

2023-UNAT-1325, Philip van de Graaf

UNAT Held or UNDT Pronouncements

With respect to the Secretary-General's appeal of the UNDT finding that misconduct under Count 2 was not established, the UNAT held that the UNDT did not err in fact, resulting in a manifestly unreasonable decision. Messages sent by the staff member to his neighbour were suggestions and statements to a person who was not a witness at the time. The staff member was not under and did not suspect he would likely be under an investigation at the time he sent the messages. The neighbour found them appropriate and did not feel “influenced” by them.

The UNAT also denied the Secretary-General's appeal of the UNDT's decision to rescind the sanction imposed by the Administration. The UNAT held that it was reasonable for the UNDT to find that the imposed sanction of separation from service was unduly harsh and grossly disproportionate to the nature and gravity of the misconduct and the circumstances. The disciplinary measure of demotion by one level in grade with two years' deferment of eligibility for consideration for promotion was within a reasonable range of penalties appropriate in the circumstances.

With respect to Mr. Van de Graaf's cross-appeal on inadequate compensation, the UNAT noted that any loss resulting from the lack of payment of the education grant has already been accounted for by the UNDT. Further, the costs of his children's attendance at a private school are not connected to the contested decision as the private school was solely his choice. Insufficient details are provided that his suffering from depression is connected to the contested decision and that the contested decision was the cause of his ailment. The damage to his reputation arising from the defamation campaign was not caused by nor could it have been prevented by the Administration.

The UNAT dismissed the appeal the cross-appeal and affirmed Judgment No. UNDT/2022/037.

Decision Contested or Judgment/Order Appealed

A former staff member at UNICEF in Nairobi, Kenya, contested the Secretary-General's finding of misconduct resulting from a videotaped altercation he had with individuals on his neighbour's property (Count 1) and from allegedly trying to influence his neighbour on the content of her report to the United Nations Department of Safety and Security (Count 2), and the imposition on him of the disciplinary measure of separation from service with compensation in lieu of notice with termination indemnity.

In Judgment No. UNDT/2022/037, the UNDT rescinded the contested decision and ordered that the staff member be reinstated with an election to the Respondent to pay financial compensation in lieu of rescission at a sum equivalent to two years' net base salary. It replaced the measure of separation by demotion of one level in grade and a two-year deferment of eligibility for consideration for promotion.

The Secretary-General appealed and the staff member cross-appealed.

Legal Principle(s)

The Secretary-General has broad discretion in determining the most appropriate disciplinary measure but that discretion, however, was not unfettered but it had to be exercised in a manner consistent with due process and proportionality. The Tribunals' intervention is only warranted where the sanction imposed was blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. Due deference to the Administration's discretion to select the adequate sanction does not entail uncritical acquiescence. While the UNDT 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. This requires the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Finally, the ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline.

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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.” This requires the Dispute Tribunal “to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality.” Finally, “[t]he ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline”.

Any decision on the appropriate sanction for misconduct involves a value-judgment and the consideration of a range of factors and the Tribunal remains vested with the authority to overturn a prescribed sanction if it is regarded as too excessive in the circumstances of the case. In assessing the proportionality of the disciplinary sanction, the most important factors to be taken into account 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.

In regards to compensation for harm, it must be supported by three elements: the harm itself; an illegality; and a nexus between both. In other words, if one of these three elements is not established, compensation cannot be awarded. Furthermore, the claimant bears the burden of proof to establish negative consequences and harm to be shown to be directly caused by the contested decision.

Outcome

Appeal dismissed on the merits; Cross-appeal dismissed on the merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Philip van de Graaf

Entity

UNICEF

Case Number(s)

2022-1703

Tribunal

UNAT

Registry

New York

Date of Judgement

17 Apr 2023

President Judge

Judge Sandhu

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Burden of proof

Evidence of harm

Non-pecuniary (moral) damages

Pecuniary (material) damages

Breach of duties of independence, neutrality, and impartiality

Dismissal/separation

Inappropriate or disruptive behaviour

Proportionality of sanction

Disciplinary cases

Discretionary authority

Compensation
Disciplinary matters / misconduct
Standard of review (judicial)

Applicable Law

Other UN issuances (guidelines, policies etc.)
Staff Regulations

- Regulation 1.2(b)
- Regulation 1.2(f)
- Regulation 1.2(g)

Staff Rules

- Rule 10.1(a)
- Rule 10.2(a)
- Rule 10.3(b)
- Rule 10.5

UNAT Statute

- Article 2.1(e)

UNDT Statute

Related Judgments and Orders

UNDT/2022/037
2022-UNAT-1259
2011-UNAT-164
2021-UNAT-1181
2020-UNAT-1033
2013-UNAT-381
2019-UNAT-976
2018-UNAT-859
2010-UNAT-084
2022-UNAT-1216
2021-UNAT-1118