



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

BAIDYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the 1 February 2011 decision made by the Under-Secretary-General, Department of Management, to impose on him the disciplinary measures of a written censure and a fine of one month's net base salary. The Applicant seeks the rescission of the decision and for it to be removed from his Official Status File.

Relevant background

2. On 9 June 2007, an interview panel consisting of the Applicant and two other staff members interviewed candidates for the position of Chief, Accounts Unit, Finance Office, United Nations Stabilization Mission in Haiti ("MINUSTAH"). The panel recommended that one of the candidates ("MT") be selected for the position.

3. On 18 June 2007, the Principal Deputy Special Representative of the Secretary-General ("PDSRSG"), prior to providing his approval of the selected candidate, contacted the Applicant via email stating:

I tried calling you and did not find you and did not want to wait and risk having more time pass before raising this issue. Regarding the [P-3 Finance Officer] recruitment, it has been noted that the selected candidate is a Bangladeshi national the same as you are. While this is not a problem in itself it will undoubtedly bring closer scrutiny to the process and the PDSRSG wants to be assured that you are aware of that possibility. If you know the candidate personally, or know people who know him, or he is a distant relative, etc. If this were to be investigated any ties to friendship or family would be potentially damaging. The PDSRSG wants you to be completely comfortable with the selection considering the above and should you not feel absolutely certain he would recommend not to proceed. Please advise.

4. Following the Applicant's receipt of the 18 June 2007 e-mail from the PDSRSG, the Applicant and the Special Assistant to the PDSRSG had

a conversation about MT's selection. MT was selected and joined MINUSTAH on 14 July 2007.

5. On 25 June 2008, the Investigations Division, Office of Internal Oversight Services ("OIOS") received a report that the Applicant had tampered with the recruitment process for the P-3 position of Chief of the Accounts Unit in MINUSTAH's Finance Office by providing confidential information to the successful candidate, MT. The Applicant was interviewed by OIOS as part of its investigation into the allegation on 22 October 2008 and 10 July 2009.

6. On 11 February 2010, OIOS advised the Applicant that it was in the process of completing its investigation and requested that he provide them with comments on their draft investigation report. Two weeks later, the Applicant provided comments stating, *inter alia*, that:

- [MT] was technically cleared by the FBFD and his name was forwarded to the Finance section as a technically cleared candidate.
- [The Applicant] did not provide any questions to [MT].
- [The Applicant] did not provide any confidential information and interview questions to [MT].
- [The Applicant] did not provide any false information concerning [his] relationship with [MT].
- [The Applicant] never discussed recruitment issues with [MT].
- [The Applicant] did not call [MT] the evening before the interview... [and] did not call [MT] the day of the interview.
- [The Applicant] clarif[ied] that due to [MT's] persistent personal requests as well as due to his very good academic background [he] advised [MT] how to apply for the UN job.
- [MT] brought this unjustified allegations on his own recruitment process after getting his performance [evaluation] graded as 'partially meets performance expectations'... with his continuous poor performance, presumably these false and unjustified allegations of [MT's] own recruitment [are being] brought by [him]...to divert the attention from his poor performance.

7. On 10 March 2010, OIOS provided the Under-Secretary-General, Department of Field Support with its findings and recommendations regarding the allegations that the Applicant had tampered with a post selection process.

8. On 21 April 2010, the Assistant-Secretary-General, Department of Field Support, sent the Assistant-Secretary-General, Office of Human Resources Management (“ASG/OHRM”), a memorandum regarding the “investigation report on irregular recruitment process by [the Applicant]”. The memorandum recommended that the Applicant be subject to disciplinary action for having provided a staff member confidential information during a selection procedure and failing to disclose the nature of his relationship with the successful candidate, MT.

9. By memorandum dated 10 May 2010, the Applicant was charged with misconduct for “improperly interfering with the recruitment process for the P-3 position of Chief of Account Units in the MINUSTAH Finance Office by taking action to give an unfair advantage to [MT], whom [the Applicant has] known personally for several years ...”. The Applicant was also charged with failing to disclose his friendship with MT to the Special Assistant to the PDSRSG.

10. On 5 August 2010, the Applicant, and his Counsel, responded under separate cover to the allegation of misconduct stating that he did not provide any false information concerning his relationship with MT; that he did not have any contact with him in the 17 years between them attending university together and the end of December 2005; that he never discussed the recruitment process with him; and that all of the short-listed candidates, including MT, were highly qualified and cleared by the Field Budget and Finance Division, and that he “did not have any personal interest in the matter and [he] did not tamper or deviate from the recruitment process ...”.

11. On 1 February 2011, the ASG/OHRM notified the Applicant that there was insufficient evidence to conclude that he had provided MT with information which had the effect of providing MT with an unfair advantage in the selection process.

However, the ASG/OHRM considered that there was sufficient evidence to conclude that the Applicant had failed to disclose the nature of his relationship with MT, thereby violating former staff regulations 1.2(b), (e), (f) and (g) as well as former staff rule 101.2(e). It was accordingly decided that disciplinary measures be imposed on the Applicant in the form of a written censure plus a fine of one month's net base salary. A copy of this memorandum, which constituted the letter of censure, was placed in the Applicant's Official Status File.

12. On 13 April 2011, the Applicant requested management evaluation of the ASG/OHRM's decision. On 15 April 2011, the Management Evaluation Unit ("MEU") advised the Applicant that he was not required to request management evaluation of a decision to impose disciplinary measure following the completion of a disciplinary process. The Applicant was further advised that should he wish to contest the decision, an application could be made directly before the Dispute Tribunal. On 25 May 2011, the Applicant filed his application. On 22 June 2011, the Respondent filed his reply.

13. By Order No. 343 (NY/2013), dated 17 December 2013, the Tribunal requested that the parties indicate by 20 January 2014, on the basis of supporting evidence, the date on which the Applicant received the contested decision. On 24 December 2013, the Respondent informed the Tribunal that the decision was received by the Applicant on 8 March 2011.

14. By Order No. 355 (NY/2013), dated 27 December 2013, the Tribunal requested that the parties indicate the exact nature of the Applicant's current professional status, whether there were any disclosure issues or other issues that needed to be addressed by the Tribunal; whether an oral hearing was warranted; and whether there would be any prospect of informal resolution of the case.

15. On 28 January 2014 and 12 February 2014, the Respondent and the Applicant, respectively, filed their response to Order No. 355. The Applicant submitted that all the relevant evidence had been disclosed and that no oral hearing was necessary.

The Respondent submitted that he did not object to a judgment on the papers although it was noted that there was a factual dispute in this case regarding the accuracy of some of the events as recounted by the Deputy Director of Mission Support and Head of the Santo Domingo Support Office, MINUSTAH.

16. On 19 February 2014, the Respondent filed a motion to strike paras. 3.1 to 3.8 and 3.11 of the Applicant's submission made pursuant to Order No. 355 "because they go beyond the scope of the information requested by the Tribunal". By Order No. 54 (NY/2014), dated 2 April 2014, the Tribunal stated that paras. 3.4 to 3.8 and 3.11 were to be struck from the record of the case.

17. In view of parties' submission that, even though this case concerned a disciplinary matter, they did not require an oral hearing, and taking into consideration the evidence before it, the Tribunal considered that this case could be decided on the papers before it and ordered the parties to file closing submissions. The Respondent's closing submissions were filed on 17 April 2010, with the Applicant's closing submissions being filed on 30 April 2014.

Consideration

Receivability

18. The Applicant received notification of the decision to impose on him a written censure plus a fine of one month's net base salary on 8 March 2011. In accordance with staff regulation 11.2(b) from ST/SGB/2011/1, in place at the time of the judicial proceedings, a staff member wishing to formally contest an administrative decision to impose a disciplinary measure following the completion of a disciplinary process is not required to request management evaluation. The Applicant filed a request for management evaluation on 13 April 2011 and, two days later, he was informed by the MEU that management evaluation was not required in a disciplinary case and that he could file an application directly with the Dispute Tribunal. On 25 May 2011, the application was filed with the Dispute Tribunal, within 90 days of the Applicant

being notified of the disciplinary decision. The application therefore meets all of the receivability requirements set out in art. 8.1(c) of the Tribunal's Statute.

Applicable law

19. ST/SGB/2003/1 (Amendments to the 100 Series of the Staff rules) dated 1 January 2003 states in relevant parts:

Rule 101.2

Basic rights and obligations of staff

...

(e) Staff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization, nor shall staff members threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official duties.

20. ST/SGB/2006/1 (Amendments to the 100 Series of the Staff rules) dated 1 January 2006 states in relevant parts:

Rule 110.1

Misconduct

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.

...

Rule 110.3

Disciplinary measures

(a) Disciplinary measures may take one or more of the following forms:

- (i) Written censure by the Secretary-General;
- (ii) Loss of one or more steps in grade;

- (iii) Deferment, for a specified period, of eligibility for within-grade increment;
- (iv) Suspension without pay;
- (v) Fine;
- (vi) Demotion;

21. ST/SGB/2007/4 (Staff regulations of the United Nations) dated 1 January 2007 states in relevant parts:

Regulation 1.2

Basic rights and obligations of staff

Core Values

...

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

...

General rights and obligations

...

(e) By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants;

(f) ...They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status;

(g) Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour;

Scope of the review

22. As stated in *Yapa* UNDT/2010/169, when the Tribunal is seized of an application contesting the legality of a disciplinary measure, it must examine whether the procedure followed is regular, whether the facts in question are established, whether those facts constitute misconduct and whether the sanction imposed is proportionate to the misconduct that was committed.

23. In *Hallal* UNDT/2011/046, the Tribunal held that:

30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred. (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

24. In *Zoughy* UNDT/2010/204 and *Hallal*, the Tribunal held that it is not sufficient for an Applicant to allege procedural flaws in the disciplinary process. Rather, the Applicant must demonstrate that these flaws affected his or her rights.

Regularity of the procedure

25. The Applicant submitted that the disciplinary measures imposed on him were based on unfounded, unproven, biased allegations, and the result of a flawed OIOS investigation, contrary to the letter and spirit of the Staff Rules and Regulations. The Tribunal will therefore consider the regularity of the procedure and whether the Applicant was responsible of misconduct.

26. MT, a P-3 Finance Officer, joined MINUSTAH on 14 July 2007. On 9 May 2008, prior to his 11 May 2008 departure from MINUSTAH, the Applicant, as MT's first supervisor, finalized MT's 2007 performance appraisal document ("PAD") the content of which MT then contested by filing a rebuttal.

27. As part of his rebuttal, MT stated, among other things, that the Applicant had helped him obtain his post. OIOS investigated MT's allegations that in June 2007 the Applicant had interfered in his favor during the selection procedure.

The Applicant was interviewed twice, on 22 October 2008 and 10 July 2009. On both occasions, the Applicant acknowledged the accuracy of the transcripts of OIOS' interview by signing off on them. The draft investigation report was provided to the Applicant on 11 February 2010 and he provided OIOS with his comments on 25 February 2010. The investigation report was finalized on 10 March 2010 and sent to the Under-Secretary-General, Department of Field Support. On 21 April 2010 the case was referred to OHRM.

28. By memorandum dated 10 May 2010, the Applicant was charged with misconduct for: (1) having improperly interfered with the recruitment process for the P-3 position of Chief of Accounts Unit in MINUSTAH's Finance Office; (2) his failure to disclose his personal relationship with MT, including to members of the panel, which he chaired; that interviewed MT; and (3) not answering truthfully when specifically asked about his relationship by a staff member acting on behalf of the PDSRSG.

29. On 5 August 2010, the Applicant submitted two sets of comments in response to the charges filed against him. These comments were duly considered by the Respondent and, where relevant, the Respondent sought additional factual information from two other witnesses: one being interviewed on 14 December 2010 and 17 January 2011, the other on 21 December 2010.

30. By letter dated 1 February 2011, the Applicant was notified that the ASG/OHRM considered that there was insufficient evidence to conclude that he had improperly interfered with the recruitment process of MT. This charge was accordingly dropped. However, he was informed that the Under-Secretary-General for Management, on behalf of the Secretary-General, had found that there was sufficient evidence to conclude that he had engaged in misconduct by failing to disclose his friendship with MT to the PDSRSG's Special Assistant, despite a specific and detailed request in this regard.

31. During OIOS's investigation, the Applicant was duly informed of the charges and allegations made against him. He was interviewed and he signed off on the content of interview transcripts. Further, when notified of the charge of misconduct on 10 May 2010, he had an opportunity to provide his comments, which were analyzed and duly taken into consideration by OHRM given that the first charge was subsequently dropped. The Tribunal therefore finds that the Applicant's due process rights were respected during each phase of the disciplinary process.

32. In the present case, the allegations were only put forward by MT in June 2008 as part of the rebuttal of his performance appraisal and after the Applicant's departure from MINUSTAH. The duration of the disciplinary process was, in relation to the complexity of the case and the parties' position vis-a-vis the facts, reasonable.

Misconduct

33. The Tribunal will further analyze whether, as determined by the Respondent, the facts in the present case constitute misconduct. The existence of misconduct is determined by the following cumulative conditions:

- a. The objective element which consists of either:
 - i. an illegal act (when the staff member takes an action which violates a negative obligation);
 - ii. an omission (when the staff member fails to take a positive action); or
 - iii. mixture of both which negatively affects other staff members including the working relationships and/or the order and discipline in the workplace;
- b. The subjective element which consists of the negative mental attitude of the subject/staff member who commits an act of indiscipline either intentionally or by negligence;

- c. The causal link between the illegal act/omission and the harmful result;
- d. The negative effect on labour relations in the workplace.

34. It is clear from the email correspondence and the record of the phone calls provided to the Tribunal that the Applicant knew MT prior to him applying for the P-3 post in MINUSTAH. They attended the same university together and were in regular contact during the months leading up to the selection process for the P-3 post.

35. The Applicant, who chaired the interview panel, failed to disclose his relationship to the other panelists and to withdraw from the panel. The Applicant had no direct authority with regard to MT's actual recruitment as the final decision was made by the Chief Mission Support in consultation with the Field Personnel Division, New York. Nevertheless, he was a member of the panel which identified MT as a preferred candidate and recommended that he be selected.

36. In *Finniss* 2014-UNAT-397, the Appeals Tribunal stated that:

20. The guidelines in paragraph 9 of ST/AI/2006/3 provide that candidates need to be evaluated against pre-approved criteria. It is reasonable to expect that the selection process is not only fair, but also seen to be fair. Thus, as a matter of fair process, there is no room for extraneous considerations such as bias, prejudice and discrimination.

...

22. We refer to the persuasive holding by the Administrative Tribunal of the International Labour Organization (ILOAT) in *Varnet v. UNESCO*, Judgment No. 179, where the ILOAT stressed that:

It is a general rule of law that a person called upon to take a decision affecting the rights and the duties of other persons subject to his jurisdiction must withdraw in cases in which his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the person affected by the decision to suspect its author of prejudice.

Persons taking part in an advisory capacity in the proceedings of decision-making bodies are equally subject to the above-mentioned rule. It applies also to members of bodies required

to make recommendations to decision-making bodies. Although they do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence of the decision to be taken.

37. The Tribunal considers that the Applicant had a legal obligation and therefore should have, on his own initiative, withdrawn himself from the interview panel since his objectivity as a chairperson could reasonably be open to questioning.

38. Consequently, being a matter of law and not a matter of fact, the Applicant's inaction to withdraw from the interview panel was in and of itself a breach of law. The Tribunal further considers that the Applicant should have been reasonably aware that his behavior was immoral. By virtue of the relations of subordinations that characterize social relations in the workplace, the employees must observe not only general contractual obligations and the staff regulations and rules, but also general principles of moral conduct.

39. The Administration has a statutory duty to offer selection processes which are both fair and seen to be fair (*Finniss* 2014-UNAT-397). In the present case, the Applicant wrongly considered that his prior relationship with one of the candidates (who was to be considered the best candidate by the members of the interview panel) was not relevant and that it was not necessary to inform the other members of the panel of his pre-existing contacts and relation with MT. Furthermore, the Applicant also failed to disclose this upon receiving an official and specific inquiry from the PDSRSG's Special Assistant. Rather, as part of his response to the allegations of misconduct, the Applicant stated that: "there is no question of me denying anything [...]. I informed [the Special Assistant to the PDSRSG] MC that there is no relationship and [...] that the selection was purely based on skills and qualifications, not based on friendship and that the recommendation of the panel was unanimous".

40. The Special Assistant to the PDSRSG informed OHRM by e-mail dated 21 December 2010 that he had informed the Applicant that the purpose of his email and conversation was to clarify whether the Applicant had any connection with MT.

He further stated that while he did not recall if he specifically asked if they were friends, he did recall being very clear about the PDSRSG inquiring as to “whether he knew him in any capacity whatsoever” to which the Applicant responded that he did not know MT and that he was simply the most qualified.

41. The Tribunal, in light of the documents filed by the parties regarding the conversation between the Applicant and the Special Assistant, considers that there is no factual dispute regarding the content of their conversation and that there was therefore no need to call upon the Special Assistant to the PDSRSG to testify.

42. The Tribunal considers that by stating that there was no “relationship” between himself and MT, the Applicant covered all aspects of the PDSRSG’s inquiry, namely whether the Applicant knew MT personally, or knew people who knew him, or was a distant relative. The Applicant was further clearly notified on 18 June 2007 that should the matter be investigated “any ties to friendship or family would be potentially damaging”.

43. The Applicant admitted that he had told MT that he would “guide him and he should keep it confidential [...]. Because he has a lot of friends that would ask for assistance and he cannot help everybody”. The Tribunal considers that it is clear from the Applicant’s own statement that he considered MT to be a friend and yet, when asked directly, he failed to recognize it. While the Applicant indicated that he and MT were not related, the Applicant intentionally omitted to deny the existence of a relation which could reasonably be considered as more than an acquaintance, possibly a friendship. The inquiry made by the PDSRSG, prior to the completion of the selection process, served the purpose of identifying and preventing both the existence and the appearance of conflict, including by protecting the candidate and the members of the deciding bodies.

44. The Applicant’s actions, which were based on his personal understanding and perception of how one defines relationship, friendship, impartiality or honesty, cannot possibly be considered appropriate. Even if the Applicant, both prior to and during

the selection process, considered that his objectivity would not be affected by his pre-existing relations with MT, he should have taken the necessary steps to ensure a fair selection process. This was even more necessary when considering that the issue of the existence of possible bias or perception of favoritism was specifically raised by the Special Assistant to the PDSRSG regarding MT's selection.

45. In conclusion, the Applicant not only failed to disclose the existence of his relation with MT to the other panelists but, more importantly, to the PDSRSG when required to do so. The Applicant also failed to withdraw from the interview panel which could lead to a perception of bias. After MT was selected as the preferred candidate, he further failed to inform the Special Assistant to the PDSRSG about his relationship with MT. The recommendations of this panel were crucial in assisting the decision-making body responsible for the selection of the successful candidate, namely MT.

46. The Applicant's failure to inform the PDSRSG of the nature of his relations with MT, and the denial of any relationship of significance with MT, resulted in a breach of the staff regulations and rules and of his duties and obligations as an international civil servant in a position of authority. The Tribunal concludes that the Respondent correctly determined that the Applicant's behavior constituted misconduct.

Proportionality of the sanction

47. The decision as to whether to impose a disciplinary measure falls within the discretion of the Organization. In the present case, the sanction applied to the Applicant was written censure plus a fine of one month net base and the Tribunal will review whether it was proportionate.

48. The Tribunal considers that an employee's disciplinary liability has a contractual nature. It consists of a constraint applied by the employer, mainly physical or moral, and exercises both sanctioning and preventive (educational) functions.

49. The necessary and sufficient condition for the disciplinary liability to be determined by the employer is the existence of misconduct.

50. The individualization of the sanction is very important because only a fair correlation between the sanction and the gravity of the misconduct will achieve the purpose of a disciplinary measure. Applying a disciplinary sanction, in order to respect a staff member's right to a proportionate sanction, cannot occur arbitrarily but rather it must be based solely on the application of rigorous criteria. The Tribunal also considers that the purpose of the disciplinary sanction is to punish adequately the guilty staff member while also preventing other staff members from acting in a similar way.

51. Former staff rule 110.3 provides for sanctions which can be applied to the Applicant once a finding of misconduct has been reached. The Tribunal will further verify whether the staff member's right to a proportionate sanction was respected and that the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct. The nature of the sanction relates to the finding of conduct which is in breach of the applicable rules. The "gravity" of the misconduct is related to the subjective element of misconduct (guilt) and to the negative impact of the illegal act/omission.

52. In order to appreciate the gravity of a staff member's misconduct, all the circumstances that surround the disciplined behavior, which are of equal importance, have to be considered and analyzed in conjunction with one another, namely the exonerating, aggravating and mitigating circumstances.

53. The Tribunal notes that there are some circumstances which can exonerate a staff member from disciplinary liability such as: self-defense, state of necessity, force majeure, disability or error of fact.

54. As stated in *Yisma* UNDT/2011/061:

Both aggravating and mitigating circumstances factors are looked at in assessing the appropriateness of a sanction. Mitigating circumstances may include long and satisfactory service with the Organisation; an unblemished disciplinary record; an employee's personal circumstances; sincere remorse; restitution of losses; voluntary disclosure of the misconduct committed; whether the disciplinary infraction was occasioned by coercion, including on the part of fellow staff members, especially one's superiors; and cooperation with the investigation. Aggravating factors may include repetition of the acts of misconduct; intent to derive financial or other personal benefit; misusing the name and logo of the Organisation and any of its entities; and the degree of financial loss and harm to the reputation of the Organisation. This list of mitigating and aggravating circumstances is not exhaustive and these factors, as well as other considerations, may or may not apply depending on the particular circumstances of the case.

55. The sanctions which can be applied to the Applicant in the present case are listed under former staff rule 110.3. They are listed from the lesser sanction to the most severe and, generally, they must be applied gradually based on the particularities of each individual case.

56. The consequences of the misconduct, prior behavior, as well as prior disciplinary record can either constitute aggravating or mitigating circumstances. Sometimes, in exceptional cases, they can directly result in the application of even the harshest sanction (dismissal), regardless of whether or not it is the staff member's first offence.

57. As the Tribunal held in *Galbraith* UNDT/2013/102:

79. The Tribunal notes that the Termination of Employment Convention adopted by the General Conference of the International Labour Organization on 2 June 1982 states in art. 4 (Justification for termination) that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".

80. Staff regulation 9.3 and staff rule 9.6(c) contain the following provision: “the Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the reasons (grounds) listed”.

81. The Tribunal considers that the above-mentioned legal provisions applicable in the present case reflect the staff member’s right to be informed about the reason and the explanation for it and the Secretary-General correlative obligation to give the reason and the explanation for the termination.

58. The Tribunal considers that the analysis of the exonerating, aggravating and mitigating circumstances are part of the mandatory justification (explanation) of the disciplinary decision in relation to the staff member’s right to a proportionate sanction.

59. In *Applicant* UNDT/2010/171, the Tribunal held that, given the range of permissible sanctions for serious misconduct, it is necessary to consider the totality of the circumstances, including any mitigating factors, to assess where to pitch the appropriate sanction. Consequently, in the absence of such an analysis or in cases where these circumstances were partially observed by the Organization, the Tribunal has to determine the relevance of any circumstances which may have been previously ignored.

60. The Tribunal will therefore review whether the sanction applied in the present case is consistent with those applied in similarly situated cases by the Secretary-General based on the Secretary-General’s 2010–2012 reports on disciplinary cases:

61. ST/IC/2007/47 (Practice of the Secretary General in disciplinary matters and cases of criminal behavior, 1 July 2006–30 June 2007) dated 31 August 2007 states, in relevant parts:

38. A staff member engaged in a conflict of interest in connection with a recruitment process. The staff member also acted in an insubordinate and obstructive manner during the investigation into the matter.

Disposition: a written censure after waiver of referral to the Joint Disciplinary Committee

62. ST/IC/2008/041 (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2007 to 30 June 2008), dated 15 August 2008, states:

Gross Negligence

...

19. A staff member who was head of the Contracts Unit, Procurement Section, and Acting Chief Procurement Officer in a peacekeeping mission failed to perform duties pursuant to the correct procurement procedures, as demonstrated, inter alia, by poor file management practices and allowing brand-specific items to be included in scope-of-work and bill-of-quantity documentation.

Disposition: a written censure after waiver of referral to the Joint Disciplinary Committee.

...

Other

...

45. A staff member attempted to cheat on an official language examination administered to internal and external candidates. The staff member refused to cooperate in an official investigation on the incident.

Disposition: demotion, no possibility of promotion for two years and written censure after receipt of the advice of a Joint Disciplinary Committee.

63. ST/IC/2009/30 (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2008 to 30 June 2009), dated 19 August 2009, states:

Fraud/Misrepresentation

...

25. A staff member misused a United Nations-issued mobile telephone for private calls, and deliberately failed to declare these private calls through the United Nations mobile billing systems in order to avoid payment.

Disposition: written censure and a fine of two months' net base salary after advice of a Joint Disciplinary Committee.

64. ST/IC/2010/26 (Practice of the Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2009 to 30 June 2010), dated 7 September 2010, states:

Fraud/Misrepresentation

...

29. A staff member knowingly submitted false information and supporting documentation in support of a claim for medical expenses.

Disposition: dismissal.

65. ST/IC/2011/20 (Practice of the Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2010 to 30 June 2011), dated 27 July 2011, states:

Fraud/Misrepresentation

38. A staff member submitted to the Organization, in connection with his recruitment, a secondary school report card containing altered grades.

Disposition: demotion of one grade with deferment, for three years, of eligibility for consideration for promotion.

39. A staff member cheated on a written test administered by the Organization by submitting the model answers prepared by others for the test.

Disposition: demotion by one grade with deferment, for a period of three years, of eligibility for consideration for promotion.

66. In *Sow* UNDT/2011/086, the Tribunal found that the principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offence, the penalty, in general, should be comparable.

67. Furthermore, as stated by the Dispute Tribunal in *Meyo* UNDT/2012/138:

31. Where an offence has been committed the Tribunal may lessen the imposed sanction where there are mitigating circumstances that have not been previously considered. [see *Sanwidi* 2010-UNAT-084, *Abu Hamda* 2010-UNAT-022]

32. A factor in considering whether a disciplinary measure taken against an individual is rational may be the extent to which the measure is in accordance with similar cases in the same organization.

68. In the present case, the Tribunal considers that there are no exonerating circumstances. The Tribunal did, however, identify the following aggravating and mitigating circumstances.

Aggravating circumstances

69. In June 2007, the Applicant, a P-4, Chief Finance Officer in MINUSTAH chaired the interview panel which recommended a particular candidate, MT, to the decision-making body as the preferred candidate. This recommendation was done without disclosing the nature of the Applicant's relationship with the recommended candidate. The Applicant failed to either withdraw from the interview process or to inform the other panelists of his relations with MT. After having made the recommendation, upon receiving an inquiry from the Special Assistant to the PDSRSG, the Applicant denied the existence of any relation between himself and MT and he failed to respond in writing to inquiries into the matter. This resulted, upon the completion of the selection process, in him becoming MT's supervisor following his appointment.

70. Further, the Applicant failed to voluntarily recognize his friendship with MT during the disciplinary process and at no time did he indicate that he regretted any of his actions.

71. The Applicant's actions affected the impartiality and fairness of the selection process and the trust vested in him, not only by the Organization as an employer, but

also by his colleagues and superiors.

Mitigating circumstances

72. The Applicant joined the United Nations in July 2000 and he was never investigated prior to or after June 2008 and no administrative or disciplinary sanctions, prior to the one under appeal, were ever imposed on him.

73. The Applicant never sought to obtain any personal gain or to create a prejudice to the Organization and continues to work for the Organization as a devoted staff member.

74. The Tribunal considers that in light of the above mentioned circumstances, the disciplinary measure of a written censure plus one month's fine is proportionate to the gravity of the Applicant's misconduct and is in line with the sanctions applied by the Organization in broadly similar cases.

75. A disciplinary sanction is applied to achieve the purpose of promptly punishing a staff member and also to prevent similar offences in future from being committed by that, and other, staff members. The sanction applied to the Applicant served the purpose of not only punishing him for his dishonesty, but also prevented similar acts from being committed in future. The sanction was therefore proportionate to the misconduct.

Conclusion

In the light of the foregoing the Tribunal DECIDES

76. The application is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 24th day of July 2014

Entered in the Register on this 24th day of July 2014

(Signed)

Hafida Lahiouel, Registrar, New York