UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2023/002
Judgment No.: UNDT/2023/040
Date: 30 May 2023
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MIHYAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Ana Giulia Stella, OSLA
Mario Hainboeck, OSLA

Counsel for Respondent:
Isavella Maria Vasilogeorgi, AAS/ALD/OHR, UN Secretariat
Santiago Steta Perea, AAS/ALD/OHR, UN Secretariat

Introduction

1. By application filed on 13 January 2023, the Applicant, a staff member of the United Nations Department of Safety and Security ("UNDSS"), contests the decision to reimpose on him the disciplinary measures of written censure and loss of two steps in grade.

Facts and procedural history

2. The Applicant commenced employment with the United Nations Development Programme ("UNDP") in New York in 2005.

3. On 1 June 2018, in accordance with the Secretary-General's management reform, the Applicant's contract was transitioned to a United Nations Secretariat staff contract. At the time of the transition, the Applicant held a fixed-term appointment with UNDP as a Field Security Coordination Officer at the United Nations Assistance Mission for Iraq ("UNAMI") at the P-4, step XII level, that was due to expire on 24 February 2020.

4. On 23 September 2018, the Applicant transferred to UNDSS as a Security Adviser in Kuala Lumpur, where he is currently stationed.

5. In 2016, the Applicant was involved in a recruitment process for a Local Security Assistant ("LSA") with UNDSS in Sulaymaniyah, Iraq. At the relevant time, he reported directly to Mr. H. K., who was the most senior security officer in the Kurdistan Region of Iraq and responsible for UNDSS offices located in Erbil, Sulaymaniyah, and Duhok.

6. Following receipt of an allegation that the Applicant improperly interfered with the above-mentioned recruitment exercise, the Office of Audit and Investigations ("OAI"), UNDP, conducted an investigation between March 2018 and January 2019.

7. On 15 February 2019, the Director, OAI, UNDP referred the Applicant's case to the Office of Human Resources ("OHR") for appropriate action. The referral was based on an investigation report dated 15 February 2019, together with supporting documentation.

8. By letter dated 16 December 2020, the Applicant was informed that, based on a review of his entire dossier, including his comments, the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/DMSPC") had concluded that it had been established by clear and convincing evidence and, in any case, by a preponderance of the evidence, that the Applicant had engaged in misconduct. The Applicant was also informed that the USG/DMSPC had decided to impose the disciplinary measures of written censure and loss of two steps in grade, in accordance with staff rule 10.2(a)(i) and (ii), having found no aggravating or mitigating circumstances.

9. On 12 March 2021, the Applicant filed an application contesting the disciplinary measures of written censure and loss of two steps in grade, which was registered under Case No. UNDT/GVA/2021/016.

10. By Order No. 67 (GVA/2022) of 23 June 2022, the Tribunal convoked the parties to a case management discussion ("CMD") which took place, as scheduled, on 6 July 2022. At the CMD, both parties agreed that the case could be determined on the written pleadings without holding a hearing on the merits.

11. By Judgment *Mihyar* UNDT/2022/085 of 21 September 2022, this Tribunal found, *inter alia*, that in determining the sanction, the Administration failed to duly consider all relevant factors. As such, it rescinded the disciplinary sanction, and remanded the Applicant's case to the Administration for a proper determination of the applicable sanction.

12. By Sanction Letter dated 18 October 2022, the USG/DMSPC reimposed on the Applicant the disciplinary measures of written censure and loss of two steps in grade.

13. On 13 January 2023, the Applicant filed the present application, which was registered under Case No. UNDT/GVA/2023/002. In his application, he requested the Tribunal, *inter alia*, to:

a. Review the present case on an expedited basis; and

b. Order the disclosure of relevant facts of the referenced cases contained in the Sanction Letter of 18 October 2022.

14. On 15 February 2023, the Respondent filed his reply, in which he requested the Tribunal to:

a. Grant his request for leave to exceed the page limit; and

b. Strike from the case record Annex 14 to the application, which concerns communications between the Applicant and OAI, UNDP, regarding the outcome of the UNDP OAI Report No. 2225.

15. By Order No. 12 (GVA/2023) of 24 February 2023, the Tribunal ordered that:

a. The Applicant's request for an expedited consideration of the present matter be granted;

b. The Applicant's request for disclosure of relevant facts of the referenced cases contained in the Sanction Letter of 18 October 2022 be rejected;

c. The Respondent's request for leave to exceed the page limit be granted;

d. The Respondent's request to strike Annex 14 to the application from the case record be rejected;

e. By 3 March 2023, the Applicant file a rejoinder; and

f. By 10 March 2023, the Respondent may file his comments, if any, on the Applicant's rejoinder.

16. By email of 24 February 2023, the Respondent requested an extension of one week to file his comments and sought guidance from the Tribunal concerning the length of the rejoinder and the comments thereon.

17. By email of 27 February 2023, the Applicant informed the Tribunal that he did not object to the Respondent's request and requested it to extend his deadline to file a rejoinder until 10 March 2023.

18. By Order No. 13 (GVA/2023) of 27 February 2023, the Tribunal:

a. Ordered the Applicant to file a rejoinder by 8 March 2023,

b. Invited the Respondent to file his comments thereon, if any, by 17 March 2023, and

c. Ordered that, unless justified, both the Applicant's rejoinder and the Respondent's comments thereon not exceed 10 pages.

19. On 8 March 2023, the Applicant filed his rejoinder pursuant to the above-mentioned Order.

20. On the same day, the Applicant filed, on an *ex parte* basis, a motion for leave to submit evidence of damage with three annexes related to his "mental distress and health damages directly caused by the disciplinary process against him, and sanction imposed".

21. By Order No. 21 (GVA/2023) of 10 March 2023, the Tribunal ordered that:

a. The Applicant's motion to adduce additional evidence be granted. Accordingly, the three annexes to the motion were admitted as evidence into the case record;

b. By 10 March 2023, the Geneva Registry change the confidentiality setting of the Applicant's motion to adduce additional evidence and its annexes from "*ex parte*" to "under seal"; and

c. By 22 March 2023, the Respondent file comments, if any, on the Applicant's rejoinder and the additional evidence he adduced.

22. Due to a technical issue, the above-mentioned changes to the confidentiality setting could only be made on 13 March 2023. In view of this, the Tribunal found it appropriate to give the Respondent two extra working days to address the additional evidence in his forthcoming submission. As such, by email of 14 March 2023, the Tribunal extended the Respondent's deadline to file his comments to 24 March 2023.

23. On 22 March 2023, the Respondent filed his comments on the Applicant's rejoinder and on the Applicant's medical evidence in support of his claim for damages.

Consideration

Scope of judicial review

24. As per well-settled case law of the internal justice system, judicial review of a disciplinary case requires the Tribunal to consider the evidence adduced and the procedures utilized during the course of an investigation by the Administration (see, e.g., *Applicant* 2013-UNAT-302, para. 29). In this context, the consistent jurisprudence of the Appeals Tribunal (see, e.g., *Haniya* 2010-UNAT-024, para. 31; *Wishah* 2015-UNAT-537, para. 20; *Ladu* 2019-UNAT-956, para. 15; *Nyawa* 2020-UNAT-1024, para. 48) requires the Tribunal to ascertain in this case:

a. Whether the facts on which the disciplinary measure was based have been established according to the applicable standard;

b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules;

c. Whether the disciplinary measure applied is proportionate to the offence, and

d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

25. The Tribunal recalls that by Judgment *Mihyar* UNDT/2022/085, it concluded that:

a. The Administration established to the requisite standard of proof the facts on which the disciplinary measures were based;

b. The established facts amounted to misconduct under Chapter X of the Staff Rules; and

c. The Applicant's due process rights were respected during the investigation and the disciplinary process.

26. However, the Tribunal also found that in determining the sanction, the Administration failed to duly consider all relevant factors. As such, it rescinded the disciplinary sanction, and remanded the Applicant's case to the Administration for a proper determination of the applicable sanction.

27. The Tribunal further notes that the parties did not contest its findings in Judgment *Mihyar* UNDT/2022/085 before the Appeals Tribunal and, thus, such findings may not be relitigated before it.

28. Nevertheless, the Applicant submits that the Administration erroneously made new submissions or arguments on the facts that were not previously raised. Specifically, he argues that the Administration relied upon the Applicant's statements during the CMD in establishing that the Applicant was untruthful when interviewed under oath by OAI.

29. The Tribunal notes that the 2022 Sanction Letter relied upon the Applicant's statements during the CMD as evidence of dishonesty in conducting its proportionality analysis. This is fundamentally different from a *de novo* investigation into certain facts underlying the disciplinary measure at issue. As such, the Tribunal rejects the Applicant's submissions in this respect.

30. Accordingly, the Tribunal finds it appropriate to limit its scope of judicial review in the present case to examining the following issues:

a. Whether the sanction imposed by the 2022 Sanction Letter was proportionate to the offence; and

b. Whether the Applicant is entitled to any remedies.

31. The Tribunal will address below these two issues in turn.

Whether the sanction imposed by the 2022 Sanction Letter is proportionate to the offence

32. The Tribunal notes that "the Administration has a broad discretion when it comes to the choice of a disciplinary sanction" (see *Iram* 2023-UNAT-1340, para. 86). In this respect, the Appeals Tribunal has consistently held that:

> 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; to wit: a sanction within the limits stated by the respective norms, which is 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 (see, e.g., *Appellant* 2022-UNAT-1216, para. 45; *Iram*, para. 86).

33. Moreover, "due deference must be shown to the Secretary-General's decision on sanction 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" (see, e.g., *Beda* 2022-UNAT-1260, para. 57).

34. In the present case, the Applicant submits that:

a. The sanction imposed was inconsistent with past practice; and

b. The Administration failed to properly consider aggravating and mitigating factors.

35. The Respondent contends that the 2022 Sanction Letter provides detailed explanations relating to all issues affecting the proportionality of the sanction, including past practice, aggravating and mitigating factors, and thus the contested decision is fair and reasonable.

36. The Tribunal will address these issues in turn.

Whether the sanction imposed was consistent with past practice

37. The Applicant submits that the sanction imposed was inconsistent with past practice. Specifically, he argues that the Administration relied upon previous cases involving misconduct that were not comparable with his; that the Administration failed to properly consider past practice that the Tribunal had identified in Judgment *Mihyar* UNDT/2022/085; and that the Administration failed to explain why staff members who had committed similar offences to that of the Applicant, as outlined in UNDP OAI Report No. 2225, were not treated in the same way as the Applicant.

38. The Tribunal finds no merit in the Applicant's submissions for the following reasons.

39. First, it is well-settled case law that "the Administration has a broad discretion in determining the disciplinary measure imposed on staff members because of wrongdoing. It is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing" (see, e.g.,

Iram, para. 87; *Conteh* 2021-UNAT-1171, para. 50). Therefore, it is within the Administration's discretion to identify comparable previous cases. Indeed, it is neither for the Tribunal nor for the Applicant to "pick and choose" what precedents the Administration should take into consideration in determining the appropriate sanction.

40. Accordingly, while the Tribunal took issue with the Administration's failure to provide an adequate and reasoned explanation in the Sanction Letter of 16 December 2020, which merely stated that the USG/DMSPC "considered the past practice of the Organization in matters of comparable misconduct" without any elaboration, it did not intend to replace the Administration in identifying what cases constitute comparable past practices in determining the appropriate sanction in the Applicant's case (see *Mihyar* UNDT/2022/085, paras. 63, 64 and 75).

41. Second, after a careful analysis of the 2022 Sanction Letter, the Tribunal is satisfied that the Administration has properly considered previous cases involving misconduct that were comparable with that of the Applicant. Indeed, para. 24 of the Annex to the 2022 Sanction Letter shows that the Administration identified numerous cases involving "tampering with established processes of the Organization, particularly competitive selection processes either for recruitment or for procurement", "the purposeful manipulation/altering of, breach of confidentiality of, or the unauthorised use/access of, official UN documents/databases", and "failure to report potential misconduct of other staff members". It further examined how the Administration dealt with those cases and what types of disciplinary measures were applied. Ultimately, para. 25 of said Annex concluded that:

> the disciplinary measures imposed in respect of the foregoing classes of misconduct were more lenient (written censure and loss of steps in grade), if the misconduct was relatively minor or there were multiple mitigating factors, such as the staff member's remorse and early admission of the misconduct. However, […] stricter measures, such as deferment for consideration for promotion, demotion, separation from service, or even dismissal, were imposed in cases where the integrity of the process/operation was compromised, confidentiality breached, and the staff member showed no remorse or was untruthful during the investigation.

42. Third, the Tribunal is not convinced by the Applicant's submission in relation to the relevance to the present case of Annex 14 to the application regarding UNDP OAI Report No. 2225. In support of his submission, the Applicant argues that the report is related to UNDP recruitment processes in Malaysia, which were closed without issuing charges or imposing sanctions, although they resulted in the hiring of four staff who did not meet the required qualifications.

43. The Tribunal fails to see how alleged recruitment irregularities that might have occurred in another duty station are comparable to the Applicant's conduct or could have had any bearing on the determination of the sanction in his case. The Tribunal also recalls its findings in *Mihyar* UNDT/2022/085, at para. 54, that it "does not have any other source of information, nor any further details about the reason why an investigation did not take place". Moreover, "[a]s a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action against another part" (see e.g., *Abboud* 2010-UNAT-100, para. 34; *Benfield-Laporte* 2015-UNAT-505, para. 37). Therefore, unless the judicial organ is seized of the case, it shall not interfere with the Administration's decision in that regard.

44. Finally, while "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), the Tribunal recognizes that disciplinary action is a dynamic tool that may develop over time according to policy changes, evolving jurisprudence (see, e.g., *Appellant* 2022-UNAT-1216, para. 59), and deterrence needs.

45. Therefore, in view of the unique circumstances of each case, it is well within the Administration's discretion to reach different conclusions from case to case, depending on the factors considered.

46. Accordingly, the Tribunal finds that the Applicant failed to demonstrate that the sanction imposed was inconsistent with past practice.

Whether the Administration properly considered aggravating and mitigating factors

47. The Appeals Tribunal has consistently held that 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).

Mitigating factors

46. The Applicant argues that his long and unblemished service with the Organization, his lack of financial gain, and his acting under the instructions of his former supervisor should have been considered as full mitigating factors instead of partially applicable mitigating factors in the 2022 Sanction Letter. Consequently, he submits that the Respondent did not follow the Tribunal's direction in Judgment *Mihyar* UNDT/2022/085 in this regard.

47. This Tribunal recalls that in its Judgment *Mihyar* UNDT/2022/085 (paras. 56-60), it found that the Administration failed to properly take into account the above-mentioned factors as mitigating factors on the grounds that the Administration failed to consider the Applicant's long satisfactory service as a mitigating factor, and that the Administration disregarded his lack of financial gain and his acting under the instructions of his former supervisor while conflating the constitutive elements of an offence with mitigating factors.

48. However, in no way did the Tribunal attempt to constrain the Administration's discretion in weighing mitigating factors when determining the appropriate sanction to impose. Indeed, the Tribunal explicitly emphasised that "the Administration is better placed to weigh all relevant factors in determining an appropriate sanction" (see *Mihyar* UNDT/2022/085, para. 75). It is mindful that it is not the role of the Tribunal to "select what it believes to be the most appropriate sanction for the Administration to impose" (see *Thiare* 2021-UNAT-1167, para. 40).

49. Moreover, the Tribunal is of the view that by arguing that the Administration should have given full effect to the above-mentioned mitigating factors, the Applicant conflated the act of considering the factors with attributing weight to them. In this respect, the Tribunal wishes to highlight that the Administration's consideration of certain factors as mitigating factors does not automatically result in a less severe sanction because the decision-maker must weigh and balance all the circumstances of the case and all the relevant factors when choosing the appropriate sanction.

50. Accordingly, the Tribunal finds no merit in the Applicant's submissions concerning mitigating factors.

Aggravating factors

51. The Annex to the 2022 Sanction Letter states in its relevant part that:

> 30. […] The USG/DMSPC has considered that the following aggravating factors apply in [the Applicant]'s case:
>
> > (a) [The Applicant] exhibited lack of integrity throughout the recruitment process, by deliberately altering the pool of suitable candidates and by advancing two unsuitable candidates to the written exam stage of the recruitment exercise, as well as throughout the investigation and disciplinary process, by providing untruthful responses.
> >
> > …
>
> 31. Regarding mitigating factors … [t]he USG/DMSPC has reached the following conclusions with respect to each of these factors:
>
> > …
> >
> > (c) No personal financial gain to [the Applicant] and no financial damage to the Organization: partially applicable… [The Applicant] did not derive a personal gain from his misconduct. However, [the Applicant] was never to obtain any financial gain for his involvement in any recruitment exercise, as the contrary would have in and of itself constituted misconduct. Further, loss to the Organization is not limited to financial loss. A loss of integrity and trust in the Organization's processes can be equally harmful. The

> Organization suffered loss of integrity and trust in its processes, due to [the Applicant]'s conduct.

52. Referring to the Administration's above-mentioned findings, the Applicant submits that the Administration co-mingled the mitigating and aggravating factors, and double counted the aggravating factors, i.e., lack/loss of integrity, thereby causing unfairness to him.

53. The Tribunal finds that the Applicant essentially misread the Administration's findings in this respect. While it is true that the Administration explicitly considered the Applicant's lack of integrity throughout the recruitment process as an aggravating factor, nowhere in the 2022 Sanction Letter did it suggest that lack or loss of integrity could have constituted a mitigating factor in the Applicant's case.

54. In this respect, the Tribunal notes that in considering "no personal financial gain to [the Applicant] and no financial damage to the Organization" as a mitigating factor, the Administration stated that "[a] loss of integrity and trust in the Organization's processes can be equally harmful". In doing so, instead of identifying loss of integrity as a mitigating factor, the Administration merely provided its reasoning in accordance with the Appeals Tribunal's guidance in *Kennedy* 2021-UNAT-1184 in relation to relevant factors to be considered in the proportionality analysis. Specifically, the Appeals Tribunal in *Kennedy* 2021-UNAT-1184, at para. 69, upheld that:

> What factors are relevant considerations will necessarily depend on the circumstances and nature of the misconduct. Some considerations can include:
>
> …
>
> c) the harm or damage to the Organization, employer, colleagues and other staff members, and clients and the public, which can range from none to significant. Factors relevant to this are whether there was actual harm that can be tangible or intangible, the number of persons harmed, whether the harm affected the Organization's operations and productivity, whether the harm includes loss of finances, loss of trust or integrity in the Organization[.]

55. Therefore, one should not conflate the reasoning in relation to a mitigating/aggravating factor with the factor itself. Accordingly, the Applicant's arguments in this respect must fail.

56. Having reviewed the 2022 Sanction Letter, the Tribunal is satisfied that the Administration duly considered the nature and gravity of the Applicant's misconduct, as well as all aggravating and mitigating factors. It has provided an adequate and reasoned explanation in accordance with the Appeals Tribunal's guidance in *Kennedy*.

57. The Tribunal further recalls that "the matter of the degree of the sanction is usually reserved for the Administration, who has 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). As such, it 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" (see *Fararjeh,* 2021-UNAT-1136, para. 33), which is not the case here.

58. Considering the above, the Tribunal concludes that the Applicant failed to demonstrate that the disciplinary measure imposed in the 2022 Sanction Letter was disproportionate to the offence. Accordingly, the Tribunal upholds the disciplinary measure.

Whether the Applicant is entitled to any remedies

59. In his application, the Applicant seeks recission of the imposed sanction and requests its substitution with a written censure without loss of steps. He further claims compensation for moral damages in the amount of six months net base salary, as well as compensation for pecuniary damages.

60. Having found that the Applicant failed to establish that the Respondent acted in any manner contrary to law, the Tribunal finds no basis for the remedies pleaded for in the application. Therefore, the Tribunal rejects the Applicant's request for remedies.

Conclusion

61. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

Judge Teresa Bravo
Dated this 30th day of May 2023

Entered in the Register on this 30th day of May 2023

René M. Vargas M., Registrar, Geneva