

UNDT/2021/164, Applicant

UNAT Held or UNDT Pronouncements

Public interest, transparency, scrutiny and accountability are not impaired by the removal of the Applicant's name from the public domain. Consequently, and taking into consideration the sensitive nature of the facts, which involve alleged "sexual exploitation of a vulnerable person", the Tribunal grants the Applicant's request for anonymity. The decision not to renew the Applicant's fixed-term appointment, communicated to him on 23 September 2019, is not grounded on disciplinary considerations, which were the subject of the instant case, and constitutes an autonomous administrative decision that the Applicant could have contested before the Tribunal if he had requested management evaluation. In the absence of a request for management evaluation of this decision, the application is, in this respect, irreceivable "*ratione materiae*". Documentary evidence in the joint bundle of documents and challenged by the Respondent, is admissible but with dubious probative value about the issues to examine. Additional documentary evidence filed by the Applicant and equally challenged by the Respondent, particularly those related to the closure of criminal procedures in a national jurisdiction, is also admissible but not determinant for a fair disposal of the case. The fact that national jurisdictions did not pursue a case against the Applicant has no impact on the disciplinary proceedings instituted against him under the Organization's internal law, as his behaviour can still be considered misconduct under the applicable internal legal framework. It follows, that the outcome of the internal disciplinary procedure does not depend on the outcome of national criminal procedures, nor is it impacted by the closure of such criminal procedures. There is no internal provision precluding the recording of a conversation or requiring that the parties to it be aware/made aware that it is being recorded. The breach of a privacy right is justified by the prevailing interest of the Organization to investigate and ultimately to sanction staff members who breach its internal rules. The Tribunal also underlines that legal principles applicable in the context of a criminal procedure cannot be directly and automatically transposed into administrative disciplinary procedures. As liberty is not at stake in the instant proceedings, procedural guarantees do not have to meet the highest threshold. Upon review of the recording, the Tribunal finds that the evidence it contains, and its transcript are *prima facie* admissible as there is no indication that they are not authentic or have been tampered with. The Tribunal found the audio-recording of a conversation between the complainant and the Applicant admissible, relevant and probative of the issues of the case. Based on the evidence on file, the Tribunal found that a) the facts on which the disciplinary measure was based were established according to the applicable standard; b) the established facts legally amounted to misconduct under the Staff Regulations and Rules; c) the disciplinary measure applied was proportionate to the offence; and d) the Applicant's due process rights were respected during the investigation and the disciplinary process. Consequently, the Tribunal rejected the application in its entirety.

Decision Contested or Judgment/Order Appealed

Separation from service from UNIOGBIS with compensation in lieu of notice and without termination indemnity as well as the imposition of a fine equivalent to one month of net salary.

Legal Principle(s)

It is well-settled case law that it is incumbent on the Tribunal to properly interpret the Application as well as its legal and factual arguments. There is a difference between admissibility and relevance of evidence and the Tribunal "has broad discretion to determine the admissibility of evidence and the weight to accord [to it]". Judicial review in disciplinary matters is focused on how the decision-maker reached the impugned decision and not on the merits of the decision. The role of the Tribunal when reviewing disciplinary cases is to examine the following issues: a) Whether the facts on which the disciplinary measure was based have been established

according to the applicable standard; b) Whether the established facts legally amount to misconduct under the Staff Regulations and Rules; c) Whether the disciplinary measure applied is proportionate to the offence; and d) Whether the Applicant's due process rights were respected during the investigation and the disciplinary process. When the disciplinary sanction results in separation from service, the alleged misconduct must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable. The disciplinary sanction imposed in this matter was not termination but demotion by one grade with deferment, for one year, of eligibility for consideration for promotion, the standard of proof required is preponderance of evidence.

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Applicant

Entity

Other Agency/Fund/Programme/UN Entity

Case Number(s)

UNDT/GVA/2021/29

Tribunal

UNDT

Registry

Geneva

Date of Judgement

29 Dec 2021

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Sexual exploitation and abuse

Applicable Law

Administrative Instructions

- ST/AI/2017/1

Other UN issuances (guidelines, policies etc.)

- Standard Operating Procedures Governing the Use of Vehicles

Secretary-General's bulletins

- ST/SGB/2003/13

Staff Regulations

- Regulation 1.2(a)

- Regulation 1.2(b)
- Regulation 1.2(f)
- Regulation 1.2(q)

Staff Rules

- Rule 1.2(c)
- Rule 1.2(e)

UN Charter

- Article 105

UNDT RoP

- Article 18

UNDT Statute

Related Judgments and Orders

UNDT/2011/218

UNDT/2019/118

2010-UNAT-084

2014-UNAT-415

2010-UNAT-018

2011-UNAT-164

2013-UNAT-280

2010-UNAT-040

2017-UNAT-781

2013-UNAT-336

2013-UNAT-295

2018-UNAT-829

2017-UNAT-762

2013-UNAT-366

2020-UNAT-982

2021-UNAT-1082

UNDT/2020/014 Corr.1

2010-UNAT-024