



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2018/120
Judgment No.: UNDT/2020/175
Date: 1 October 2020
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

GROSSE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Miryoung An, AAS/ALD/OHR, UN Secretariat
Susan Maddox, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, an Information Systems Officer at the P-3 level with the United Nations Office at Geneva (“UNOG”), contests the decision to impose on him the disciplinary measures of written censure, loss of five steps in grade and a fine of three months’ net base salary, in accordance with staff rules 10.2(a)(i), (ii) and (v), for engaging in remunerated outside employment without authorisation.

Facts and procedural history

2. The Applicant joined the Organization on 6 June 2005 and serves as an Information Systems Officer at the P-3 level with UNOG.

3. Since 2012, the Applicant served as a Vice-President of the “Association Cooperative des Automobilistes et des motocyclistes des Secretariats et Bureaux des Organisations internationales et des Institutions Accreditees” (“CASBIA”), an association of dues-paying members employed by international organizations operating on UNOG premises since the 1920s. The Applicant was paid CHF21,000 annually for his work.

4. On 9 June 2017, the Human Resources Management Service (“HRMS”), UNOG, was informed that the Applicant was serving as one of three Vice-Presidents of CASBIA and, on 17 July 2017, UNOG requested the Applicant to provide information regarding his involvement with CASBIA.

5. On 20 July 2017, the Applicant responded that he was a member of CASBIA’s managing committee and was responsible for administrative and technical tasks for which he was remunerated. He emphasized that he performed tasks for CASBIA outside working hours. He indicated that he did not know that prior authorisation was required and expressed his interest to immediately cease his activities.

6. On 26 July 2017, the Applicant notified CASBIA that he was suspending all his activities.

7. On 27 September 2017, a fact-finding panel was appointed to investigate the Applicant's alleged misconduct regarding his work for CASBIA.

8. On 21 November 2017, the Applicant was interviewed. He admitted that he performed work for CASBIA since 2012 for which he was remunerated. When he was shown the forensic evidence of his work computer showing that he performed work for CASBIA during working hours, he admitted that he sometimes performed some tasks by exchanging emails and visiting websites related to CASBIA during working hours as it did not take much time to complete them.

9. On 7 March 2018, upon completion of the investigation, UNOG referred the case to the Assistant Secretary-General for Human Resources ("ASG/OHR") for possible disciplinary action after finding that the Applicant worked for CASBIA during working hours and for which he was remunerated. In particular, it was noted that the Applicant had received and sent up to 769 email messages using his work computer in connection with CASBIA, and the majority of these emails were sent during his regular working hours. It was also noted that over the years the Applicant accessed 1695 websites related to his work for CASBIA using his work computer during regular working hours.

10. The Applicant received a letter of allegations of misconduct ("the charge letter") dated 7 May 2018.

11. On 22 June 2018, the Applicant provided his comments in response to the allegations of misconduct.

12. On 13 August 2018, the Applicant received a sanction letter imposing the disciplinary measures of written censure, loss of five steps in grade and a fine of three months' net base salary.

13. On 11 November 2018, the Applicant filed his application contesting the disciplinary measures, and on 12 December 2018, the Respondent filed his reply.

14. In response to Order No. 89 (GVA/2020) of 21 August 2020, the Applicant confirmed that no oral hearing was required and that the Tribunal may adjudicate the matter based on the papers.

15. On 18 September 2020, the parties filed their closing submissions.

Parties' submissions

16. The Applicant's principal contentions are:

- a. The Administration failed to establish that CASBIA is a body external to the United Nations before finding that he engaged in an outside activity;
- b. CASBIA has operated on UNOG premises since the 1920s, and its statute requires that it be chaired by a United Nations staff member;
- c. He lacked the requisite *mens rea* to engage in prohibited conduct as he was not aware that he was engaging in outside employment;
- d. The charge letter did not make it clear that the sanction was to be based, to a large extent, on the fact that he performed work for CASBIA during working hours and thereby deprived him of an opportunity to provide a defence; and
- e. His utilisation of his work computer for CASBIA was limited and falls within the permitted use of the United Nations resources under ST/SGB/2004/15 (Use of information and communication technology resources and data).

17. The Respondent's principal contentions are:
- a. That the Applicant occupied the position of Vice-President of CASBIA from 2012 to 2017 and received CHF21,000 annually without seeking the Secretary-General's authorisation are facts established by the requisite standard of proof;
 - b. The Administration is not required to establish the Applicant's *mens rea*;
 - c. The record clearly shows that the Applicant was aware that his occupation with CASBIA was not part of the United Nations;
 - d. The Applicant, as a UN staff member, is deemed to be aware of the Staff Regulations and Rules and his alleged ignorance is not an excuse;
 - e. The imposed sanction fell within the Administration's discretion as it is in line with past practice in comparable disciplinary cases, and all relevant aggravating and mitigating circumstances were considered in determining the appropriate sanction; and
 - f. The Applicant's due process rights were respected throughout the investigation and disciplinary process as he was adequately informed of the allegations of misconduct against him and had ample opportunity to make representations before the disciplinary action was taken against him.

Consideration

Scope of judicial review in disciplinary cases

18. It is well-established case law that the role of the United Nations Dispute Tribunal ("UNDT") in disciplinary cases is to perform a judicial review of the case and assess the following elements:

- a. Whether the facts were established according to the applicable standard of proof, i.e., preponderance of evidence;
- b. Whether the established facts amount to misconduct;
- c. Whether the sanction is proportionate to the gravity of the offence; and
- d. If the staff member's due process rights were guaranteed during the entire proceeding.

19. In the current case, it is consensual that the Applicant has not disputed the core factual circumstances of the case. In fact, the evidence on file shows that on 9 June 2017, HRMS, UNOG was informed that the Applicant was serving as one of three Vice-Presidents of CASBIA, and on 17 July 2017, UNOG requested the Applicant to provide information regarding his involvement with CASBIA.

20. On 20 July 2017, in his response, the Applicant informed UNOG that he was a member of CASBIA managing committee and was responsible for administrative and technical tasks for which he was remunerated. He emphasized that he performed tasks for CASBIA outside working hours. He indicated that he did not know that prior authorisation was required and expressed his interest to immediately cease his activities.

21. On 26 July 2017, the Applicant notified CASBIA that he was suspending all his activities.

22. The applicable legal framework, i.e., section 9.1(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), provides that in cases where dismissal is not at stake, the standard of proof is “[p]reponderance of the evidence (more likely than not that the facts and circumstances underlying the misconduct exist or have occurred)”. This has also been consistently held by the internal case law of the Organization.

23. Bearing in mind that the Applicant has admitted the facts of the case and the sanction(s) at stake were not dismissal, the Tribunal is satisfied that the investigation and the subsequent disciplinary procedure have met the threshold of preponderance of the evidence.

Misconduct

24. The Tribunal will turn to the issue of misconduct and whether the intentions of the Applicant should be taken into account.

25. From the Tribunal's point of view, it is clear that the facts amount to misconduct since the evidence shows that the Applicant engaged in remunerated employment with CASBIA without authorization of the Secretary-General, in violation of staff regulation 1.2(o) and secs. 3 and 6 of ST/AI/2000/13 (Outside activities).

26. Moreover, he did so for several years, including during UN working hours and by using UN assets, and received a considerable amount of money for this unauthorized employment.

27. The Tribunal is of the view that the doubts raised by the Applicant regarding CASBIA statutes and its relationship with the UN are irrelevant for the purpose of evaluating his behavior as an international civil servant.

28. In fact, what is at stake is the breach of staff regulation 1.2(o) and secs. 3 and 6 of ST/AI/ 2000/13, which are an essential element of the Applicant's employment contract with the UN and binding upon him.

29. In addition, the Tribunal recalls that the staff member could not have ignored his obligation to seek the Secretary-General's authorization as it was part of his status as an international civil servant.

30. The Tribunal also rejects his argument related to the alleged lack of *mens rea*.

31. The Tribunal recalls that this is an administrative proceeding and not a criminal case.

32. In the context of administrative/disciplinary proceedings, only the objective facts are essential to determine if misconduct has occurred. The “underlying intentions” of the subject can only be taken into account as mitigating or aggravating circumstances.

33. Nonetheless, the Tribunal acknowledges the fact that CASBIA has had its offices in UNOG premises and, apparently, this situation has been so since the 1920s. Moreover, according to the CASBIA statute, it is required that it be chaired by a UN staff member.

34. The Tribunal finds that while these elements cannot be ignored, they can only be taken into consideration as mitigating factors when assessing the proportionality of the sanctions imposed on the staff member.

Proportionality of the sanctions

35. As a consequence, the sole issue this Tribunal is left to determine is whether the three cumulative sanctions imposed on the Applicant are proportionate to the gravity of the offence.

36. In the current case, the Applicant does not dispute the facts, nor does he deny that he committed the misconduct; on the contrary, he has confessed the offence and cooperated with the investigation conducted.

37. The internal jurisprudence has consistently recognized that the UNDT can interfere with the administration’s discretionary powers whenever the sanction appears to be disproportionate to the gravity of the offence (see, for instance, *Applicant* 2013-UNAT-302, para. 29, citing *Messinger* 2011-UNAT-123; *Portillo Moya* 2015-UNAT-523, paras. 17 and 19-21; *Masri* 2010-UNAT-098, para. 30; *Sanwidi* 2010-UNAT-084, para. 43; *Haniya* 2010-UNAT-024, para. 31; and *Mahdi* 2010-UNAT-018, para. 27).

38. More recently, in *Samandarov* 2018-UNAT-859, the Appeals Tribunal reiterated this position and stated that the Secretary-General's administrative discretion to impose a disciplinary sanctions is not unfettered, and the UNDT can interfere when the sanction lacks proportionality, i.e., when it is excessive, unbalanced and unsuitable.

39. In *Samandarov*, the Appeals Tribunal held that (footnote omitted):

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. 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.

40. The Tribunal is of the view that, in the case at hand, the cumulative application of two sanctions of a financial nature (loss of five steps in grade and a fine of three months net base salary) is an excessive exercise of administrative discretion. The Tribunal underlines that the following mitigating factors should have been taken into account: the Applicant has admitted all the facts and cooperated with the investigation, the Administration could not have ignored that, since the 1920s, UN staff members have performed functions in CASBIA (as per the Statutes of this entity) and, apparently, the Applicant was the only one to be severely punished.

41. While the Tribunal recognizes that decision-makers enjoy a certain latitude in the choice of the sanctions, the Tribunal cannot agree with the unreasonable cumulative financial impact these sanctions will have on the staff member.

42. The Tribunal is of the view that, a loss of five steps in grade represents already a significant financial burden for the Applicant and, in addition to a written censure, it is already a reasonable and, more importantly, proportionate sanction.

43. Consequently, the Tribunal will rescind the sanction of a fine of three months' net salary.

Procedural irregularities and due process rights

44. In his submissions, the Applicant alleges that he was not afforded his due process rights as the charge letter did not make it clear that the sanction was to be based, to a large extent, on the fact that he performed work for CASBIA during working hours. This, in the Applicant's view, deprived him of an opportunity to provide a defence.

45. The Tribunal recalls that the burden of proof to demonstrate procedural irregularities in the course of an investigation and/or disciplinary proceedings lays with the staff member.

46. However, the Tribunal also recalls that limited due process rights apply during the course of an investigation and due process entitlements only come into play once a disciplinary process is initiated.

47. The Tribunal does not agree with the arguments raised by the Applicant in relation to the alleged breach of his due process rights.

48. The evidence on file demonstrates the following:

- a. On 21 November 2017, the Applicant was interviewed;
- b. When he was shown the forensic evidence of his work computer showing that he performed work for CASBIA during working hours, he admitted that he sometimes performed some tasks by exchanging emails and visiting websites related to CASBIA during working hours as it did not take much time to complete them;

c. The Applicant received a letter of allegations of misconduct (“the charge letter”) dated 7 May 2018; and

d. On 22 June 2018, the Applicant provided his comments in response to the allegations of misconduct.

49. The Tribunal underlines that the Applicant was confronted with forensic evidence taken from his work computer, he was interviewed, was notified of the charges, and had the opportunity to make comments.

50. As a consequence, the Tribunal does not find that the Applicant was deprived of his defence rights in the course of the investigation and disciplinary proceedings.

Conclusion

51. In view of the foregoing, the Tribunal rescinds the sanction of a fine of three months’ net base salary fine and confirms the other two sanctions of written censure and loss of five steps in grade.

(Signed)

Judge Teresa Bravo

Dated this 1st day of October 2020

Entered in the Register on this 1st day of October 2020

(Signed)

René M. Vargas M., Registrar, Geneva