



**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Isaac Endeley

AGUILAR VALLE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER  
ON CASE MANAGEMENT**

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**Counsel for Applicant:**

George G. Irving

**Counsel for Respondent:**

Isavella Maria Vasilogeorgi, DAS/ALD/OHR, UN Secretariat

Miryoungh An, DAS/ALD/OHR, UN Secretariat

## **Introduction**

1. By Order No. 021 (NY/2023) dated 17 March 2023, the Duty Judge instructed the Applicant to file a rejoinder to the Respondent's reply and state whether he wishes to adduce any further evidence by 13 April 2023.

2. On 6 April 2023, the Applicant filed the rejoinder as per Order No. 021 (NY/2023).

## **Consideration**

### *Receivability*

3. In the Respondent's reply dated 20 July 2022, it is indicated that he contends that the application, in part, is not receivable. He explains that the Applicant "was informed of the decision of the UNDP Office of Audit and Investigations (OAI) not to initiate a formal investigation into his complaint on 12 January 2021", but has not requested management evaluation of this decision in accordance with staff rule 11.2(a).

4. In the Applicant's 6 April 2023 rejoinder, he submits that "the decision being contested is the Applicant's separation from service". This also follows from the application in which it is indicated that the contested decision is the Applicant's "separation from service".

5. Accordingly, the Tribunal rejects the Respondent's claim on non-receivability as the decision to which he refers in the reply, namely "the decision of the UNDP Office of Audit and Investigations (OAI) not to initiate a formal investigation into his complaint on 12 January 2021" is not under judicial review in the present case.

### *The issues of the present case*

6. 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.

7. 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 measure of separation from service, with compensation in lieu of notice and without termination indemnity, in accordance with Staff Rule 10.2(a)(viii), 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*

8. 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).

9. 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* 2010-UNAT-084, 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).

10. 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*

#### Agreed and disputed facts

11. When studying the parties’ submissions on facts, it is not clear to the Tribunal on what facts they actually agree and disagree. In this regard, the Appeals Tribunal has held that the Dispute Tribunal is not to make its own factual findings if the parties have agreed on certain facts (see *Ogorodnikov* 2015-UNAT-549, para. 28). The Tribunal also notes that the very purpose of producing evidence—written or oral—is to substantiate the specific relevant facts on which the parties disagree. Accordingly, there is, in essence, only a need for evidence if a fact is disputed and relevant (in line herewith, see *Abdellaoui* 2019-UNAT-929, para. 29, and *El-Awar* 2019-UNAT-931, para. 27).

12. The Tribunal will therefore order the parties to produce a consolidated list of agreed and disagreed facts to be able to understand the factual issues at stake.

## Evidence

13. To start with, the Tribunal notes that neither party has requested production of any additional evidence, either written or oral. If either of the parties wishes to do so, 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 certain evidence must therefore be able to provide a certain degree of specificity to her/his request.

14. As the present case is a disciplinary case, the Tribunal notes that evidence is only relevant in the judicial review of the Applicant’s claim regarding whether the facts of the contested decision have lawfully been established—the disciplinary findings on misconduct and proportionality are legal rather than factual determinations.

15. The relevant facts of the contested decision are set out in the sanction letter dated 1 April 2022 as follows:

... Between August and October 2016, [the Applicant] created a hostile work environment for [AA], which resulted in her resignation from [Department of Safety and Security] Bolivia by commenting on her choice of underwear and physical appearance, suggesting that she close her eyes so that [the Applicant] could teach her how to properly kiss/greet, suggesting that [the Applicant] lift her from her waist to reach high shelves, commenting on the prospect of her undertaking training with [the Applicant] alone, and hinting at eating her leg for lunch; and/or;

... [the Applicant] created a hostile work environment for staff members during [his] tenure in Bolivia, including by making denigrating, humiliating and offensive remarks and comments with regards to [BB], [CC] and [DD], showing favouritism to certain staff members and by greeting female staff members with unwelcomed physical contact and salutations, such as “my love”, “my life”, “my princess”, etc.

16. Regarding written documentation, when perusing the case file, the Tribunal finds that it needs to understand the case better before deciding whether all relevant

materials have been submitted. The parties are also instructed to indicate what, if any, further documentation they wish to produce and, if possible, submit the relevant material(s).

17. As for oral evidence, the Tribunal notes that arts. 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 assigned judge to a case to determine whether a hearing is necessary and that in a disciplinary case like the present one, this shall normally be done.

18. If no oral evidence needs to be produced, the Tribunal will accordingly request each of the parties to indicate whether they find that an oral hearing is necessary and indicate the purported objective thereof (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.

19. In light of the above,

**IT IS ORDERED THAT:**

20. By **4:00 p.m. on Friday, 11 August 2023**, the parties are to file a jointly-signed statement providing, under separate headings, the following information:

- a. A consolidated list of the agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning;
- b. A consolidated list of the disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex in the application or reply, as

applicable. At the end of the disputed paragraph in square brackets, the party contesting the disputed fact shall set out the reason(s);

21. By **4:00 p.m. on Friday, 11 August 2023**, each party is to submit whether it requests to adduce any additional evidence, and if so, state:

a. What additional documentation it requests to be disclosed, also indicating what fact(s) this is intended to substantiate; and/or

b. The identity of the witness(es) the party wishes to call, and what disputed fact(s) each of these witnesses is 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.

22. Upon receipt of the above-referred submissions, the Tribunal will issue the relevant instructions for further case management.

*(Signed)*

Judge Joelle Adda

Dated this 13<sup>th</sup> day of July 2023

Entered in the Register on this 13<sup>th</sup> day of July 2023

*(Signed)*

Isaac Endeley, Registrar, New York