

2022-UNAT-1267, AAD

UNAT Held or UNDT Pronouncements

The Appeals Tribunal rejected AAD's request for an oral hearing because she provided no persuasive reasons in support of her request.

UNAT held that the Dispute Tribunal erred in determining whether the established facts qualify as misconduct and whether the disciplinary sanctions were proportionate. In its Judgment, the Dispute Tribunal also erred by substituting its determination of the appropriate disciplinary sanction for that of the Administration and, as such, the UNAT concluded that the UNDT Judgment must be vacated. AAD said her actions did not amount to misconduct and sought a rescission of the Administration's finding on this. The UNAT disagreed and found AAD's actions amounted to misconduct that attracts discipline. Given the finding of misconduct, there could be no compensation award as requested by AAD.

UNAT noted that there was no real dispute on the underlying facts. AAD admitted to most of the Administration's findings of facts in her pleadings as well as at the Dispute Tribunal's hearing. Therefore, the primary question for the Appeals Tribunal was whether these facts constituted misconduct under the relevant regulatory framework.

UNAT held that ST/AI/2000/13 clearly provides that staff members require prior approval for certain outside activities and allows for private non-remunerated activities for social or charitable purposes without prior approval which have "no relation" to the staff member's functions or the Organization as long as that activity is "compatible" with their status of international civil servants. The activities engaged in by AAD were clearly related to the Organization's initiatives and activities, and as a result, the UNAT held that she should have sought prior approval before engaging in those outside activities. There was no supporting evidence that AAD had prior approval for any of the alleged activities. Finally, the UNAT held that the activities engaged in by the staff member must still be compatible with the standards and regulatory framework that is applicable to an international civil

servant.

The Secretary-General says the Dispute Tribunal excluded, without any explanation, two events, which were mentioned at the beginning of the Judgment when exposing the content of the allegation memorandum. The Appeals Tribunal agreed that the Dispute Tribunal erred by not determining whether these allegations were factually established and amounted to misconduct.

The UNAT held that AAD's use of her UN e-mail address to reach out to a former staff member to work for Mr. X. was contrary to ST/SGB/2004/15, and regardless of the content, it was a misuse of UN resources. If this was the only transgression, it could be considered "harmless" but nevertheless it occurred and was misconduct under the regulatory framework. However, this incident was consistent with many other uses of her UN e-mail address to provide unapproved assistance to Mr. X., and therefore, should not be considered "harmless" misconduct. The UNAT held that it was part of a pattern of misuse of the e-mail facility. As for the "various requests" for assistance from Mr. X. that AAD did not respond to, UNAT stated that this was a relevant consideration in determining misconduct and sanctions. Alone, it may not amount to misconduct, but with consideration of other incidents, it is relevant and probative. Also, the UNAT did not find significant that AAD did not "solicit" the request for assistance. A proper and compliant response by AAD would have been to ask Mr. X to cease such e-mail communications to her. The fact remains that AAD received the requests and did not discourage them, and in many instances acceded to the requests.

The UNAT determined that the Dispute Tribunal correctly held it was a very basic principle of due process in a disciplinary case that each of the relevant facts and allegations of misconduct be presented to the employee or staff member in such a manner that they can easily understand them, and they be afforded an adequate opportunity to respond to those allegations. UNAT agreed with the Dispute Tribunal that certain allegations pertaining to A/66/748 were too ambiguous and confusing, which made the staff member's response to the allegations difficult and therefore, was a significant procedural irregularity and violation of due process.

However, this irregularity did not support the rescission of the finding of misconduct or the overturning of the disciplinary sanctions. The misconduct that had been factually established was serious enough on its own to support the initial sanctions. The UNAT held that the evidence that did establish the misconduct (excluding

actions relating to A/66/748) met the high standard appropriate to the gravity of the allegations and severity of the consequences for such misconduct. Moreover, AAD had the opportunity to defend herself appropriately, having been sufficiently appraised of the allegations against her.

The UNAT found that the Dispute Tribunal inappropriately interfered in the exercise of the Secretary-General's discretion on disciplinary sanctions. The UNAT held that the Dispute Tribunal wrongfully noted it found only "5 out of the 12" impugned activities were a breach of AAD's duties and that some of AAD's input was of a "trivial nature". The Dispute Tribunal had found the sanction disproportionate because it noted the Administration failed to "convincingly" explain how the interests of the Organization or anyone were harmed by AAD's conduct and that AAD's conduct belonged to the "lightest end of the scale of disciplinary offences".

The UNAT considered that the Dispute Tribunal's reasoning was flawed as it failed to consider whether the sanction was "excessive in relation to the objective of staff discipline" and whether it was "arbitrary and irrational". The Dispute Tribunal inappropriately substituted its own opinion about the seriousness of the misconduct. In assessing the disciplinary sanctions in the present case, the Secretary-General considered past practice of the Organization in matters of comparable misconduct involving unauthorized outside activities. He considered relevant mitigating factors of the staff member, namely the long period of time to resolve the matter and the fact that AAD did not benefit financially from her misconduct, which was appropriate. The Secretary-General also considered AAD's positive performance in recent years but found this was not a sufficiently mitigating circumstance as it was in his discretion to do.

The UNAT noted that the Secretary-General could have imposed harsher sanctions, but he exercised his discretion judiciously in imposing the sanctions of loss of two steps in grade, plus a written censure. Thus, the UNAT held that it could not find that the initial disciplinary sanctions that were imposed were unlawful or "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity".

In conclusion, the UNAT held the Secretary-General's imposition of the initial disciplinary sanctions was a reasonable exercise of his discretion in imposing sanctions for misconduct, and the Dispute Tribunal erred in inappropriately interfering with this.

The UNAT also denied AAD's requests for compensation for harm and emotional distress and harm to dignitas resulting from the excessive delay in the investigative and disciplinary proceedings. The UNAT stated that a staff member cannot receive compensation for harm for their misconduct except in extenuating circumstances which were not present here.

Decision Contested or Judgment/Order Appealed

In Judgment No. UNDT/2021/2066, the Dispute Tribunal found that the Administration committed errors in the allegations memorandum and disciplinary sanction letter with respect to AAD's involvement in unauthorized outside activities. As a consequence of its findings, the Dispute Tribunal overturned the sanction of a loss of two steps in grade, but confirmed the written censure.

Legal Principle(s)

In an application concerning disciplinary cases, the Dispute Tribunal must establish: i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, and iii) whether the sanction is proportionate to the offence.

The Administration has 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. This includes considering whether relevant matters have been ignored and irrelevant matters considered, whether the decision is absurd or perverse, or affected by bias, etc. Assuming compliance with these legal standards, it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action lawfully open to it or to substitute its own decision for that of the Administration.

The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly

probable.

Judicial review of decisions of whether or not misconduct has been established dictates that due deference 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 best placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements.

With regard to due process, only substantial procedural irregularities can render a disciplinary sanction unlawful.

It is a well established principle that the Secretary-General has wide discretion in applying disciplinary sanctions for misconduct but the disciplinary measure must be proportionate to the misconduct as proven by appropriate evidentiary methods. Due deference must be shown to the Secretary-General's decision on sanctions because Article 101(3) of the United Nations Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard.

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 most important factors to be taken into account in assessing proportionality of a sanction include the seriousness of the offense, then 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 order to award compensation for harm, there must be evidence to support the existence of harm, an illegality, and a nexus between the two. For a delay to be compensated, the staff member's due process rights must have been violated by the delay and the staff member must have been harmed or prejudiced by the violation of his or her due process rights.

Outcome

Appeal granted; Cross-appeal dismissed on merits

Outcome Extra Text

The Secretary's General appeal's is granted, and the Judgment is vacated. The cross-appeal is dismissed. The contested decision is reinstated.

Full judgment

[Full judgment](#)

Applicants/Appellants

AAD

Entity

UN Secretariat

Case Number(s)

2021-1595

Tribunal

UNAT

Registry

New York

Date of Judgement

29 Aug 2022

President Judge

Judge Colgan

Judge Sandhu

Judge Halfeld

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Disciplinary measure or sanction

Unauthorised outside activities and conflict of interest

Applicable Law

Administrative Instructions

- ST/AI/2017/1

Secretary-General's bulletins

- ST/SGB/2004/15

Staff Regulations

UNAT RoP

UNAT Statute

Related Judgments and Orders

2018-UNAT-859

2019-UNAT-956

2010-UNAT-084

2015-UNAT-550

2019-UNAT-918

2020-UNAT-1033

2018-UNAT-890

2017-UNAT-781

2015-UNAT-523

2018-UNAT-874