



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

Judgment No. 2023-UNAT-1394

**Sajiv Nair
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Katharine Mary Savage, Presiding Judge Kanwaldeep Sandhu Judge Nassib G. Ziadé
Case No.:	2022-1765
Date of Decision:	27 October 2023
Date of Publication:	4 December 2023
Registrar:	Juliet E. Johnson

Counsel for Appellant: Rupa Mitra

Counsel for Respondent: Sètondji Roland Adjovi

JUDGE KATHARINE MARY SAVAGE, PRESIDING.

1. In Judgment No. UNDT/2022/108 (impugned Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) granted the application of Mr. Sajiv Nair (Respondent) and rescinded the Administration's decision to impose on him certain disciplinary measures.
2. The Secretary-General of the United Nations (Appellant) has lodged the instant appeal of the impugned Judgment with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) against the decision of the UNDT to rescind the disciplinary decision imposed.
3. For the reasons discussed herein, the Appeals Tribunal grants the appeal, and reverses the impugned Judgment.

Facts and Procedure

4. Mr. Nair is the Chief Human Resources Officer (CHRO) at the P-5 level in the United Nations Economic Commission for Africa (ECA), based in Addis Ababa, Ethiopia. He began his service with ECA on 31 October 2016.
5. On 12 June 2016, another staff member of ECA who was also at the P-5 level, Mr. N., contacted Mr. Nair about any rules, regulations or administrative issuances that pertained to a staff member making false claims about accomplishments in their performance assessment document (ePAS). Mr. N. stated that this question related to one of his supervisees.
6. Mr. Nair was away from the duty station and forwarded Mr. N.'s e-mail to the Officer-in-Charge of the Human Resource Management Service (HRMS) for action. Upon his return to the office, Mr. Nair learned that no one had responded to Mr. N.'s inquiry, so he responded himself on 21 June 2017 and provided references to the relevant Staff Regulations and Rules and an Administrative Issuance.
7. Mr. N. responded that same day, stating that: "I suspect that you have not studied the issue very well; I suggest that you should. You should also seek the advice of the lawyers on applicable jurisprudence." He also noted that he had "reported the matter to OHRM in view of [Mr. Nair's] long silence". Mr. Nair seemingly took offense, responding six minutes later that they would "seek advice from lawyers on matters of jurisprudence if we doubt our own capability to read and

interpret the law”. He also stated that “[a]mongst other pressing matters, we also process queries such as your own, which we suspect is an outcome of having a lot of time on hand, a luxury that we are not afforded”.

8. Thereafter ensued an exchange of an additional twelve e-mails between the two staff members from 5:03 pm until 8:59 pm.¹ The language and tone of the e-mails degenerated over the course of the evening, including as excerpted below:

N.: [5:03 pm] It is increasingly obvious to me that you have an exaggerated (and I submit empty) sense of your self-importance. An empty, baseless superiority, I-know-it-all attitude that will get you into trouble sooner than later. (...) You write a lot of nonsense, outright drivel, which indicate[s] that you have little knowledge or understanding of your remit. (...) I would want you to know that I am in no mood to tolerate any nonsense from you. And I will not. Get on with your job and stop these purposeless retorts unless you have nothing better to do.

Nair: [5:15 pm] You seem to be in a habit of unconsciously projecting what you seem to suffer from yourself – self-importance, empty baseless superiority and whatever else you have attributed to me. (...) Integrity to self and organization is what I believed and practiced in through my life and limited professional career. (...) Your threats and intimidatory tactics will not cut ice with HR, least of all with me Mr. [N.].

N.: [5:26 pm] ... There is no evidence that you practice ‘integrity to self and Organization’ because there is absolutely no evidence of your having demonstrated any scintilla of it. (...) you have no intellectual (or indeed administrative and practical) understanding of what integrity means. Very sad for a Chief of HRSS. Now, stop wasting my time and attend to the issues that I have put squarely before you on ePerformance (...).

Nair: [5:42 pm] ... Your comments on my intellect and understanding of anything do not bother me an iota, so whilst you may continue with this waste of time, I have better things to do.

N.: [5:59 pm] ... Once again, I repeat that you are nothing but candyfloss, an intellectual snowflake that will melt with the application of the smallest amount of heat. You know nothing. Absolutely nothing. (...)

Nair: [6:10 pm] ... Unfortunately for you, I have developed a thick skin to deal with persons of your caliber and disposition. Your insults, threats, intimidation – do not really matter to me. Therefore you may hide behind your veneer of your knowledge of rules

¹ Secretary-General’s Annex 2 (Mail Exchanges with Mr. [K.N.] on 21 and 22 June 2017).

regulations and administrative issuances and your 8 victories in the UNDT. They have summarily failed to impress me (...) Grow up, learn to work, learn to respect yourself and your environment. Stop wasting my time – again with your meaningless diatribe.

N.: [6:18 pm] ... I do not seek to impress you or anybody else in the Organization. (...) Grow up. Hunker down and study. Do not cost the Organization any losses through your laziness to learn.

Nair: [6:28 pm] ... I am not surprised that bullies like you still exist in world organisations such as the UN. (...) I come from a family of civil servants with relatively modest means. My ego therefore is infinitesimally minute as compared to you given that you derive your sense of self-worth from what your family does or owns. (...) Very soon you will run out of words for these rantings – your bandwidth of the English language and its limits are increasingly evident.

N.: [7:25 pm] It is possible that you have over-achieved given your modest background. Which must explain your arrogance, crudity, and exaggerated sense of your self-importance. (...) You have neither the intellect nor the capacity to make a contribution. You have no capacity to learn. If you did, you would have known that your priority should be to deal with the issue before you – a corruption of the ePerformance system, not provoke and engage in the writing of meaningless drivel to me.

Nair: [7:40 pm] ... Your efforts at personal vilification and disparagement do not surprise me. You seem to have a long history of such behavior. (...) But thanks for the two pence worth of laughs that your mails provide me. And yes, my advice remains on the table – grow up.

N.: [8:51 pm] ... A Chief of HR who shamelessly engages in gossip and backbiting. The whole of ECA laughs at you because of your lack of knowledge and competence (...) Stop exposing your abysmal ignorance. It is embarrassing. (...) You will be exposed for who you are – a clueless, chief of HR, a young man gifted who was gifted with what he did not merit...

Nair: [8:59 pm] Whilst it is a waste of my time responding to your rantings, I still feel duty bound to do so (...) What is truly embarrassing is to engage in this fruitless duel with someone your age, experience and education. I pity you. (...) I also exhort you to consider giving “growing up” one more chance. (...) As for my youthful life and career development that seem to be a thorn in your flesh, I will certainly take up your offer for a drink someday. When you behave. Good night Mr. [N.].

9. The next day, on 22 June 2017, Mr. N. responded again at 7:51 am in lengthy e-mail. In addition to personal attacks that Mr. Nair was “a baby still [in] diapers and still on breast milk”,

Mr. N. stated that Mr. Nair did not have “the temperament, the skills, the expertise to run HRSS”, that several people had left to “escape from [Mr. Nair’s] poor leadership”, and that Mr. Nair’s appointment was “a waste of a very important post”.

10. Rather than halt the communication, Mr. Nair replied, and a further thirty-seven e-mails were exchanged between the two staff members during the day, finally ending at 4:45 pm. Mr. N. continued to attack Mr. Nair for his “abysmal and incorrigible incompetence”, being a “pitiable man-child”, “a most pathetic and sorry fellow”, “completely and totally unfit”, “a shameless coward”, and repeatedly lambasted him as having a poor command of the English language.

11. For his part, Mr. Nair made several comments regarding Mr. N.’s reputation, to wit:

[9:25 am] As I have said earlier, your threats, intimidations and filth do not scare me. I thought gossip and rumour mongering were part of your favorite sport at work, once again, given your past record.

[4:22 pm] That you are a compulsive gossip is established beyond doubt. You do not have to state any further. Your trip down the memory lane and nostalgia for the times you were assessed for higher responsibilities is also as admirable as the 8 UNDT medals you wear on your chest.

12. Mr. Nair also made comments regarding future action he or Human Resources might take, including:

[11:06 am] A statement of my incompetence coming from you shall be hel[d] up as a trophy. You revel in insults, acrimony, conflicts, disparagement – and as HR we shall not tolerate it one bit. And you shall not get your way with me. You shall get back what you play with and in good measure.

[12:08 pm] I do not think you have understood my HR team or me yet. Suffice to say that your tomfoolery, disparagement, insults, threats, abuse will not be taken lying down and will be responded to in adequate measure. So in your own interest, cease now. You will be surprised by our persistence.

[1:49 pm] As already mentioned HR does not threaten any action. We only implement a process. It is individuals who through their immaturity, or irresponsibility or deliberate acts invite action. That again is a matter for time to unleash (...)

[3:04 pm] Your threats do not intimidate me. Your abuses will not go unanswered. So brace yourself for that.

13. Mr. Nair also repeatedly made reference to Mr. N. needing to “grow up”, such as:

[11:20 am] Instead of putting a lid on your rantings, you chose to indulge in this useless volley of threats, abuse, insults and intimidation. Do you not have any work at all? Grow up. Else you will be treated like a juvenile.

[2:44 pm] I suggest you enroll for the Kindergarten school here – not only will they teach you manners, but also how to relate with other human beings.

14. The next day, on 23 June 2017, Mr. N. filed a complaint of harassment and abuse of authority against Mr. Nair. On 30 June and 6 July 2017, Mr. Nair lodged complaints of harassment, abuse, intimidation, and disparagement against Mr. N. Both staff members’ complaints were based on the e-mail chain above.

15. On 30 June 2017, Mr. N. wrote to the ECA Legal Advisor and advised that he had “decided to stand down [his] complaint” but that this decision was “without prejudice to [his] right to re-submit it in the future (within the time limit prescribed by law) should circumstances warrant”.²

16. In the meantime, the ECA Executive Secretary approved the establishment of a fact-finding panel to investigate the complaints of Mr. Nair and another staff member against Mr. N. The panel issued its report on 20 December 2017. Among the panel’s findings were that Mr. N. had “engaged on several occasions, and over extended periods of time, in written exchanges with staff members, including the complainants, in a tone and with content that could be perceived as disrespectful, harassing, abusive, intimidating and insulting, and therefore [could] constitute ‘prohibited conduct’” under the provisions of Secretary-General’s bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).³ The report was forwarded to the Assistant Secretary-General of Human Resources for further action.

17. Thereafter Mr. N. received a censure on condition that he was “placed on [Special Leave Without Pay (SLWOP)] and take[s] an early retirement effective 31 October 2019”.

² Annex 19 of Investigation Report.

³ Respondent’s Annex 4 (Fact Finding Review under the provisions of ST/SGB/2008/5, Executive Summary).

Investigation and disciplinary process

18. On 14 August 2019, Mr. N. decided to resubmit his complaint of 23 June 2017 against Mr. Nair. He alleged that:⁴

- a. Several emails from [Mr. Nair] made him feel belittled and humiliated and that [Mr. Nair] provoked him into having the exchange.
- b. The exchange of emails was ‘premeditated and improperly motivated’ conduct since [Mr. Nair] being CHRO had access to [Mr. N.’s] Official Status File (OSF) and [Mr. Nair] was aware of previous sanction brought against [Mr. N.] and the conditions attached to it.
- c. The abuse of authority by [Mr. Nair] by using ‘privileged and confidential information’ about him to ‘influence and guide the outcome of an investigation in which he [Mr. N.] was the Subject.’ To this Mr. N. referred to part of the testimony made by [Mr. Nair] against him during a different investigation that took place in August 2017.
- d. [Mr. Nair] used his authority as CHRO to ‘intimidate, use insider knowledge to ridicule and humiliate’ him and that this has been the ‘most humiliating, demeaning and an extremely belittling experience of his United Nations experience’.

19. The ECA Executive Secretary appointed a new Fact-Finding Panel (Panel) to investigate Mr. N.’s complaint. The Panel conducted its investigation in October 2019, including interviewing Mr. Nair, Mr. N., and five other witnesses.

20. On 5 June 2020, the Panel issued its Report of Fact-finding Investigation (Investigation Report). In its Summary and Conclusions, the Panel found that in the June 2017 e-mail exchange Mr. Nair had “used language that cause[d] offense and humiliation to Mr. N. (...) and his words [were] demeaning, intimidating, and humiliating”. The Panel rejected the notion that this was a one-time event, given that the messages occurred over several days. The Panel also concluded that the sequencing of the messages was “no justification for the use of insults containing aggressive and inappropriate words by both staff members”.⁵

21. As excerpted in the impugned Judgment, the Panel made further specific findings regarding Mr. Nair:⁶

(...) The use of such language by [Mr. Nair] is particularly troubling as he is expected to adhere and uphold the highest standards of conduct as Chief Human Resources and

⁴ Impugned Judgment, para. 19.

⁵ *Ibid.*, para. 21.

⁶ *Ibid.*

because of his expected knowledge of rules and regulations with regard to conduct and discipline matters. [Mr. Nair] did not seek a different way to resolve the conflict with Mr. [N.] as escalating the matter to ECA senior managers but decided to engage in a war of insults with Mr. [N.].

(...) The Panel ascertains that [Mr. Nair] used his official position to access information about Mr. [N.] which later was used in the exchange of messages in June 2017 and the subsequent fact-finding investigation.

(...) There is clear and conclusive evidence that [Mr. Nair] continued handling Mr. [N.'s] human resources matters after filing of his complaint in July 2017 and there was no segregation of [Mr. Nair's] duties in place which may have negatively impacted the handling of Mr. [N.'s] human resources by [Mr. Nair].

(...) Finally, the Panel concludes that there is clear and conclusive evidence that [Mr. Nair] considers Mr. [N.] not fit for work in the Organization and there is prevalence of evidence that Mr. Nair used his official position and authority to influence the career of Mr. [N.] which ended with his separation from the Organization.

22. The ECA Executive Secretary forwarded the report to the Office of Human Resources, which in turn sent Mr. Nair a memorandum detailing the allegations of misconduct (Allegations Memorandum) on 16 December 2020.

23. The Allegations Memorandum expressly noted that despite the findings of the Investigation Report concerning allegations that Mr. Nair had improperly accessed personnel information regarding Mr. N. and had not distanced himself from human resource matters pertaining to Mr. N., these allegations did “not form a part of the formal allegations of misconduct”.⁷

24. The Allegations Memorandum highlighted twenty-one statements from the e-mails sent by Mr. Nair and incorporated by reference the rest of the exchange (including Mr. N.'s e-mails). It stated that in Mr. Nair's e-mail communications with Mr. [N.] he used “language which was belittling, demeaning, intimidating, and antagonizing”. It noted that if established, this conduct would violate Staff Regulation 1.2(a), Staff Rule 1.2(f),⁸ and constitute harassment under

⁷ Allegations Memorandum, p. 1.

⁸ Secretary-General's bulletin ST/SGB/2018/1/Rev. 2 (Staff Regulations and Rules of the United Nations).

Secretary-General's bulletin ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

25. Mr. Nair submitted his comments to the Allegations Memorandum on 8 March 2021.

26. On 21 April 2021, the decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) in respect to sanction was conveyed to Mr. Nair (Sanctions Letter or contested decision).⁹

27. The Administration noted Mr. Nair's views that he had felt provoked and bullied by Mr. N., who had many more years of experience at the United Nations, and that Mr. N's conduct should be considered an exonerating or mitigating circumstance. The Administration recognized that Mr. Nair believed that the matter should not have been reopened and that the investigators had exceeded their brief. Finally, the Administration acknowledged that Mr. Nair "deeply regretted" his actions, that he asked that his good performance record be taken into consideration and that the matter be concluded with managerial non-disciplinary action.

28. After a thorough review, the USG/DMSPC concluded that it was "established, by clear and convincing evidence, that in 2017, [Mr. Nair] had engaged in harassment of another staff member, namely, Mr. [N.]", through the June 2017 e-mail exchanges. The Administration disagreed that it was a single emotional outburst, finding instead that Mr. Nair "repeatedly engaged with insulting and/or belittling messages". Moreover, the Administration noted that Mr. Nair "could have disengaged but [he] elected to continue" and even "put forth further belittling messages which served to only deteriorate the situation further".

29. The USG/DMSPC decided that Mr. Nair's role as the CHRO for ECA was an aggravating factor in the matter, as a person in this position was expected to maintain civil and respectful tones with other staff. At the same time, the USG/DMSPC found that Mr. N.'s "hostile" behavior towards Mr. Nair was a mitigating factor.

30. Weighing all of the factors and circumstances, the USG/DMSPC imposed on Mr. Nair the disciplinary measures of (i) loss of two steps in grade and (ii) deferment, for two years, of eligibility for consideration for promotion. In addition, two administrative measures were imposed which

⁹ Secretary-General's Annex 3 (Letter to Mr. Nair from Assistant Secretary-General for Human Resources).

required Mr. Nair to serve in another human resources section of the Organization for three months and be mentored for twelve months by another senior human resources professional.

31. On 15 July 2021, Mr. Nair filed an application with the UNDT challenging the sanctions decision. His application also included a motion for anonymity.

Dispute Tribunal proceedings

32. On procedural matters, the UNDT first found that, contrary to Mr. Nair's contentions, the Allegations Memorandum was approved and authorized by the official with the requisite delegated authority.¹⁰ The UNDT found no special circumstances or justification for granting anonymity to Mr. Nair.¹¹ The UNDT also rejected Mr. Nair's argument that he was not charged under the applicable iteration of the relevant Secretary-General's bulletin.¹²

33. Turning to the merits of the application, the UNDT was of the view that the e-mail exchanges "show[ed] only a huge patience by [Mr. Nair] not to respond by the same tone to offences and vulgar provocations" by Mr. N. The UNDT reflected on the first fact-finding report of December 2017, in which it was noted that "a picture emerged of a consistent pattern of communication, on the side of Mr. N. (...) that could be described, at best, as arrogant, aggressive, dismissive (...) and at worst as gravely insulting, intimidating, threatening and degrading".¹³ The UNDT believed that a "completely different evaluation" of Mr. Nair's conduct emerged if one also reviewed the provocations of Mr. N.¹⁴

34. The UNDT found it "singularly noteworthy" that Mr. N. received a lesser disciplinary sanction, even though his case involved additional conduct (other than the June 2017 e-mails with Mr. Nair).¹⁵

35. The UNDT considered that Mr. Nair's behavior "deserves no disciplinary measure at all, of any type, even minor, as no misconduct at all occurred" and that the sanction bore "no rational

¹⁰ Impugned Judgment, paras. 32-34.

¹¹ *Ibid.*, paras. 35-38.

¹² *Ibid.*, paras. 40-43.

¹³ *Ibid.*, paras. 48-49.

¹⁴ *Ibid.*, para. 50.

¹⁵ *Ibid.*, para. 51.

connection or suitable relationship to the evidence on the record and the purpose of progressive or corrective discipline”.¹⁶

36. The UNDT found that accusations against Mr. Nair (other than about the e-mail exchanges) were “generic and unsubstantiated” and that there was nothing on the record to show that he had abused information access with respect to Mr. N.¹⁷

37. Nonetheless, the UNDT found that while Mr. Nair’s reaction to Mr. N.’s bullying behavior could be considered appropriate by a typical staff member, Mr. Nair was the CHRO, and he should have stopped the e-mail exchange sooner, and he was reasonably expected to maintain a civil and respectful tone in his communications. Accordingly, the UNDT concluded that a corrective administrative measure was called for, but not a disciplinary sanction.¹⁸ The UNDT recognized that the administrative measures had already been fulfilled by Mr. Nair.

38. The UNDT thus concluded that Mr. Nair’s “application [was] granted only as it relates to the disciplinary measure” but then further stated that “the disciplinary decision is rescinded”. The UNDT ordered that Mr. Nair be placed in the same position (step in grade) as he had before the disciplinary sanction of loss of two steps in grade was imposed.¹⁹

39. The Secretary-General filed an appeal of the impugned Judgment on 6 December 2022, to which Mr. Nair submitted his answer on 3 February 2023.

Submissions

Secretary-General’s Appeal

40. The Secretary-General requests that the UNAT vacate the impugned Judgment, except for paragraphs 33-43 with respect to the UNDT’s determination that the contested decision was lawfully authorized, that the investigation followed the relevant rules in force, and that Mr. Nair’s request for anonymity was baseless.

¹⁶ *Ibid.*, paras. 52-53.

¹⁷ *Ibid.*, para. 54.

¹⁸ *Ibid.*, paras. 56-57.

¹⁹ *Ibid.*, paras. 59-61.

41. The Secretary-General submits that the UNDT improperly usurped the Secretary-General's authority to hold staff members to the highest standards of integrity embodied in Staff Regulation 1.2(b). He argues that the finding of the UNDT that contrary to the decision of the USG/DMSPC, Mr. Nair's conduct did not constitute harassment, did not follow the rulings of the Appeals Tribunal in matters such as *Sanwidi*²⁰ that in judicial review of misconduct decisions, due deference should be given to the Secretary-General. In addition, the Secretary-General contends that the UNDT failed to apply the relevant legal framework and committed a factual error in focusing on Mr. N.'s e-mails to find provocation without considering whether Mr. Nair's e-mails met the definition of harassment as set out in ST/SGB/2019/8. Mr. Nair's e-mails met the standard of harassment under Section 1.3 of ST/SGB/2019/8, regardless of how gravely Mr. N. may have "provoked" him; and that any such provocation does not excuse Mr. Nair from engaging in further provocation and escalation.

Mr. Nair's Answer

42. Mr. Nair opposes the appeal but has raised no cross-appeal, including against the UNDT's finding in respect of his application for anonymity. He seeks that the Appeals Tribunal dismiss the Secretary-General's appeal in its entirety on the basis that the Secretary-General has not established any of the five grounds of appeal under Article 2(1) of the Appeals Tribunal Statute and is merely (and impermissibly) re-arguing the same points he presented to the UNDT. He denies that the UNDT usurped the Secretary-General's authority, in that the UNDT did not absolve him from all responsibility but found that the appropriate corrective measure was administrative not disciplinary.

43. In the event that the UNAT vacates the impugned Judgment and upholds the contested decision that Mr. Nair committed misconduct, Mr. Nair seeks that the disciplinary sanction imposed on him be modified to a written censure in place of the loss of two steps in grade and deferment for two years for consideration for promotion. This is so in spite of the fact that by the time that the Appeals Tribunal renders its judgment, the disciplinary sanction of deferment for two years of eligibility for consideration for promotion will have been fully implemented, since the contested decision was issued on 21 April 2021.

²⁰ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 47.

44. Mr. Nair argues, with reference to the Appeals Tribunal's judgment in *Samandarov*,²¹ that due deference to the Secretary-General on matters of discipline "does not entail uncritical acquiescence" and that the UNDT was permitted to interfere where a sanction is disproportionate or lacking in proportionality pursuant to the decisions of *Samandarov* and *Sanwidi*.

45. Mr. Nair argues that the UNDT did not consider the evidence selectively but considered all the facts before it and that no error of fact or law arose in its consideration of the evidence before it. Mr. Nair submits that he only had seven months of service with the Organization when he was confronted by the "serial bullying style" of Mr. N. who had been serving at the P-5 level for 16 years. Mr. Nair avers that he had not been provided sufficient formal training by the Organization and that this was a relevant fact for the UNDT to consider in assessing the proportionality of the sanction.

46. Mr. Nair contends that the Appeals Tribunal's judgment in *Belkhabbaz*²² is inapposite, because in that case the contested communications were between a staff member at grade P-3 and a manager at grade P-5 who had a long professional relationship. In this case, Mr. N. and Mr. Nair had never even met in person, and Mr. Nair was junior to Mr. N. in terms of duration of service and step level in the P-5 grade.

47. Mr. Nair argues that there was no error in the UNDT referring to the "other accusations" against Mr. Nair, given that this information was provided by the Secretary-General to the UNDT in the Allegations Memorandum and Investigation Report. Likewise, the first fact-finding report of 20 December 2017 was part of the entire record provided to the UNDT, which was entitled to review and comment on all elements.

48. Mr. Nair submits that the Secretary-General should be estopped from claiming that the UNDT erred in referring to Mr. N.'s sanction. He states that he provided several cases, including Mr. N.'s case, to the UNDT to show that the disciplinary sanction that he received was disproportionate. The Secretary-General did not respond to these arguments in his reply and should not be allowed to do so now on appeal.

49. Mr. Nair submits that it is not in dispute that Mr. N. received the sanction of "censure" in connection with the June 2017 e-mail exchange, and that this is a lesser penalty than what

²¹ *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, para. 24.

²² *Belkhabbaz (formerly Oummih) v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-873.

Mr. Nair received. Mr. Nair argues that under the principle of equality of treatment, the penalty should have been very similar.

50. Mr. Nair asserts that the sanction in his case was “purely punitive” because by the time that the sanction was imposed, Mr. Nair had served for four years after the e-mail exchange without any further issues and excellent performance. Mr. Nair argues that if the Organization truly cared about “progressive and corrective discipline” it would have taken corrective measures at the time of the incident, and not five years later.

51. Finally, if the Appeals Tribunal considers that the UNDT committed reversible error by rescinding the disciplinary sanction in its entirety, Mr. Nair requests that the Tribunal should reduce the sanction to an appropriate administrative/managerial action under Staff Rule 10.2(b) and Section 5.18(b) of ST/SGB/2008/5.

Considerations

52. The Judgment the UNDT recorded in the penultimate paragraphs stated that:²³

... In conclusion, the application is granted only as it relates to the disciplinary measure. The disciplinary decision is therefore rescinded.

... The Applicant must be placed in the same position he had before the sanction was applied.

53. The impugned Judgment finally concluded that “[i]n light of the foregoing, the disciplinary decision is rescinded”.²⁴

54. A clear disjunct exists in the impugned Judgment between the recordal of the decision to grant Mr. Nair’s application only in relation to the disciplinary measure and the decision to rescind the disciplinary decision. This confusion is reflected in the finding on the one hand that “no misconduct occurred at all”, while at the same time accepting that Mr. Nair had “repeatedly reacted and used hostile language” and “resorted to the use of belittling and insulting language”.²⁵ Although finding that Mr. Nair’s conduct did not amount to misconduct, the Tribunal stated that his “behaviour called for a corrective measure that was administrative

²³ Impugned Judgment, paras. 59-60.

²⁴ *Ibid.*, para. 61.

²⁵ *Ibid.*, paras. 52 and 56.

but not disciplinary”.²⁶ The Tribunal’s approach appears to have its genesis in its erroneous interpretation of Staff Rule 10.

55. Chapter X of the Staff Rules concerns “Disciplinary measures”.²⁷ Under the heading of “Misconduct”, Staff Rule 10.1 provides that a “[f]ailure by staff members to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct”.

56. Staff Rule 10.2(a) details that the disciplinary measures which may be imposed in cases of misconduct “may take one or more of the following forms only”: (i) written censure; (ii) loss of one or more steps in grade; (iii) deferment, for a specified period, of eligibility for salary increment; (iv) suspension without pay for a specified period; (v) fine; (vi) deferment, for a specified period, of eligibility for consideration for promotion; (vii) demotion with deferment, for a specified period, of eligibility for consideration for promotion; (viii) separation from service, with notice or compensation in lieu of notice; and (ix) dismissal.

57. Staff Rule 10.2(b) records that “[m]easures other than those listed under staff rule 10.2 (a) above shall not be considered to be disciplinary measures”. Such measures are administrative measures that include, but are not limited to, the following: “(i) a written or oral reprimand; (ii) recovery of monies owed to the Organization; (iii) administrative leave with full or partial pay or without pay”.

58. The UNDT found that “no misconduct at all occurred”²⁸ and that Mr. Nair’s “behaviour called for a corrective measure that was administrative but not disciplinary”.²⁹ In finding as much, the UNDT approached the matter on the basis that given that Rule 10.1 provides that disciplinary measures may be imposed for misconduct but that Rule 10.2(b) states that administrative measures “shall not be considered disciplinary measures”, to impose administrative measures a finding of misconduct is not required.

²⁶ *Ibid.*, para. 57.

²⁷ ST/SGB/2018/1/Rev. 2.

²⁸ Impugned Judgment, para. 52.

²⁹ *Ibid.*, para. 57.

59. The difficulty with this approach is that the disciplinary and non-disciplinary measures detailed in Rule 10.2 are imposed within a disciplinary context. It is not open to the Administration to impose a sanction, whether disciplinary or administrative, without a finding that some misconduct has occurred. The distinction in Rule 10.2 between the sanctions of disciplinary and non-disciplinary or administrative measures is one of degree, with the gravity of the sanction of a disciplinary measure being more severe than that of an administrative measure.

60. Mr. Nair did not deny his conduct, which was borne out from the text of the numerous e-mail exchanges with Mr. N. The UNDT found that Mr. Nair's reaction, as the CHRO, was not appropriate given his obligation to find solutions and resolve personnel problems; that he could have stopped the e-mail exchange sooner instead of repeatedly reacting and using the hostile, belittling or insulting language that he did; and that his behaviour was not appropriate.

61. Harassment is defined as any unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person, when such conduct interferes with work or creates an intimidating, hostile or offensive work environment.³⁰ As prohibited conduct, Section 1.4 of ST/SGB/2019/8 recognizes that harassment "may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another. Harassment may be directed at one or more persons based on a shared characteristic or trait as set out in section 1.2 above. Harassment normally implies a series of incidents". The test for harassment, as was made clear in *Belkhabbaz*, "focuses on the conduct itself and requires an objective examination as to whether it could be expected or perceived to cause offence or humiliation to a reasonable person".³¹

62. Although in December 2017 an investigation of Mr. Nair's complaint against Mr. N. found that Mr. Nair used "inappropriate" language and that the exchanges between the two had "escalated into a war of words and insults", no finding was made that Mr. Nair's conduct constituted harassment. It was only in the course of the subsequent investigation, instituted following receipt of a complaint which was re-filed by Mr. N.,³² that Mr. Nair's conduct was found to meet the threshold of harassment. While this may reasonably have been as a result of the fact that the first investigation was directed at the conduct of Mr. N. and not Mr. Nair,

³⁰ Section 1.3 of ST/SGB/2019/8, Secretary-General's bulletin (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

³¹ *Belkhabbaz* Judgment, *op. cit.*, para. 76.

³² The first complaint filed by Mr. N. was withdrawn on 30 June 2017.

the fact that the first investigation did not find Mr. Nair's conduct to meet the threshold of harassment, is not in itself sufficient to undermine the conclusion reached in the second investigation that it did.

63. The clear and convincing evidence which emerges from the undisputed facts placed before the UNDT was that in repeatedly responding to Mr. N. in the manner that he did, Mr. Nair escalated the conflict with Mr. N. using inflammatory language over the course of many hours and on repeated occasions. By so doing, Mr. Nair committed misconduct which fell within the definition of harassment as set out in the applicable legal framework. Despite the provocative tone and content of Mr. N.'s emails, Mr. Nair's conduct was wholly unwarranted. He did not act in a manner reasonably expected of a senior employee in the human resources role in which he was employed and he repeatedly directed statements at Mr. N. which were abusive, demeaning and belittling of him.

64. As this Tribunal has found in *Belkhabbaz*³³ and *Applicant*³⁴, a senior staff member's aggressive and abrasive tone cannot be justified even where the other staff member contributed to the tension. In behaving as he did, Mr. Nair would reasonably have been aware that he may cause offence or humiliation, in circumstances in which his conduct clearly interfered with the work of the Organization, his own work, that of Mr. N. and was patently offensive. For these reasons, the UNDT erred in finding that the evidentiary standard of clear and convincing evidence had not been met in spite of undisputed evidence to the contrary. Mr. Nair was shown to have committed the misconduct alleged, with the evidence and established facts proving that such conduct qualified as misconduct in the form of harassment in terms of the applicable legal framework.

Sanction

65. Staff Rule 10.3(b) provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". The task of the UNDT is therefore, in relation to the issue of sanction, to determine whether in a disciplinary matter the sanction imposed is proportionate to the misconduct committed.³⁵

³³ *Belkhabbaz* Judgment, *op. cit.*, para. 75.

³⁴ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209, paras. 53-54.

³⁵ *AAC v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1370, para. 38.

66. In *Sanwidi*, this Tribunal recognized that “the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive”.³⁶ This entails balancing competing considerations and priorities to determine the action to be taken, while recognizing that “decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment”.³⁷ We also held therein:³⁸

... 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.

67. In *Samandarov*,³⁹ it was emphasized that due deference to the decision-maker “does not entail uncritical acquiescence” and that interference is warranted where a sanction is disproportionate or lacking in proportionality:⁴⁰

... The proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired 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.

68. The task of the Dispute Tribunal is therefore not to determine the issue of sanction afresh and impose on an employee a sanction which it considers to be more appropriate. Rather, an assessment of proportionality requires the review and balancing of competing considerations to determine whether less drastic and more suitable means might better have

³⁶ *Sanwidi* Judgment, *op. cit.*, para. 39.

³⁷ *Ibid.*

³⁸ *Ibid.*, para. 40.

³⁹ *Samandarov* Judgment, *op. cit.*, para. 24.

⁴⁰ *Ibid.*, para. 23.

accomplished the necessary disciplinary objective.⁴¹ As recognized in *Rajan*,⁴² factors to be considered in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency. This is however not a closed list.

69. Interference with a sanction is therefore only warranted where it has been shown to be disproportionate, in the sense that it exceeds accepted limits, is arbitrary, irrational, excessive, bears no rational connection to the evidence or is out of keeping with the purpose and objective of staff discipline.

70. The UNDT's finding that the sanction imposed on Mr. Nair bore "no rational connection or suitable relationship to the evidence on the record and the purpose of progressive or corrective discipline", was rooted in its view that his behavior "deserves no disciplinary measure at all, of any type, even minor, as no misconduct at all occurred".⁴³ This finding fails to take cognisance of the serious nature of the misconduct committed by Mr. Nair.

71. The importance of attributing seriousness to and acting against harassment in the workplace is that this promotes adherence to the values of respect and dignity, ensures that action is taken against conduct that causes offence or humiliation to another person or interferes with work and creates an intimidating, hostile or offensive work environment. Mr. Nair, given his senior role in human resources and his knowledge of Staff Rules and Regulations and the standard of conduct required of him, should have been aware of the seriousness of the misconduct committed. He failed however to display the restraint which could reasonably have been expected of him in his senior position, acting instead in a manner which only aggravated and prolonged the objectionable interactions between him and Mr. N., who like him was employed in a senior role at P-5 level, but whom he had not met. The fact that Mr. N. had a longer period of service, being 16 years, as opposed to Mr. Nair's service of seven months, did not mitigate the seriousness of the misconduct committed given his unique knowledge of the standard of conduct required of employees.

⁴¹ *Balint Szvetko v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1311, paras. 43-47.

⁴² *Rajan v. Secretary-General of the United Nations*, Judgment No.2017-UNAT-781, para. 48.

⁴³ Impugned Judgment, para. 52.

72. For these reasons, the decision of the UNDT in respect of sanction cannot stand on the basis that it was disproportionate and excessive in its leniency. Counsel for Mr. Nair contended that in the event of such a finding, at least interference with the disciplinary measures of loss of two steps in grade and the deferment of promotion opportunity was appropriate and that these should be modified to a written censure. Mr. Nair's counsel recognized however that as of 21 April 2023, the disciplinary measure of loss of eligibility for promotion for two years, as well as the administrative sanctions received by Mr. Nair have been completed.⁴⁴

73. Consistency between disciplinary and other measures imposed on staff members who commit the same or similar misconduct ensures that different employees are treated similarly and not disproportionately in relation to the same or similar misconduct. Consistency arises both contemporaneously between employees in relation to specified misconduct and historically in an assessment of prior instances of the same or similar misconduct.

74. In previous cases of *Michaud*⁴⁵ and *Alobwede*⁴⁶, matters which concerned similar misconduct to that committed by Mr. Nair, the staff members concerned received an administrative sanction of letter of reprimand or letter of censure. In *Michaud*, the staff member was employed in a role similar to Mr. Nair, in which he was aware of the applicable codes of conduct and the standard of appropriate behavior required, with the offending e-mails between a supervisor and supervisee, copied to other colleagues. In *Alobwede*, an insulting e-mail that was copied to 29 colleagues led to a similar administrative censure.

75. Mr. Nair takes issue with the fact that a more severe and punitive sanction was imposed on him compared to what he contended to be a more lenient sanction imposed on Mr. N., who received a censure on condition that he was "placed on SLWOP and take[s] an early retirement effective 31 October 2019", despite the fact that Mr. N. had been involved in additional unrelated misconduct.⁴⁷ Under the principle of equality of treatment, there must exist an appropriate degree of consistency in the disciplinary response meted out to different employees for the

⁴⁴ Respondent's Answer Form, Part III. Relief.

⁴⁵ *Michaud v. Secretary-General of the United Nations*, Judgment No.2017-UNAT-761, paras. 12-13, 16.

⁴⁶ *Alobwede v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-586, paras. 2, 4, 30, 34-37.

⁴⁷ Impugned Judgment, para. 51.

same or similar misconduct, with due regard to the different personal and factual circumstances.⁴⁸

76. The loss of two steps in grade imposed on Mr. Nair and deferment of consideration for promotion for a period of two years, coupled with the other administrative sanctions imposed on him over a two-year period, cumulatively amounted to a severe sanction. The administrative sanctions imposed, if coupled with a written censure, would have provided a sufficient and suitable means to ensure the realization of progressive and corrective discipline in accordance with the object of discipline within the Organization. It was a further relevant consideration that four years had elapsed before the sanction was imposed on Mr. Nair and the Secretary-General took no issue with Mr. Nair's contention that during that period he had served without any further issues and that his performance had been exemplary.

77. With regard had to the importance of consistency in staff discipline and the relevant factors applicable to such an enquiry, leads the Appeals Tribunal to the conclusion that in imposing the loss of two steps in grade on Mr. Nair in addition to the other measures imposed, the administrative action taken was more excessive than was necessary to obtain the desired result. In the circumstances, the sanction imposed is found to be disproportionate and unlawful. The two administrative measures imposed on Mr. Nair which required him to serve in another human resources section of the Organization for three months and be mentored for twelve months by another senior human resources professional have been completed and are no longer in issue. The deferment of consideration for promotion is also moot. Accordingly, the only remaining sanction is the loss of two steps in grade, which we see fit to vacate and replace with written censure.

78. For the reasons set out, interference with the Judgment of the UNDT by this Tribunal, in terms of Article 2(1) of the Appeals Tribunal Statute, is warranted.

⁴⁸ Respondent's Annex 5 (Excel sheet presenting disciplinary outcome in cases of harassment).

Judgment

79. The Secretary-General's appeal is granted in part, and Judgment No. UNDT/2022/108 is hereby modified.

80. The contested decision is upheld.

81. The sanction imposed on Mr. Nair is found to be disproportionate and excessive, and the disciplinary measure of loss of two steps in grade is vacated and replaced with written censure.

Original and Authoritative Version: English

Decision dated this 27th day of October 2023 in New York, United States.

(Signed)

Judge Savage, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Ziadé

Judgment published and entered into the Register on this 4th day of December 2023 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar