

2023-UNAT-1341, Josef Reiterer

UNAT Held or UNDT Pronouncements

The UNAT dismissed the appeal. The UNAT held that the UNDT did not err in finding that Mr. Reiterer had committed the alleged misconduct. The UNAT agreed with the finding of the UNDT that the established facts amounted to misconduct on the part of Mr. Reiterer, namely that he violated ST/SGB/2008/5 concerning count one and ST/AI/2013/4 concerning count two. The UNAT further found that given the nature and the specific facts surrounding Mr. Reiterer's misconduct, the sanction of demotion by one grade with deferment, for one year, of eligibility for consideration for promotion, was not unreasonable, absurd, or disproportionate. The UNAT dismissed Mr. Reiterer's challenges to the fairness of the UNDT's general approach and management of his case, which he asserted compromised the proceedings. The UNAT was satisfied that the UNDT did not err by not holding a case management hearing before proposing a witness list for the parties to comment upon; by agreeing to hear only two of the four witnesses proposed by Mr. Reiterer; and by denying Mr. Reiterer's motion to submit additional evidence into the record. The UNAT rejected Mr. Reiterer's claim for compensation. Since no illegality was found, there was no justification for the award of any compensation.

Decision Contested or Judgment/Order Appealed

Mr. Josef Reiterer, a staff member of OCHA, contested before the UNDT the Administration's decision to impose upon him a disciplinary measure of "demotion by one grade with deferment, for one year, of eligibility for consideration for promotion and threatened reassignment". The disciplinary measure had been imposed on grounds that Mr. Reiterer created a hostile, offensive and humiliating work environment for one complainant and abused his authority by facilitating the recruitment and an extension of a daughter of a friend and/or facilitating her official travels for the purpose of helping her gain field experience. The UNDT dismissed his application and upheld the Administration's imposed disciplinary measure. Mr. Reiterer appealed.

Legal Principle(s)

In disciplinary cases, the Tribunals will examine the following: (i) whether the facts on which the disciplinary measure is based have been established; (ii) whether the established facts amount to misconduct; (iii) whether the sanction is proportionate to the offence; and (iv) whether the staff member's due process rights were respected. When termination is the sanction imposed, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable. In all other cases preponderance of the evidence is sufficient. However, the Appeals Tribunal has also held that the Administration has a broad discretion in disciplinary matters which will not be lightly interfered with on judicial review. This discretion is not unfettered and can be judicially reviewed to determine whether the exercise of the discretion is lawful, rational, procedurally correct, and proportionate. But it is not the role of the UNDT to consider the correctness of the choice made by the Administration amongst the various courses of action open to it or to substitute its own decision for that of the Administration. The UNAT's task on appeal is to determine whether the UNDT did not apply the correct tests and whether the Dispute Tribunal could reasonably have reached the decisions it did about what happened. In a system of administration of justice governed by law, the presumption of innocence has to be respected. The Dispute Tribunal has broad discretion under its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision. This Tribunal is mindful that the Judge hearing the case had an appreciation of all the issues for determination and the evidence before it. The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures such as a sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the

administrative balance. That is why the Tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed without any change in the jurisprudence of this Tribunal. The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose. Due deference [to the Administration's discretion to select the adequate sanction] 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. This obliges 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. Hence, proportionality is a jural postulate or ordering principle requiring teleological application. The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power. In the context of exercising its judicial review of proportionality of the imposed disciplinary sanction and molding its value judgment in this regard, the UNDT - and eventually the UNAT on appeal - may recur to and take stock of decisions rendered in similar cases in the past. However, in light of the unique circumstances of each case, it is well within the discretion of the Tribunals to reach different conclusions from case to case, as they should, depending on the factors considered, even though the type of harassment or abuse of authority may be the same. Again, in determining the proportionality of a sanction, the UNDT should observe a measure of deference. The UNDT has broad discretion under its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The Appeals Tribunal will not lightly interfere with the broad discretion conferred on the first instance tribunal in the management of its cases to enable cases to be judged fairly and expeditiously and for dispensation of justice. We will intervene only in clear cases of denial of due process of law affecting

a party's right to produce evidence. Under Article 2(1)(d) of its Statute, the Appeals Tribunal is competent to hear and pass judgment on an appeal filed against a judgment rendered by the Dispute Tribunal in which it is asserted that the latter has committed an error in procedure, such as to affect the decision of the case. It follows that a party, in order to be successful on appeal, not only has to assert and show that the Dispute Tribunal committed an error in procedure but also that this error affected the decision on the case. Compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair.

Outcome

Appeal dismissed on merits

Outcome Extra Text

Full judgment

[Full judgment](#)

Applicants/Appellants

Josef Reiterer

Entity

OCHA

Case Number(s)

2022-1680

Tribunal

UNAT

Registry

New York

Date of Judgement

9 May 2023

President Judge

Judge Raikos

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Abuse of authority

Breach of duties of independence, neutrality, and impartiality

Harassment (non-sexual)

Proportionality of sanction

Admissibility of evidence

Case management

Disciplinary matters / misconduct

Procedure (first instance and UNAT)

Applicable Law

Administrative Instructions

- ST/AI/2013/4

Secretary-General's bulletins

- ST/SGB/2008/5

Staff Regulations

- Regulation 1.2(g)

Former Staff Regulations

- Regulation 1.2(m)

Staff Rules

- Rule 1.2(f)

UNAT Statute

- Article 2.1(d)
- Article 2.1(e)

Related Judgments and Orders

2021-UNAT-1184

UNDT/2022/011

2021-UNAT-1136

2018-UNAT-859

2020-UNAT-1006

2019-UNAT-956

2010-UNAT-084

2020-UNAT-1033

2020-UNAT-1024

2019-UNAT-976

2022-UNAT-1216

2019-UNAT-960

2017-UNAT-762

2016-UNAT-675

2018-UNAT-879

2018-UNAT-829