

UNDT/2017/039, Applicant

UNAT Held or UNDT Pronouncements

The Tribunal (a) granted the application in part, (b) rescinded the contested decision in part and replaced the excessive and unlawful disciplinary measure of dismissal with the lesser sanction of separation from service with termination indemnity; (c) ordered the judgment to be included in the Applicant's official status file and all references relating to the disciplinary sanction of dismissal to be removed from this file and to be replaced with the new sanction, namely separation from service with termination indemnity; and (d) in the event that the Respondent would decide not to rescind the decision, ordered him to compensate the Applicant in the amount of six months of net-base pay at the salary the Applicant was earning on 26 February 2015 with interest on the award of compensation at the US Prime Rate from the date of the Judgment to the date when the payment was actually made to the Applicant.

Decision Contested or Judgment/Order Appealed

The Applicant, a former staff member with the OLA, contested the decision of the USG/DM, taken on behalf of the Secretary-General, to dismiss her from service as a disciplinary measure for having submitted a series of claims for special education grants to the Organization that allegedly contained false information.

Legal Principle(s)

The onus of preponderance of evidence during the disciplinary investigation: In the present case, this standard would have been satisfied only if a hand-writing expert contracted by the OIOS had been requested during the investigation to review the relevant forms and the supporting documents submitted by the Applicant, and if this expert had concluded that these documents were false and the Applicant had prepared these documents herself. This was done in a similar disciplinary case where the sanction of dismissal was applied to another staff member on 30

November 2015. The nature and purpose of a disciplinary sanction: A United Nations staff member's disciplinary liability is of a contractual nature. It consists of a sanction applied by the Organization that has both sanctioning and preventive (educational) functions. The necessary and sufficient condition for the disciplinary liability to be determined by Organization is the existence of misconduct. The individualization of a sanction is very important because only a fair correlation between the sanction and the gravity of the misconduct will achieve the educational and preventive role of disciplinary liability. Applying a disciplinary sanction cannot occur arbitrarily but must be based on the application of rigorous criteria. 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.

The gravity of the misconduct: The "gravity of misconduct" is related to the subjective element of misconduct (guilt) and to the negative result/impact of the illegal act/omission. If there is no guilt, there cannot be a misconduct and consequently no disciplinary liability. In order to appreciate the gravity of a staff member's misconduct, all of the existing circumstances that surround the contested behavior, which are of equal importance, have to be considered and analysed in conjunction with one another, namely: the exonerating, aggravating and mitigating circumstances. Some circumstances may completely exonerate a staff member from disciplinary liability such as: self-defense, state of necessity, force majeure, disability, or error of fact. The consequences of the misconduct, previous behaviour, 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.

Compensation: The compensation established in accordance with art. 10.5(a) of the Statute is mandatory and directly related to the rescission of the decision and/or to the ordered specific performance and is distinct and separate from the compensation for harm which may be ordered based on art. 10.5 (b) of the Statute. The Tribunal has the option to order one or both remedies, so the compensation mentioned in art. 10.5(b) can represent either an additional legal remedy to the rescission of the contested decision or can be an independent and singular legal remedy when the Tribunal decides not to rescind the decision. The only common element of the two compensations is that each of them separately "shall normally not exceed the equivalent of two years net base salary of the applicant", respective four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

UNDT's remedies when considering a disciplinary decision:

When the Tribunal considers an appeal against a disciplinary decision, the Tribunal can decide to: (a) confirm the decision; (b) rescind the decision if the sanction is not justified and set an amount of alternative compensation; (c) rescind the decision, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation; or (d) set an amount of compensation in accordance with art. 10.5(b). Moral damages in disciplinary cases: A severe disciplinary sanction like a separation from service or dismissal is a work-related event which generates a certain emotional distress. This legal remedy generally covers both the moral distress produced to the Applicant by the illegal decision to apply an unnecessarily harsh sanction and the material damages produced by the rescinded decision. The amount of compensation to be awarded for material damages must reflect the imposition of the new disciplinary sanction and consequently will consist of a partial compensation. Effect of rescinding a termination decision: Rescission of such decision does not automatically imply the reinstatement of the parties into the same contractual relation that existed prior to the termination. According with the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Furthermore, reinstatement cannot be ordered in all cases where it is requested by the staff member, for example, if during the proceedings in front of the Tribunal the staff member reached the retirement age, is since deceased or her/his contract expired during the judicial proceedings, or in cases where the sanction of dismissal is replaced with the lesser sanction of separation from service with or without termination indemnity.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Only spec. perform. (incl. rescission with \$ alt.)

Full judgment

[Full judgment](#)

Applicants/Appellants

Applicant

Entity

OLA

Case Number(s)

UNDT/NY/2015/34

Tribunal

UNDT

Registry

New York

Date of Judgement

31 May 2017

Duty Judge

Judge Greceanu

Language of Judgment

English

French

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Procedure (first instance and UNAT)

Confidentiality

Separation from service

Applicable Law

Administrative Instructions

- ST/A1/371/Amend.1
- ST/AI/2011/4

Information Circulars

- ST/IC/2005/25

Secretary-General's bulletins

- ST/SGB/2014/1

UNDT RoP

UNDT Statute

- Article 10.5
- Article 8

Related Judgments and Orders

UNDT/2010/169

UNDT/2011/046

2016-UNAT-700