



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/025

Order No.: 048 (NY/2023)

Date: 29 June 2023

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Alister Cumming, UNICEF

Note: This order has been corrected in accordance with Order No. 077 (NY/2023).

Introduction

1. By Order No. 018 (NY/2023) dated 24 February 2023, the Duty Judge instructed the parties to jointly produce and file a consolidated statement of facts setting out the agreed facts and the disputed facts in this case by 31 March 2023 and rejected the Applicant's request for anonymity. The parties were further instructed that all other matters in the present case would be decided by the assigned Judge.

2. On 31 March 2023, the parties filed the joint submission as per Order No. 018 (NY/2023).

3. On 26 June 2023, the case was assigned to the undersigned Judge.

Consideration

The issues of the present case

4. The Appeals Tribunal has consistently held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

5. Accordingly, the basic issues of the present case can be defined as follows:

a. Was it a lawful exercise of discretion to impose the disciplinary measures of dismissal and a fine equivalent to EUR5,300 against the Applicant?

b. If not, to what remedies, if any, is the Applicant entitled?

The Tribunal's limited scope of review of disciplinary cases

6. Under "the settled case law" of the Appeals Tribunal, "judicial review of a disciplinary case requires [the Dispute Tribunal] to examine 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 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, *Nsabimana* 2022-UNAT-1254, para. 62, and *Bamba* 2022-UNAT-1259, para. 37). 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).

7. The Appeals Tribunal, however, underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40). In this regard, "the Dispute Tribunal is not conducting a 'merit-based review, but a judicial review'" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

8. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

Case management

9. Whereas neither party has explicitly requested the production of any additional written evidence, the Tribunal notes that in the application, the Applicant requests that a hearing be held, although he does not indicate what the objective of such hearing would be, such as presenting oral evidence through witnesses.

10. Articles 16.1 and 2 of the Rules of Procedure provide that “[t]he judge hearing a case may hold oral hearings” and that “[a] hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure”. It therefore follows that it is for the Tribunal to determine whether a hearing is necessary and that in a disciplinary case like the present one, this shall normally be done.

11. If neither party requests any oral evidence to be presented, the Tribunal will request each of the parties to indicate the purported objective of a hearing (see, also *Nadasan* 2019-UNAT-918, para. 39, as affirmed in *Ganbold* 2019-UNAT-976, para. 28). This could, for instance, be for the parties to present their legal contentions directly to the assigned Judge, although it is noted that the parties would, in any case, also need to file written closing statements summarizing all their submissions.

12. If any of the parties, however, wishes to request the production of further evidence, written or oral, they are to specifically refer to the relevant documentation/witness and clearly indicate what disputed fact the relevant evidence is intended to corroborate. In this regard, the Tribunal notes that the Appeals Tribunal has prohibited a so-called “fishing expedition”, whereby one party requests the other party to produce evidence in “the most general terms” (see, for instance, *Rangel* Order No. 256 (2016)). A party requesting evidence to be produced must therefore be able to provide a certain degree of specificity to her/his request.

13. The Tribunal further notes that evidence is only relevant in the judicial review of the Applicant's claim regarding whether the facts have lawfully been established—the disciplinary findings on misconduct and proportionality are legal rather than factual determinations. As the very purpose of producing evidence—written or oral—is to corroborate specific facts on which the parties disagree, there is, in essence, only a need for evidence if a fact is relevant and disputed (in line herewith, see *Abdellaoui* 2019-UNAT-929, para. 29, and *El-Awar* 2019-UNAT-931, para. 27).

IT IS ORDERED THAT:

14. By **4:00 p.m. on Friday, 14 July 2023**, each party is to submit whether they request to adduce any additional evidence and indicate:

- a. What additional documentation, if any, they request to be disclosed, also indicating what fact(s) this is intended to substantiate; and/or
- b. The identity of the witness(es), who the party wishes to call, if any, and what disputed fact(s) each of these witnesses are to give testimony about, also setting out the proposed witness's testimony in writing. This written witness statement may also be adopted as the examination-in-chief at a potential hearing if the party leading the witness should wish to do so.
- c. If the party does not wish to hear any witnesses but wishes a hearing to be held, he is to indicate what the purported purpose would be of this possible hearing;

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d. Dates of availability for a hearing during the period of 11 to 22 September 2023.

(Signed)

Judge Joelle Adda

Dated this 29th day of June 2023

Entered in the Register on this 29th day of June 2023

(Signed)

Isaac Endeley, Registrar, New York