenced to one month's imprisonment and fined 1000 Sudanese pounds. The staff member was censured.

... Three of the other cases involved positive drug tests, rather than possession, by staff members in Georgia, and resulted in written censure."

11. On the basis of its review, the Dispute Tribunal held that, whilst it did not "condone the use of illegal drugs", the sanction imposed was disproportionate and did not take full account of a number of mitigating factors (Mr. Nasrallah having pled guilty and served his prison sentence; his returning to work and performing "to a high standard"; and, his repentance and reform). Accordingly, the Dispute Tribunal ordered rescission of the decision to separate him from service and ordered his reinstatement or, in the alternative, compensation in the amount of two years' net base salary, with restoration of all "lost earnings from the date of his separation to the date of his reinstatement, or the date of his compensation".

Submissions

Secretary-General's Appeal

12. The Secretary-General submits that the UNDT exceeded its competence by concluding that the sanction imposed was disproportionate.

13. The Secretary-General avers that the UNDT erred in concluding he had not properly taken account of mitigating factors as, in fact, he had done so in separating Mr. Nasrallah with termination indemnity. Moreover, he adds that completion of a prison sentence cannot be construed as a mitigating factor.

14. The Secretary-General criticizes the Dispute Tribunal for apparently suggesting there should have been no disciplinary sanction at all, in view of its order and the fact that it did not indicate what lesser sanction would have been proportionate.

15. Finally, the Secretary-General requests that the Appeals Tribunal reverse the Judgment in its entirety.

Mr. Nasrallah's Answer

16. Mr. Nasrallah acknowledges his misconduct deserved "some sort of a disciplinary sanction", but asserts that he deserves to remain in service.

17. He contends that the decision to separate him from service was disproportionate when reviewed against the outcome of similar cases, "especially since [he has] already paid his dues to [the] government and ... society".

Considerations

18. It is not contested that Mr. Nasrallah, a Language Assistant with UNIFIL, joined the United Nations on 23 July 2007.

19. Less than one year later, on 28 April 2008, he was arrested by the Lebanese police for illegal possession of 388 grams of hashish. He was convicted to nine months' imprisonment and, during custody, imprisonment, trial and subsequent release, was placed on special leave with full pay until 17 July 2008, with half pay until 17 October 2008 and without pay from 18 October 2008 onwards.

20. Mr. Nasrallah was released on 18 January 2009 and, on 26 January 2009, requested to continue working with the Organization, explaining he had undergone a rehabilitation programme. Six months later, on 30 June 2009, he received a memorandum from OHRM confirming that he could return to duty pending the outcome of a disciplinary process.

21. The disciplinary process against Mr. Nasrallah was not concluded until 2011 and, on 5 May of that year, he was separated from service with compensation in lieu of notice and with termination indemnity.

22. Mr. Nasrallah does not deny the alleged misconduct but appeals the sanction as disproportionate.

23. In *Masri, Maslamani and Haniya*,² this Tribunal held that, “when reviewing a disciplinary sanction imposed by the Administration, the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence”.³

24. In *Cabrera*, the Appeals Tribunal held that it would not substitute its own judgment in the case, finding:

Under the circumstances we agree with the UNDT that the conduct was established and that it was serious. Though perhaps the Secretary-General, in his discretion, could have come to a different conclusion, we cannot say that the sanction of summary dismissal was unfair or disproportionate to the seriousness of the offences. The UNDT refused to substitute its judgment in this case, and this Tribunal must be deferential not only to the Secretary-General, but also to that Tribunal, which is charged with finding facts.⁴

25. Furthermore, in *Aqel*, the Appeals Tribunal stated:

Having established misconduct and the seriousness of the incident, the Appeals Tribunal cannot review the level of sanction imposed. Such a decision, which falls within the remit of the Commissioner-General, can only be reviewed by the Appeals Tribunal in cases of obvious absurdity or flagrant arbitrariness, which has not been established.⁵

26. This case does not differ from the cited precedents. Mr. Nasrallah committed serious misconduct, for which he was separated from service with compensation in lieu of notice and termination indemnity. The Appeals Tribunal is satisfied that this sanction was not disproportionate and notes that the Secretary-General could have chosen to summarily dismiss Mr. Nasrallah, as foreseen in then-applicable Staff Rule 110.4(b)(ii), or to separate him without compensation and indemnities.

² *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098; *Maslamani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-028; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024.

³ *Masri, ibid.*, para. 30.

⁴ *Cabrera v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-089, para. 27.

⁵ *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para. 35.

27. Having decided that the sanction was not disproportionate, we now turn to address the conduct of the Administration. In spite of the fact that no investigation was necessary, as the facts were not contested, the Organization committed an egregious error in taking almost two years to finalize the disciplinary proceedings. This Tribunal does not consider this undue delay to have prejudiced Mr. Nasrallah, however. Rather, it worked in his favour, permitting him to benefit from nearly two years' further service, with full salary, and delaying his termination.⁶

28. Pursuant to Article 9(5) of its Statute, the Appeals Tribunal may refer appropriate cases to the Secretary-General of the United Nations for possible action to enforce accountability. We consider that the severity of the delay in the disciplinary proceedings in the instant case merits such referral and call upon the Secretary-General to enforce accountability of the responsible officials. Accordingly, we instruct the Registrar to transmit a copy of this Judgment directly to the Office of the Secretary-General.

Judgment

29. We vacate the UNDT Judgment in its entirety.

⁶ See also *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-292, para. 45.

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 24th day of May 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar