



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/046/T

Order No.: 99 (NY/2021)

Date: 27 October 2021

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

SAINT-LOT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:

Jorge Diaz-Cueto

Counsel for Respondent:

Matthias Schuster, UNICEF

Alister Cumming, UNICEF

Introduction

1. On 28 September 2020, the Applicant, a staff member of the United Nations Children’s Fund (“UNICEF”) filed an application contesting “Allegations of sexual harassment and a finding of misconduct in violation of Staff Regulation 1.2(a), Staff Rule 1.2(f), and section 2.1 of CF/EXD/2012-007”.
2. On 20 November 2020, the Respondent replied that the application is without merit.
3. Subsequently, the Applicant requested the holding of a “status conference” and a hearing.

Consideration

The Tribunal’s limited scope of review in disciplinary cases

4. The Appeals Tribunal has consistently held the “[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration”. In this context, [the Dispute Tribunal] is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. In this regard, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”, and when “termination is a possible outcome, misconduct must be established by clear and convincing evidence”. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it “means that the truth of the facts asserted is highly probable”. See, for instance, para 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-

UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT-1024.

5. The Appeals Tribunal has generally held that the Administration enjoys a “broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere” (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, “when judging the validity of the exercise of discretionary authority, ... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate”. This means that the Tribunal “can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”.

6. The Appeals Tribunal, however, underlined that “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” or otherwise “substitute its own decision for that of the Secretary-General” (see *Sanwidi*, para. 40). In this regard, “the Dispute Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision” (see *Sanwidi*, para. 42).

7. Among the circumstances to consider when assessing the Administration’s exercise of its discretion, the Appeals Tribunal stated “[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion” (see *Sanwidi*, para. 38).

Scope of the application

8. From the Applicant's submissions, the Tribunal understands that his contentions can be summarized as follows: the facts of the case were not properly established because some of the witnesses are not credible; the facts do not amount to misconduct and that the disciplinary process was tainted by racism against the Applicant.

Evidence

9. The Tribunal notes that arts. 16.1 and 2 of the Rules of Procedure provide that "[t]he judge hearing a case may hold oral hearings" and that "[a] hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure". Therefore, it is for the trier of fact to determine whether a hearing is necessary, which, in a disciplinary case like the present one, it normally will.

10. The Tribunal also notes that the very purpose of producing evidence—written or oral—is to substantiate the specific relevant facts on which the parties disagree. Accordingly, the production of additional evidence is only required in trial if a fact is relevant and disputed (in line herewith, see *Abdellaoui* 2019--UNAT--929, para. 29, and *El-Awar* 2019-UNAT---931, para. 27).

11. In light of the above, should the Applicant request the production of further evidence, he shall specifically identify the relevant documentation/witness and clearly indicate which of the facts he disputes is the requested evidence intended to support. In this regard, the Tribunal notes that the Appeals Tribunal has prohibited a so-called "fishing expedition", whereby one party requests the other party to produce evidence in "the most general terms" (see, for instance, *Rangel* Order No. 256 (2016)). A party requesting certain evidence must therefore be able to provide a certain degree of specificity to her/his request.

12. Once the Applicant has clarified his request for further evidence, the Tribunal will hear the Respondent's views on the request.

13. In light of the above,

IT IS ORDERED THAT:

14. By **4:00 p.m. on Friday, 12 November 2021**, Applicant shall submit his request for production of any additional evidence, and if so, state:

a. What additional documentation he requests to be disclosed, also indicating what fact(s) such evidence is intended to substantiate; and/or

b. The identity of the witness(es), who the Applicant wishes to call, and what disputed fact(s) each of these witnesses would testify about.

15. By **4:00 p.m. on Friday, 3 December 2021**, the Respondent may submit his response to the Applicant's submission on production of evidence.

16. Upon receipt of the above-referred submissions, the Tribunal will issue further instructions on case management.

(Signed)

Judge Joelle Adda

Dated this 27th day of October 2021