

UNDT/2021/066, Applicant

UNAT Held or UNDT Pronouncements

A very basic tenet of due process in a disciplinary case is that each of the relevant facts and allegations of misconduct must be presented to the accused person in such manner that s/he can easily understand them and is thereby afforded a fair and just opportunity to defend herself/himself. If not, the Administration cannot subsequently sanction a staff member against the backdrop of any such fact and/or allegation (in line herewith, see ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), in particular para. 8.3). Further, this is a matter of access to justice, which not only relates to the involved staff member's right to defend herself/himself, but also to the Tribunals' ability to undertake a proper judicial review as per Sanwidi in order to assess of "whether relevant matters have been ignored and irrelevant matters considered". When describing the facts on which the allegations of misconduct are grounded, the Administration must therefore do so in writing and in a structured, concise and precise manner. Normally, at minimum, this would require the Administration to make clear and specific references to dates and events and list these in an appropriate order (chronological, prioritized or otherwise) to describe what was relevant and, if necessary, what was irrelevant. In line herewith, see Sanwidi, and para. 4 of ST/AI/371 and ST/AI/371/Amend 1 (Revised disciplinary measures and procedures). Similar minimum standards would also apply to the subsequent disciplinary decision as per para. 9.3 of ST/AI/2017/1. Pursuant to para. 13.2 of ST/AI/2017/1, this is the applicable Administrative Instruction in the present case, contrary to what the Respondent submits. The disciplinary process was initiated after the entry into force ST/AI/2017/1 and para. 13.2 only states that "investigations and disciplinary processes initiated prior to the entry into force of the present instruction shall continue to be handled in accordance with the provisions of ST/AI/371 and ST/AI/371/Amend.1" (*italics added*). ST/AI/371 and ST/AI/371/Amend.1 therefore only applies when both the investigation and the disciplinary process are both initiated before the entry into force of the ST/AI/2017/1. Otherwise, para. 13.2 should have stipulated "or" instead of "and". If a United Nations staff member assists a non-

United Nations entity, such as an NGO, with preparing substantive input to a communication document to or about the United Nations, then, even if not remunerated, this would typically constitute an outside activity that would require the Secretary-General's prior approval in accordance with staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and 1.2(q) and staff rule 1.2(s). The reason is essentially that the Organization would have a direct, or at least a perceived, interest in the relevant communication document. Even if the document, as such, bears no significance to the Organization, other non-United Nations actors could be led to believe that the relevant non-United Nations person/entity has either been unduly favored or that a precedent has been created for the United Nations to provide such assistance to non-United Nations actors in the future. If the assistance provided by the staff member to a non-United Nations entity, such as the NGO, is not related to or concerns the United Nations, it would instead depend on the circumstances whether this would constitute an outside activity that would require the Secretary-General's prior approval. The key question would be if the Organization could have, or even be perceived to have, an interest therein with reference to staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o) and 1.2(q) and staff rule 1.2(s). In the hierarchy of disciplinary measures stated in staff rule 10.2, written censure is the lowest ranking sanction and loss of one or more steps in grade is ranked as the second lowest sanction out of an exhaustive list of nine measures. The actual impact of losing two steps might, nevertheless, be financially very burdensome if a staff member is on one of the lower steps within the relevant grade as it may take many years for the person to reach the upper ceiling of steps. Any "[c]ompensation for harm" must be "supported by evidence" under art. 10.5(b) of the Dispute Tribunal's Statute. Also, the Appeals Tribunal held in *Kebede 2018-UNAT-874*, para 20, that "compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both". It is therefore "not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien". If "one of these three elements is not established, compensation cannot be awarded", and the harm must "be shown to be directly caused by the administrative decision in question".

Decision Contested or Judgment/Order Appealed

The decision to impose on the Applicant the disciplinary sanction of loss of two steps in grade, plus a written censure.

Legal Principle(s)

The judicial 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. 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. In this regard, the Dispute Tribunal is not conducting a merit-based review, but a judicial review, which is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. There 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. Specifically regarding disciplinary matters, the Administration enjoys a broad discretion with which the Appeals Tribunal will not lightly interfere. This discretion, however, is not unfettered. 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. 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. The proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result, and 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.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Applicant

Entity

DGACM

Case Number(s)

UNDT/NY/2019/077

Tribunal

UNDT

Registry

New York

Date of Judgement

8 Jun 2021

Duty Judge

Judge Adda

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Compensation

Non-pecuniary (moral) damages

Disciplinary matters / misconduct

Misuse of information and communication technology resources

Remedies

Rescission

Applicable Law

Administrative Instructions

- ST/AI/2017/1
- ST/AI/371
- ST/AI/371/Amend.1

Staff Regulations

- Regulation 1.2(b)
- Regulation 1.2(e)
- Regulation 1.2(f)
- Regulation 1.2(g)
- Regulation 1.2(o)
- Regulation 1.2(q)
- Regulation 10.2

UNDT Statute

- Article 10.5

Related Judgments and Orders

2019-UNAT-955

2015-UNAT-550

2013-UNAT-302
2011-UNAT-164
2019-UNAT-956
2020-UNAT-1024
2010-UNAT-084
2018-UNAT-859
2018-UNAT-874