UNDT/2022/085, Mihyar

UNAT Held or UNDT Pronouncements

Whether the facts on which the disciplinary measures were based have been established There is evidence that the Applicant improperly interfered with the recruitment exercise for the position of LSA Sulaymaniyah. Also, the Applicant does not dispute the fact that he did not report potential misconduct on the part of his supervisor. Accordingly, the Administration has established to the requisite standard of proof the facts on which the disciplinary measures were based. Whether the established facts legally amount to misconduct The Administration correctly determined that:

a. By moving Mr. D. F. A. to the long list of candidates, despite UNDP HR having marked his application as “not under consideration” for lack of the requisite work experience, the Applicant did not demonstrate the highest standards of integrity, in violation of staff regulation 1.2(b), and intentionally altered and/or falsified the records entrusted to him by virtue of his functions, in violation of staff rule 1.2 (i);

b. By acting on Mr. H. K.’s instruction to include Mr. D. F. A. in the shortlist of candidates for the LSA Sulaymaniyah position even though Mr. D. F. A. did not meet the selection criterion of work experience, and by sharing the log-in details for the UNDP HR online platform with Mr. H. K. when he was not formally provided such access, the Applicant did not demonstrate the highest standard of integrity and did not utilise the assets of the Organization with the requisite care, in violation of staff regulations 1.2(b) and 1.2(q);

c. By sharing the log-in details for the UNDP HR online platform with Mr. H. K., when he had never been given such access, the Applicant also failed to exercise the utmost discretion in matters of official business and communicated information that was known only by him due to his official position to a person not authorised to receive such information, namely Mr. H. K. Thus, his actions were inconsistent with staff regulation 1.2(i); and

d. By not reporting the potential misconduct by Mr. H. K. in respect of his instructions to include Mr. D. F. A. in the short list, the Applicant did not abide by his obligations under staff rule 1.2(c). Accordingly, by his conduct, the Applicant breached staff regulations 1.2(b), 1.2(i) and 1.2(q), and staff rules 1.2(c) and 1.2(i), and the established facts amount to misconduct under Chapter X of the Staff Rules.

Whether the disciplinary measures applied were proportionate to the offence
Whether the Administration properly considered aggravating and mitigating factors: The Tribunal is concerned that the Administration failed to properly consider the following relevant factors. With respect to the Applicant's long satisfactory service, the Administration failed to consider it as a mitigating factor. Indeed, a long period of service will usually be a mitigating factor, unless acts of misconduct are of such a serious nature that no length of service can rescue an employee who is guilty of them from the harshest of disciplinary measures (see, e.g., Yisma UNDT/2011/061, para. 35; Applicant UNDT/2022/048, para. 276). In the present case, the Applicant has around 20 years of long and unblemished service with the Organization including in several hardship duty stations and war zones. The misconduct in the present case is not of such a serious nature that would allow the Administration to disregard it. Turning to the lack of financial gain, the Administration considers that the Applicant was never accused of having obtained any financial gain and is, thus, inapplicable in the instant case. In this respect, the Tribunal recalls that "the constitutive elements of an offence must be considered separately from mitigating and aggravating factors" (see Turkey 2019-UNAT-955, para. 40), and as such, the Administration conflated the constitutive elements with mitigating factors. Moreover, the investigation report shows that OAI did not find any evidence that the Applicant had any relationship or friendship with Mr. D. F. A., or that the Applicant received any favour in return for his actions with respect to the recruitment at issue. No resulting personal gain was considered as a mitigating factor in a similar case in the past. In relation to the Applicant's acting under the instructions of his supervisor, the Administration considers that "under other circumstances, [his] acting under the instructions of [his] supervisor could have been considered a mitigating factor, the fact that [he] failed to report misconduct on the part of [his] supervisor, also renders this factor inapplicable in the instant case". In doing so, the Administration again erroneously conflated the constitutive elements of an offence with mitigating factors.

The Tribunal fails to see why the Applicant's failure to report his supervisor's potential misconduct could have rendered inapplicable a mitigating factor, namely his acting under the instructions of his supervisor. Therefore, the Administration failed to properly consider the above-mentioned mitigating factors in the present case. Whether the disciplinary sanction was consistent with past practice: The sanction letter merely states that the USG/DMSPC "considered the past practice of the Organization in matters of comparable misconduct". However, it did not set out any specific "past practice of the Organization" nor did it analyse the specific nature of the actions that were considered. In his reply, the Respondent argues that the Organization takes cases involving improper processes and/or use of UN databases/platforms and failure to report misconduct seriously. The Tribunal is concerned about the Administration's inadequate and improper analysis of the nature and gravity of the conduct at issue.

Having perused the evidence on record, the Tribunal finds that, under the instruction of his supervisor, the Applicant essentially improperly interfered with the recruitment exercise for one position, and he failed to report his supervisor's potential misconduct. After a careful review of the Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2020, the Tribunal identified two cases involving improper interference with the recruitment exercise that may be comparable to the present case (see table below). In those cases, the disciplinary measures imposed were written censure and a fine of one month's net base salary, which are less severe than those imposed in the present case. Moreover, while it may be argued that in the present case, the Applicant failed to report his supervisor's potential misconduct, it is undisputed that he acted under the instruction of his supervisor after repeated recruitment exercises had failed to recruit a suitable candidate. In this respect, the Tribunal further notes that the Organization's past practice on disciplinary matters also shows that, between 1 July 2011 and 30 June 2012, two staff members were imposed a sanction of censure and requirement to attend training for having acted under the instructions of their supervisor to contact potential vendors and irregularly engaged in communications with a vendor regarding specifications required by the Organization. In determining the sanction for the procurement irregularities in that case, the Organization considered that the two staff members acted under instructions of their supervisor but did not sanction them for failure to report the potential misconduct of their supervisor. Accordingly, the imposition of two concurrent sanctions, i.e., a written censure and the loss of two steps in grade also appears excessive considering past practice. In light of the above, in determining

the sanction, the Administration failed to duly consider all relevant factors including mitigating factors and past practice and, as such, the cumulative imposition of a written censure and the loss of two steps in grade on the Applicant was excessive, unreasonable and disproportionate to the misconduct. Whether the Applicant is entitled to any remedies Having found that the disciplinary measures were excessive, unreasonable and disproportionate to the misconduct, the Tribunal considers that there has been a miscarriage of justice in the present case. As such, the contested decision must be rescinded, and the disciplinary measures must be set aside. Considering that the Administration is better placed to weigh all relevant factors in determining an appropriate sanction, the Tribunal finds it appropriate to remand the case back to the Administration so that a proportionate sanction is imposed on the Applicant. The Administration is also reminded to take into consideration the past practice of the Secretary-General, as well as all aggravating and mitigating circumstances.

Decision Contested or Judgment/Order Appealed

The Applicant contests the decision to impose on him the disciplinary measures of written censure and loss of two steps in grade.

Legal Principle(s)

The standard of proof applicable to a case where disciplinary measures do not include separation or dismissal is that of preponderance of evidence, i.e., more likely than not that the facts and circumstances underlying the misconduct exist or have occurred (see sec. 9.1(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process); see also Suleiman 2020-UNAT-1006, para. 10). In determining whether the standard of proof has been met, the Tribunal “is not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the Secretary General”. Thus, it will “only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based” (see Nadasan 2019 UNAT-918, para. 40). In assessing whether the established facts legally amount to misconduct, “due deference [should] be given to the Secretary-General to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Administration in the exercise of its rule-making discretion. The Administration is

better placed to understand the nature of the work, the circumstances of the work environment, and what rules are warranted by its operational requirements" (see Nadasan, para. 41). The matter of the degree of the sanction is usually reserved for the Administration, who has the discretion to impose the measure that it considers adequate to the circumstances of the case, and to the actions and behaviour of the staff member involved. (see Portillo Moya 2015-UNAT-523, para. 19). Due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair" (see Samandarov 2018- UNAT-859, para. 24). Staff rule 10.3(b) provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". Therefore, a sanction should not be "more excessive than is necessary for obtaining the desired result" (see Sanwidi 2010- UNAT-084, para. 39). In this respect, the Appeals Tribunal in Sanwidi further clarified that: The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. Accordingly, when choosing the appropriate sanction from a set of permissible sanctions, the decision-maker must consider the totality of the circumstances of the case, including all aggravating and mitigating circumstances (see, e.g., Applicant UNDT/2010/171, para. 27; Portillo Moya UNDT/2014/021, paras. 56, 57; Samandarov UNDT/2017/093, para. 39). In Rajan 2017-UNAT-781, para. 48, the Appeals Tribunal held that: The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency. The Secretary-General "has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose" (see, e.g., Nyawa 2020-UNAT-1024, para. 89; Ladu 2019- UNAT-956, para. 40). However, when exercising such discretion, the Secretary-General must consider all relevant factors (see Kennedy 2021-UNAT-1184, para. 63). The principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offences, the penalty, in general, should be

comparable (see, e.g., Sow UNDT/2011/086, para. 58; see also Baidya UNDT/2014/106, para. 66; Applicant UNDT/2017/039, para. 126). Indeed, “there is no gainsaying that, for the interest of justice and the principle of legal certainty, the Administration should be consistent with its own administrative practices when similar situations are at stake, follow parity principles in determining the sanction and make reference to other cases based on analogous facts and principles, if need be” (see Appellant 2022-UNAT-1216, para. 60).

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Full judgment

Full judgment

Applicants/Appellants

Mihyar

Entity

DSS

Case Number(s)

UNDT/GVA/2021/16

Tribunal

UNDT

Registry

Geneva

Date of Judgement

21 Sep 2022

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Fraud, misrepresentation and false certification
Fraud, misrepresentation and false certification
Disciplinary matters / misconduct

Applicable Law

Administrative Instructions

- ST/AI/2017/1

Staff Regulations

- Regulation 1.2(b)
- Regulation 1.2(i)
- Regulation 1.2(q)

Staff Rules

- Rule 1.2(c)
- Rule 1.2(i)
- Rule 10.1(a)
- Rule 10.3(a)

- Rule 10.3(b)

Related Judgments and Orders

2013-UNAT-302
2010-UNAT-024
2015-UNAT-537
2019-UNAT-956
2020-UNAT-1024
2020-UNAT-1006
2019-UNAT-918
2015-UNAT-523
2018-UNAT-859
2010-UNAT-084
UNDT/2010/171
UNDT/2014/021
2017-UNAT-781
2021-UNAT-1184
2016-UNAT-699
2014-UNAT-470
UNDT/2011/061
UNDT/2022/048
2019-UNAT-955
UNDT/2011/086
UNDT/2014/106
UNDT/2017/039
2022-UNAT-1216
2018-UNAT-873