



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

Judgment No. 2018-UNAT-859

**Samandarov
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge John Murphy, Presiding Judge Sabine Knierim Judge Richard Lussick
Case No.:	2018-1152
Date:	29 June 2018
Registrar:	Weicheng Lin

Counsel for Mr. Samandarov: Brandon Gardner, OSLA

Counsel for Secretary-General: Nathalie Defrasne/Isavella Vasilogeorgi

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/093, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 14 December 2017, in the case of *Samandarov v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 12 February 2018, and Mr. Fazlidden Samandarov filed his answer on 4 April 2018.

Facts and Procedure

2. Mr. Samandarov, a former staff member of the United Nations Assistance Mission in Afghanistan (UNAMA), joined the Organization in 2010 and was based in Paris, France. In July 2015, he was reassigned to UNAMA, Kunduz office, to work as an Associate Human Rights Officer. Two months after his arrival, on 28 September 2015, Taliban forces attacked and took control of Kunduz city. UNAMA evacuated its national and international staff from the Kunduz office to alternative locations such as Kabul. During the attack, the UNAMA offices and staff residences, among other premises, were invaded and ransacked, and property was destroyed and looted. Evidence indicates that there were 848 civilian casualties (289 deaths and 559 injured) in Kunduz city and surrounding districts between 28 September and 13 October 2015 resulting mainly from ground fighting.

3. During the Taliban attack, Mr. Samandarov was *en route* to Kunduz from Kabul. He was stopped from returning to Kunduz and was asked to stay in Kabul. He remained in Kabul for some months under difficult circumstances.

4. During this period, Mr. Samandarov worked as an Associate Human Rights Officer. His professional duties included recording human rights violations in Kunduz. After the Taliban attack, he worked late and throughout the weekends for several weeks. Due to the shortage of proper accommodation, he was asked to lodge for three months in a transit container, which was not suitable for long term accommodation. Nor was he given proper office space to carry out his duties as only two small containers were allocated for the team of 50 staff members evacuated from Kunduz. One set of computer, chair and table was shared by five-six staff members.

5. Mr. Samandarov lost all of his personal possessions as a result of the attack on Kunduz. He was only compensated by the Organization (in the amount of USD 12,000) for his loss 20 months after the evacuation.

6. On 26 October 2015, Mr. Samandarov went to the gymnasium located inside the UNAMA compound to exercise. In the gymnasium, he placed some of his belongings on an exercise bench while he worked out. A staff member (the complainant) came and moved Mr. Samandarov's belongings from the exercise bench because she wanted to use it. A verbal altercation ensued during which the complainant asked Mr. Samandarov for his name since she did not know him. Mr. Samandarov did not give his name but referred the complainant to the sign-in book at the entrance of the gymnasium. The complainant then decided to take a photo of Mr. Samandarov using her mobile phone. In response, Mr. Samandarov threatened to break the complainant's phone if she took a photo of him.

7. The complainant then contacted the then United Nations International Children's Emergency Fund (UNICEF) Security Advisor, who came to the gymnasium, and explained to him her side of the story. Later on the day of the incident, the UNICEF Security Advisor called Mr. Samandarov to obtain his version of events. Subsequently, both Mr. Samandarov and the complainant returned to the gymnasium and continued exercising.

8. Three days later, on 29 October 2015, the complainant made a report of the incident to the Chief Security Officer at UNAMA, who then forwarded the complaint to the Special Representative of the Secretary-General for Afghanistan (SRSG), who in turn instructed the Chief Security Officer, UNAMA, to conduct a full investigation.

9. The investigation was conducted by the Deputy Chief, Special Investigations Unit (SIU). The complainant, Mr. Samandarov, two eyewitnesses to the gymnasium incident and the UNICEF Security Advisor provided the investigator with their statements. The investigator submitted his report, dated 29 November 2015, to the Chief Security Officer, UNAMA, who forwarded it on 10 December 2015 to the SRSG for further action.

10. On 10 February 2016, the SRSG referred the matter to the Assistant Secretary-General for Field Support (ASG, DFS). On 23 February 2016, the ASG, DFS, referred the matter to the Assistant Secretary-General, Office of Human Resources Management (ASG, OHRM), and on 17 March 2016, the Chief, Human Resources Policy Service, OHRM, wrote a memorandum to Mr. Samandarov setting out the allegations of misconduct against him. Mr. Samandarov was requested to provide a response to the allegations of misconduct, which he did on 16 May 2016.

11. By letter dated 13 June 2016 (sanction letter), the ASG, OHRM, conveyed to Mr. Samandarov the decision of the Under-Secretary-General for Management (USG, DM), to impose a disciplinary measure of written censure and loss of two steps in grade in accordance with Staff Rule 10.2(a)(i) and (ii) for threatening to break the complainant's mobile phone.

12. On 17 September 2016, Mr. Samandarov filed an application with the UNDT, challenging the decision of the USG, DM. A hearing on the merits was conducted by the UNDT on 25 and 26 October 2017. The UNDT rendered its Judgment on 14 December 2017, partially granting the application. It found that the facts of the case had been established and that Mr. Samandarov's behaviour, especially the threat to break the complainant's phone, amounted to misconduct. The UNDT further held that there was no evidence of bias or procedural irregularities during the investigation and disciplinary process and Mr. Samandarov's due process rights were consequently not violated.

13. The UNDT held, however, that the cumulative imposition of two sanctions, namely a written censure *and* the loss of two steps in grade imposed on Mr. Samandarov was disproportionate to the level of misconduct, considering, in particular, that his threat had exclusively been directed against an object and not the physical integrity of the complainant and that the threat had not materialized. It found that the sanctions were particularly excessive in light of Mr. Samandarov's circumstances, which should have been considered as mitigating factors. These included the loss of all his belongings during the Taliban attack, which naturally had made him apprehensive of anyone interfering with his belongings. In addition, the Administration should have taken into account the anxiety and stress which was caused by the attack, by the nature and performance of his official functions in reviewing and reporting on civilian casualties caused by the attack and by his living and working conditions in Kabul in the months following the evacuation.

14. Based on the foregoing, the UNDT concluded that the cumulative imposition of a written censure and the loss of two steps in grade was "excessive, unreasonable and disproportionate to the misconduct"¹ and rescinded the disciplinary measure of loss of two steps in grade. It accordingly ordered the Organization to (a) retroactively place Mr. Samandarov at the step he should have been at prior to the imposition of the rescinded disciplinary measure; (b) recalculate

¹ Impugned Judgment, para. 65.

Mr. Samandarov's step increments; and (c) pay Mr. Samandarov the loss of salary that he suffered as a result of the loss in steps, with interest on that amount at the current US Prime Rate.

Submissions

The Secretary-General's Appeal

15. The Secretary-General submits that the UNDT erred in finding that the decision to impose a written censure and a loss of two steps in grade on Mr. Samandarov was disproportionate and thus unlawful. In particular, the UNDT effectively substituted its own discretion for that of the Administration when assessing the proportionality of the imposed sanctions and when determining that, under the circumstances of the case, the lesser sanction of written censure was more appropriate. The imposition of a combination of two sanctions was not unusual, let alone "obviously absurd or flagrantly arbitrary" as required by the Appeals Tribunal jurisprudence for the UNDT to review the level of the sanction imposed. In addition, similar sanctions have been imposed in comparable cases. Moreover, he submits, the UNDT made its own assessment of Mr. Samandarov's conduct rather than examining how the Administration reached the contested decision and failed to defer to the Administration's discretion in determining the appropriate sanction. The Secretary-General was fully aware of Mr. Samandarov's challenging conditions of service, but in his discretion, considered that these conditions did not warrant a lesser sanction as the United Nations expects its staff members to abide by the Organization's regulations and core principles even in difficult circumstances. Accordingly, the UNDT exceeded its competence and erred in law when considering the nature of the misconduct and what it deemed to be mitigating circumstances.

16. In light of the foregoing, the Secretary-General requests the Appeals Tribunal to uphold the Administration's decision to impose disciplinary measures on Mr. Samandarov and to vacate the UNDT's rescission of the loss of two steps in grade, as well as all other remedies ordered by the UNDT. He requests, however, to leave undisturbed the UNDT's finding that the facts of the case were established and amounted to misconduct and that Mr. Samandarov's due process rights were fully respected.

Mr. Samandarov's Answer

17. Mr. Samandarov submits that the Secretary-General failed to demonstrate that the UNDT exceeded its competence or erred on a question of law when it considered the nature of the conduct and what it deemed to be mitigating circumstances and decided to lessen the disciplinary sanction imposed. The UNDT correctly concluded that the Administration's sanction of a written censure and the loss of two steps in grade were excessive, unreasonable and disproportionate to the misconduct.

18. Mr. Samandarov asserts that the UNDT correctly found it absurd that the Administration ignored a key mitigating factor, namely Mr. Samandarov's extreme hardship and trauma suffered while performing his duties as an UNAMA staff member just prior to the event in question, and was correct to lessen the sanction upon judicial review. In particular, in the OHRM sanction letter, the Administration did not explain how it arrived at the decision not to consider his experience as a mitigating factor.

19. Moreover, he claims that the UNDT correctly determined that Mr. Samandarov's threat was made against an object and not a person, such that the Administration's sanction was excessive, unreasonable and disproportionate. The case law requires that staff members who commit similar offenses should generally be given similar sanctions and in this case, the sanction imposed on Mr. Samandarov was arbitrary in comparison to situations where staff members threatened other people and thus committed much more serious offences. In fact, the Organization has never even imposed a sanction on a staff member for an offense analogous to his which supports the argument on the *de minimis* nature of the infraction. In many cases, staff members committed more egregious offences and received lesser sanctions than Mr. Samandarov, which clearly demonstrates that the UNDT did not err in reducing his sanction.

20. In view of the foregoing, Mr. Samandarov requests that the Appeals Tribunal dismiss the Secretary-General's appeal in its entirety.

Considerations

21. Judicial review of a disciplinary case requires consideration of the evidence adduced and the procedures utilized during the course of the investigation by the Administration.² The Dispute Tribunal must establish 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.³ The UNDT, in exercising judicial review, therefore may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on the ground that the disciplinary measure is not proportionate to the misconduct. However, due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of the Charter of the United Nations requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard.

22. The UNDT correctly held that i) the Secretary-General followed due process; ii) the facts related to the allegations of misconduct were established; and iii) the threat to break the complainant's phone particularly amounted to misconduct in that such conduct violated Staff Regulation 1.2(a) and (f), which require staff members, *inter alia*, to respect the dignity and worth of others and to conduct themselves at all times in a manner befitting their status as international civil servants. These findings have not been challenged on appeal. They are in any event indisputably correct.

23. With regard to the discretion of the Secretary-General to impose a sanction, the UNDT noted that this discretion is not unfettered, in that there is a duty to act fairly and reasonably in terms of which the UNDT is permitted to interfere where the sanction is lacking in proportionality. The proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired

² *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

³ *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 17 and 19-21; *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098, para. 30; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 43; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024, para. 31; and *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018, para. 27.

result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.⁴

24. The main criticism of the impugned Judgment by the Secretary-General is that the UNDT usurped his discretion by failing to show due deference in substituting its own preference of sanction for that of his. The criticism, with respect, is somewhat overstated. It is undeniably true that the Administration is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance, etc.⁵ But due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.

25. Our jurisprudence has expressed the standard for interference variously as requiring the sanction to be “blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity” or to be obviously absurd or flagrantly arbitrary.⁶ The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

⁴ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 39-40, 42 and 47.

⁵ *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, para. 20.

⁶ *Ibid.*, para. 21; and *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.

26. The UNDT correctly balanced the competing considerations and concluded reasonably that the cumulative imposition of a written censure and the loss of two steps in grade were disproportionate to the misconduct. The fact that the threat was directed against an object and not at the physical integrity of the complainant is a critical relevant consideration to which the UNDT attached appropriate weight. The fact that the threat did not materialize is equally consequential. By the same token, the UNDT did not misdirect itself in accepting as mitigating factors the fact that Mr. Samandarov had lost all of his belongings during the Taliban attack, was sensitive about anyone interfering with his belongings, suffered anxiety and stress from the attack, his work regarding the civilian casualties caused by the attack and by his living and working conditions in Kabul in the months following the evacuation. These are all relevant factors established by the evidence which a tribunal called upon to assess the proportionality of a sanction may be expected to take into account in the balancing of competing considerations. In addition, there was an element of provocation on the part of the complainant. She did interfere with Mr. Samandarov's possessions and threatened disrespectfully to take a photograph of him. She too could have conducted herself better.

27. In the circumstances of this case, the loss of two steps in grade was not proportionate and thus unlawful; a written censure was sufficient as the suitable and necessary means to achieve the object of discipline required on the facts. The UNDT did not lapse in respect of the considerations it sought to balance or in the assessment of their weight. It accordingly did not err on any question of law or fact permitting interference by this Tribunal in terms of Article 2(1) of the Appeals Tribunal Statute.

28. The appeal must therefore be dismissed.

Judgment

29. The appeal is dismissed and Judgment No. UNDT/2017/093 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Lussick

Entered in the Register on this 10th day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar