

UNDT/2024/086, De Melo Cabral

UNAT Held or UNDT Pronouncements

The Tribunal found that the Applicant's contest to the decision of 19 July 2021 to place him on ALWP was time-barred as the Applicant did not request management evaluation of that decision within the stipulated deadline. The Tribunal found that the subsequent decisions to extend the Applicant's placement on ALWP were lawful.

The Tribunal found that Applicant's persistent refusal to complete the 2018/2019 e-PAS evaluations for staff members for whom the Applicant was the First Reporting Officer ("FRO") and engage with KJ constituted misconduct. The Tribunal further found that the Applicant did share inappropriate or confidential information with the third parties and that the Applicant's exchanges with external parties constitute misconduct.

The Tribunal found that the Applicant's engagement with other staff members of OSAA regarding their grievances with the USG/OSAA did not amount to misconduct but was appropriate communications between staff members regarding a problematic issue with a supervisor.

The Tribunal found that the sanction imposed upon the Applicant was proportionate as the Applicant engaged in a pattern of actions, as set out above, which amounted to misconduct. Therefore, his conduct not only displayed a failure to uphold the standards of conduct required of an international civil servant, but it also displayed a disregard for the rules of the Organization. The Applicant's conduct undermined the trust and confidence placed in him by the Organization. Such trust and confidence are essential for the continuation of an employment relationship. In these circumstances, the Tribunal considered that it was within the Organization's administrative discretion to decide to end its employment relationship with the Applicant.

Decision Contested or Judgment/Order Appealed

The Applicant, a former staff member of the Office of the Special Adviser on Africa (“OSAA”), contested the decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity. In his application, the Applicant also challenged the decision of 19 July 2021 to place him on administrative leave with pay, (“ALWP”), and to subsequently extend this status twice thereafter.

Legal Principle(s)

The Tribunal reviewed the correspondence exchanged between the Applicant and other staff members at OSAA and did not deem the Applicant’s actions as misconduct. First, it is not exceptional that the Applicant as a senior manager of the Organization engaged other managers and staff members to make his views of the USG/OSAA’s reforms known—especially in a situation where he suspected that a supervisor, the USG/OSAA, through illegal acts of reorganization, created confusion regarding reporting lines. Second, the Applicant, together with other managers, felt marginalized and harassed by the USG/OSAA. It is natural for staff members who all share the same misgivings to discuss such a situation and support each other until the situation is appropriately addressed. The use of private emails between the staff members does not indicate any wrongful conduct, especially in the context where they were feeling harassed by a high-level official of the United Nations and seeking to find a way to report this. It is understandable that the staff members took steps to keep their correspondence confidential and supported each other at a time they found particularly difficult in their workplace. The Tribunal takes note that the Senior Managers were vindicated by the conclusions of a fact-finding panel appointed on 14 December 2018, which found that the USG/OSAA “took a series of decisions that had the effect of marginalizing her senior managers, and that her actions exhibited poor judgment and lacked the managerial sensitivity that was required in the circumstances”. Therefore, the Tribunal finds that their exchanges to make their grievances heard and offer support to each other were appropriate. Third, the Organization actively encourages staff members, of all levels, to speak up when they consider a situation to be misaligned with the United Nations values and legal framework. The Tribunal will remind the Respondent that sec. 3.5(f) of ST/SGB/2019/8 states that it is the obligation of staff members to “[t]ake action if they witness prohibited conduct, provided they feel comfortable doing so and, where

possible, after consulting the affected individual, as well as supporting those impacted, as appropriate and to the best of their ability”. Section 3.5(g) of ST/SGB/2019/8 further states that it is the obligation of staff members to “[r]eport possible prohibited conduct and cooperate with investigations, audits and reviews”. It follows that it is entirely unreasonable for the Administration to then attempt to claim that a staff member’s engagement with other staff members on the issue of possible prohibited misconduct is unlawful. This is especially so in the case of reporting against a supervisor where there are unequal power dynamics at play, and supervisees may need to seek each other’s support to be able to address a problematic issue with a supervisor. In such a context, there is no justification for the Organization to classify as misconduct communications between staff members on a problematic issue with a supervisor.

The Administration has the discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behavior of the staff member involved, and the Tribunal should not interfere with administrative discretion unless the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity (see, for instance, Kennedy 2024-UNAT-1453; Abdrabou 2024-UNAT-1460; Portillo Moya 2015-UNAT-523; and also Sall 2018-UNAT-889, Nyawa 2020-UNAT-1024).

In Kennedy 2021-UNAT-1184, the Appeals Tribunal stated that “a decision on the appropriate sanction for misconduct involves a “value-judgment and the consideration of a range of factors. 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” (see, para. 68).

Outcome

Dismissed on merits

Outcome Extra Text

Pursuant to staff rule 11.2(c), which sets out the deadline for a staff member's request for management evaluation, this request shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

The Tribunal considered that it was reasonable for the Administration to conclude that sec. 11.3 of ST/AI/2017/1, which lists the conditions upon which a staff member can be placed on ALWP, had been met. In particular, the Tribunal noted that the Applicant was a senior staff member at the Director level with everyday functions that included the supervision of several staff members, and thus was in a position of authority over them. The Applicant had also been provided with a copy of the investigation report and was therefore aware of the identities of staff members who provided evidence against him. The Administration therefore had a legitimate concern that, under the circumstances, there was a risk that the Applicant would be unable to properly carry out his supervisory functions and maintain a harmonious work environment. It was reasonable for the Administration to assess that, until the disciplinary process was concluded, it would be appropriate to extend the Applicant's placement on ALWP.

Under the recently adopted art. 9.4 of the Dispute Tribunal's Statute and the settled jurisprudence of the Appeals Tribunal, in conducting a judicial review of a disciplinary case, the Dispute Tribunal is required to examine (a) whether the facts on which the disciplinary measure is based have been established; (b) whether the established facts amount to misconduct; (c) whether the sanction is proportionate to the offence; and (d) whether the staff member's due process rights were respected.

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 (see para. 51 of Karkara 2021-UNAT-1172, and similarly in, for instance, Modey-Ebi 2021-UNAT-1177, para. 34, Khamis 2021-UNAT-1178, para. 80, Wakid 2022-UNAT-1194, para. 58). The Appeals Tribunal has further explained that clear and convincing proof "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable" (see para. 30 of Molari 2011-UNAT-164). In this regard, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred" (see

para. 32 of Turkey 2019-UNAT-955).

The Applicant, a senior official of the Organization, was required to uphold the highest standards of conduct and adhere to the United Nations staff regulations and rules. The Tribunal finds that the Applicant failed to do so by repeatedly disobeying the USG/OSAA's directions with respect to the OSAA staff members' ePAS evaluations and professional engagement with KJ. As established above, the Applicant was aware of his duties as FRO and his disagreement with the reporting lines does not mitigate the established fact that he refused to carry out his duties as a manager. The Applicant's active insubordination violated multiple staff regulations and rules cited above. His conduct exhibited a serious lapse of integrity and competency and breached the Organization's trust in him as a senior manager.

Full judgment

[Full judgment](#)

Applicants/Appellants

De Melo Cabral

Entity

OSAA

Case Number(s)

UNDT/NY/2022/014

Tribunal

UNDT

Registry

New York

Date of Judgement

29 Oct 2024

Duty Judge

Judge Adda

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters/ misconduct

Applicable Law

Administrative Instructions

- ST/AI/2017/1

Secretary-General's bulletins

- ST/SGB/2019/8

Staff Regulations

- Regulation 1.2(b)
- Regulation 1.2(e)
- Regulation 1.2(g)

Staff Rules

- Rule 1.2(i)
- Rule 11.2 (c)

Related Judgments and Orders

2021-UNAT-1172

2021-UNAT-1177

2021-UNAT-1178
2022-UNAT-1194
2011-UNAT-164
2019-UNAT-955
2024-UNAT-1453
2015-UNAT-523
2018-UNAT-889
2020-UNAT-1024
2021-UNAT-1184