



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2023/045

Judgment No.: UNDT/2023/125

Date: 15 November 2023

Original: English

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**Before:** Judge Solomon Areda Waktolla

**Registry:** Nairobi

**Registrar:** Rene Vargas, Officer-in-Charge

SHABAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Brandon Gardner, Office of Staff Legal Assistance

**Counsel for the Respondent:**

Elizabeth Brown, UNHCR

Anna Mildemberger, UNHCR

## **Introduction**

1. At the time of the impugned decision, the Applicant served as an Associate Private Sector Partnership Officer at the Office of the United Nations High Commissioner for Refugees (“UNHCR”) in Jordan. He held a temporary appointment as a national officer and was based in Amman.

## **Procedural History**

2. On 16 May 2023, the Applicant filed an application with the United Nations Dispute Tribunal sitting in Nairobi to challenge the Respondent’s decision to separate him from service of the Organization with compensation *in lieu* of notice and the payment of half his termination indemnity pursuant to staff rule 10.2(a)(viii). This disciplinary measure was imposed on him following a finding of misconduct for having cheated in a written test that was administered as part of a selection exercise. It is the Applicant’s case that the finding of misconduct was unlawful and the sanction wholly disproportionate in that it was excessive, discriminatory and arbitrary.

3. On 15 June 2023, the Respondent replied to the application.

4. On 7 August 2023, pending assignment of this case to a presiding judge, the Tribunal issued Order No. 128 (NBI/2023) for case management. Parties were *inter alia* directed to file a joint statement of agreed and disputed facts and indicate their preference for the method of adjudication of this matter.

5. The parties filed their joint statement of facts on 21 August 2023. The parties also agreed that this matter be adjudicated on the papers.

6. Following assignment of this matter to the undersigned Judge, the Applicant was invited to submit his response to the Respondent’s reply.

7. The Applicant filed said response on 20 September 2023.

### **Facts and Submissions**

8. The Applicant formally began serving UNHCR as a staff member on 1 August 2013.

9. On 8 June 2021, a written test related to the recruitment of a Senior Cash-Based Interventions Assistant at the G-5 level, based in Amman, was administered by UNHCR in Jordan. The Applicant was not a candidate for this post.

10. When reviewing the candidates' answer sheets, UNHCR staff administering the test discovered that the response of one candidate was authored by the Applicant. This was deduced from the information visible in the Microsoft Excel and Word files submitted by that external candidate as his test responses.

11. This finding was reported to UNHCR Jordan on 10 June 2021.

12. On 27 June 2021, the Representative and Deputy Representative of UNHCR Jordan met with the Applicant.

13. On 28 June 2021, on the advice of the Mission's leadership, the Applicant wrote to the Inspector-General's Office ("IGO") to report the incident. He called his report a "Voluntary Statement". The Applicant told the Inspector General's Office that the candidate in question had asked to borrow a laptop to sit the exam; the Applicant's mother accidentally gave the candidate his UNHCR-issued laptop instead of his personal one. The Applicant told IGO that he "felt obliged" to share his UNHCR login credentials to enable the candidate to sit the test.

14. On 6 January 2022, the Applicant was formally issued a letter of caution. This caution was issued by the UNHCR Representative in Jordan on the recommendation of the Inspector General's Office.

15. On 28 February 2022, the Applicant was invited to sit a test for a National Officer position in the Private Sector Partnerships ("PSP") Unit in the UNHCR Regional Bureau for the Middle East and North Africa.

16. On 1 March 2022, a day before the scheduled test, the Applicant informed PSP that he had sustained a fracture to his right hand.

17. The PSP Unit responded on the same day and informed the Applicant that while the scheduled test could not be postponed, he would be given an extra hour to complete the test. The Applicant sat the test as scheduled.

18. On 15 April 2022, IGO received a report of suspected misconduct by the Applicant. The Applicant was alleged to have plagiarised answers to two of the four questions that were set for the National Officer position in PSP.

19. On 28 April 2022, UNHCR wrote to the Applicant to seek his comments on the allegation that he plagiarized the answers to two of the test questions.

20. The Applicant responded on the same day as follows:

Coming to the fact that I have broken right hand with cast on during that date (as I have informed PSP MENA HR earlier as attached), I have prepared some expected information that I may need on a Word draft from my own work and templates that I have personally created just to gain some time and avoid any delay due to slow typing in left hand which I don't normally and submitting the written test on time. Knowing that the core of the answer for questions number (2) and (3) is related to the calculations and further information provided in the answers which also were conducted instantly during the exam.

21. IGO opened an investigation into the allegation of plagiarism on 4 May 2022.

22. On 23 May 2022, IGO interviewed a UNHCR External Relations Officer based in Amman as a witness. IGO also conducted a forensic analysis on the Applicant's UNHCR email account and cloud storage and obtained correspondence and documents concerning two other written tests in which the Applicant had participated.

23. On 7 June 2022, the Applicant was informed of the nature of the allegations against him.

24. On 9 June 2022, the Applicant was interviewed as subject of the investigation.

25. On 16 June 2022, the Applicant and other candidates sat another test for the same post at the UNHCR premises in Amman. A UNHCR Human Resources staff member was assigned to invigilate.

26. On 24 June 2022, IGO shared its draft investigations findings with the Applicant and invited his response.

27. The Applicant submitted his comment on the findings of IGO on 30 June 2022.

28. On 7 July 2022, IGO issued its Investigation Report. The Applicant's conduct was found to support the findings that he had: (i) plagiarised responses to a written test administered on 2 March 2022 by extensively copying content from other UNHCR documents; (ii) provided undue assistance to an external candidate during a written test administered by UNHCR on 8 June 2021; and (ii) deceived senior management regarding his actions and involvement in that incident.

29. On 3 October 2022, the Applicant received a charge letter alleging that he cheated on the written test when he pasted his pre-written material into the answers. The letter also charged him with assisting another candidate to cheat on a previous written test in 2021.

30. On 10 November 2022, the Applicant responded to the allegations, apologizing profusely and explaining the two incidents.

31. On 22 February 2023, the Applicant received a sanction letter dated 17 February 2023, in which the Administration found that he had cheated on both exams. The letter made clear that the sanction had been issued only in regard to his actions as a UNHCR staff member-plagiarizing the answers on the test of 2 March 2022. The letter stated:

In determining the appropriate disciplinary measure to be imposed, the High Commissioner took into account mitigating and aggravating circumstances. He considered as mitigating circumstances your prior service with satisfactory performance, an unblemished disciplinary record and your apology. As aggravating circumstances, he considered

that you repeatedly engaged in similar conduct, and the second incident took place only two months after receiving a letter of caution. Further, your untruthfulness and lack of cooperation with IGO during your subject interview was an aggravating circumstance.

32. The parties submit that the dispute in this case centres around whether the disciplinary measure of separation from service with compensation *in lieu* of notice and half termination indemnity was proportionate to the gravity of the Applicant's misconduct.

33. The Applicant submits that the sanction that he received is much more severe than what other UNHCR staff members have received as sanctions for similar conduct. The dossier of disciplinary matters and cases of criminal behaviour in UNHCR between 2016-2022 shows that no other staff member has ever received a sanction of separation from service for cheating on a written test. In fact, a review of the sanctions given to other UNHCR staff members that were found to have cheated on tests shows that the sanction meted out to the Applicant was "singularly excessive and absurd in its severity."

34. The Applicant argues that the practice of UNHCR in respect of similar conduct shows that the sanction imposed on him was significantly more severe than on any UNHCR staff member who was found to have cheated on a written test; no one else ever received a punishment higher than demotion. The Applicant contends that he did not intend to cheat but was merely trying to overcome the difficulties and pain he incurred whilst typing with his broken right hand. This sanction is disproportionate, especially when one compares the specific facts of his case.

35. The Respondent has made extensive submissions on the proportionality of the sanction imposed on the Applicant and argues strongly that the sanction was both proper and proportionate under the circumstances.

36. The Respondent concedes that the disciplinary measures imposed by the High Commissioner on the Applicant was harsher than measures imposed by the High Commissioner upon other staff members who engaged in cheating in the past but makes the point that the sanction is not harsher than that meted out by the Secretary-General for similar conduct.

37. The Respondent urges the Court to dismiss the Applicant’s purported explanation that he did not “intend to cheat but was merely trying to overcome the difficulties and pain he incurred whilst typing with his broken right hand.” The Respondent submits that this “argument is unreasonable” and advances that

[t]he purpose of any examination is to test a candidate’s knowledge or skills. It would defeat the purpose of administering a test if candidates were allowed to obtain unfair advantages over other candidates. The Applicant was provided an extra hour to sit the test on an exceptional basis to accommodate for any typing difficulties resulting from the Applicant’s hand fracture. However, by copying extensive and substantial information from two UNHCR documents into his response to the test, contrary to the instruction to the test participants that they were requested and expected not to consult any other documents during the test, the Applicant gave himself an unfair advantage over the other candidates.

38. The Applicant, however, reminds the Court that both parties to this dispute agree that when asked if he had plagiarised answers to the test, “far from hiding his conduct”, he explained that in answering two questions, he had entered some pre-written material due to his extremely slow typing with his broken right hand. The Respondent must have given the Applicant’s explanation due consideration to have then required him (and other candidates) to re-sit the test, and—after he passed it—be interviewed.

39. The Applicant also makes the point that while the sanction letter of 17 February 2023 states that the sanction was “based *only*” (emphasis added) on the “second incident,” the Respondent’s reply is peppered with references to the first incident to bolster his argument on proportionality.

40. The Applicant also argues that it was entirely inappropriate for the Respondent “to review and apply the record from the Secretariat and choose from its harsher sanctions instead of [the own fulsome record of sanctions of UNHCR] in this area, a blatantly arbitrary decision.”

### Considerations

41. In *Nadasan* 2019-UNAT-918, the Appeals Tribunal held that:

In disciplinary cases under Article 2(1)(b) of the UNDT Statute, the UNDT will examine the following: i) whether the facts on which the disciplinary measure is based have been established (by a preponderance of evidence, but where termination is a possible sanction, the facts must be established by clear and convincing evidence); 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.

42. In accordance with the established jurisprudence of the Appeals Tribunal, the role of the Tribunal when reviewing disciplinary decisions is to ascertain whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct and whether the sanction is proportionate to the offence. The Tribunal also examines whether the staff member’s due process rights were respected.<sup>1</sup>

*Whether the facts on which the disciplinary measure was based have been established*

43. Where the disciplinary measure results in the staff member’s dismissal, the alleged facts must be established by “clear and convincing evidence”. This standard of 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.<sup>2</sup>

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<sup>1</sup> *Suleiman* 2020-UNAT-1006, para. 10; *Nadasan* 2019-UNAT-918, para. 38; *Siddiqi* 2019-UNAT-913, para. 28.

<sup>2</sup> See also *Suleiman op. cit.*, para. 10; *Applicant* 2013-UNAT-302, para. 29; *Molari* 2011-UNAT-164, para. 30.



44. There is no need to examine the evidence against the Applicant to determine whether the facts are established or not because the Applicant admitted that he copied extensive and substantial information from two UNHCR documents into his response to a written test for the recruitment to a position of Associate PSP Officer (NOB) with UNHCR in Amman on 2 March 2022.<sup>3</sup>

45. The facts are not at all in dispute. Consequently, the Tribunal is not required to decide which standard of proof should be applied in disciplinary proceedings or whether the charge against the Applicant was proved in accordance with that standard.

46. As there are no disputed material facts, the Tribunal concludes that the facts on which the disciplinary measure was based have been established.

*Whether the established facts legally amount to misconduct under the Staff Regulations and Rules*

47. Staff regulation 1.2(b) requires staff members to uphold the highest standards of efficiency, competence and integrity.

48. The Respondent argues that the Applicant's conduct of cheating on the exam constituted fraud and was inconsistent with his basic obligations under staff regulations 1.2(b) and (g) and staff rule 1.5(a).

49. During the investigation, the Applicant responded to the allegations by apologizing profusely and explaining the incident.

50. For the accusation of plagiarizing two answers on the written test, the Applicant submits that he followed all relevant rules for the test. For the two answers in question, he inserted some pre-written material because of his broken right hand. Specifically, he argues that that he had pre-prepared some expected information that he may need on a Word draft from his own work and templates that he had personally created to

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<sup>3</sup> Annex 5 of the application.

save time because he knew that typing with his left hand alone would slow him down considerably.

51. The Respondent argues that the Tribunal should dismiss the Applicant's purported explanation that he did not intend to cheat but was merely trying to overcome the difficulties and pain he incurred whilst typing with his broken right hand. The Respondent submits that this argument is unreasonable.

52. The Appeals Tribunal ruled in *Vijay Neekhra* 2023-UNAT-1335 (paras. 58 and 59) that plagiarism of any kind in a written exam for a promotion, whether intentional or negligent, violates the integrity principle, as it gives the candidate an unfair advantage over others.

53. Any exam is administered to assess a candidate's abilities or knowledge. Allowing candidates to gain unfair benefits over others would undermine this exercise. The Applicant pasted large and significant information from two UNHCR documents into his test answer, against the instruction that no other documents should be consulted during the test.

54. In so doing, the Applicant breached the standard of integrity, especially honesty. This act was dishonest and damaged the trust relationship between the Organization and the Applicant.

55. Therefore, the Tribunal rejects the Applicant's argument that he did not intend to cheat but was merely trying to overcome the difficulties and pain he incurred whilst typing with his broken right hand.

56. In view of foregoing, the Tribunal concludes that the established facts constitute misconduct.

*Whether the disciplinary measure was proportionate to the offence*

57. As there is no dispute as to the facts in this case, the Tribunal will proceed to consider whether, in the circumstances and considering all relevant factors, the imposed disciplinary measure was proportionate to the established misconduct.

58. The Administration has broad discretion in determining the most appropriate disciplinary measure. Staff rule 10.2(a) provides a wide range of disciplinary measures.

59. In determining the appropriate measure, each case is decided on its own merits, taking into account the particulars of the case, including aggravating and mitigating circumstances.

60. Additionally, in accordance with staff rule 10.3(b), disciplinary measures imposed must be proportionate to the nature and gravity of the misconduct involved.

Mitigating and aggravating factors in the Applicant's case.

61. Staff rule 10.2 lists the types of disciplinary measures available to the Respondent when dealing with cases of misconduct. It states:

**Disciplinary measures**

(a) Disciplinary measures may take one or more of the following forms only:

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

62. The last two sanctions are the only ones that entail terminating the employment.

63. Staff rule 10.2(a) offers many options of disciplinary measures. The best measure for each case is decided by the Administration, which enjoys considerable discretion in this respect. The Administration considers the merits of the case and its specifics, as well as any aggravating or mitigating circumstances.

64. 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. The Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.<sup>4</sup>

65. In *Yisma* UNDT/2011/061, the Dispute Tribunal held that:

Both aggravating and mitigating circumstances factors are looked at in assessing the appropriateness of a sanction. Mitigating circumstances may include long and satisfactory service with the Organization; an unblemished disciplinary record; an employee's personal circumstances; sincere remorse; restitution of losses; voluntary disclosure of the misconduct committed; whether the disciplinary infraction was occasioned by coercion, including on the part of fellow staff members, especially one's superiors; and cooperation with the investigation. Aggravating factors may include repetition of the acts of misconduct; intent to derive financial or other personal benefit; misusing the name and logo of the Organization and any of its entities; and the degree of financial loss and harm to the reputation of the Organization. This list of mitigating and aggravating circumstances is not exhaustive and these factors, as well as other considerations, may or may not apply depending on the particular circumstances of the case.

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<sup>4</sup> *Nyawa* 2020-UNAT-1024, at para. 89; *Mancinelli* 2023-UNAT-1339, at para. 60.

66. As part of its consideration of the proportionality of the contested disciplinary measures, the Tribunal will discuss the various mitigating and aggravating factors in the present case.

67. In determining the Applicant's disciplinary sanction, the Respondent considered both aggravating and mitigating circumstances. It considered the following as aggravating circumstances:

- a. The Applicant engaged in repeated instances of similar conduct, and the 2 March 2022 incident took place only two months after receiving a letter of caution in relation to the 8 June 2021 incident; and
- b. The Applicant's untruthfulness and lack of cooperation with IGO during his interview as a subject of the IGO investigation.

68. As for the mitigating circumstances, the Applicant's approximately nine years of service with a satisfactory record and an unblemished disciplinary record at the time of committing misconduct as well as his apology were considered.

69. In his application, the Applicant challenges that his alleged "untruthfulness and lack of cooperation with IGO during his subject interview" was improperly considered as an aggravating circumstance.

70. In *AAE 2023-UNAT-1332*, the Appeals Tribunal held that:

Whether a lack of cooperation may be considered an aggravating circumstance will depend on the circumstances of each case because there is a positive obligation in the regulatory framework on a staff member to cooperate with an investigation. Therefore, it cannot be concluded that a lack of cooperation can never be considered a relevant circumstance in every case. The Majority correctly emphasized that it was important to distinguish between "passive lack of cooperation and active hampering of an investigation.

71. A lack of cooperation is not always a relevant circumstance in every case to be taken as aggravating factor. Sometimes, if the lack of cooperation is not serious, it may not be taken as an aggravating circumstance. However, the nature of the case may affect how lack of cooperation during an investigation is viewed. Being dishonest and misleading during the investigation may be considered serious and be taken as a ground of aggravation. Therefore, it cannot be concluded that a lack of cooperation can never be considered as an aggravating circumstance.

72. In the present case, the letter of caution that the Applicant received from the UNHCR Representative and Deputy Representative in Jordan for the incident on 8 June 2021 was issued based on the Applicant's false and misleading statements to the Representative and Deputy Representative, concealing his actual involvement in the incident to unduly help an external candidate sitting on an exam by giving him the Organization's laptop and helping him in replying to the exam's questions.

73. The Applicant repeated his false and misleading statements on several occasions. During the investigation, the Applicant untruthfully stated that he had merely shared UNHCR documents with the external candidate taking the test on 8 June 2021 but had not provided any other help to the candidate. Only when confronted with additional evidence later in the interview did the Applicant admit that he was in fact in the same room as the external candidate and that, while the external candidate was typing his test responses on the Applicant's UNHCR laptop, the Applicant was also actively helping him with the test questions. He was lying repeatedly. He was untruthful several times.

74. It follows that the Applicant did not merely display a passive lack of cooperation but was actively hampering the IGO investigation by repeatedly providing untruthful and misleading information to IGO on several occasions prior to and during his subject interview. Therefore, this Tribunal concludes that the Respondent did not err in taking the Applicant's untruthfulness and lack of cooperation with IGO as an aggravating circumstance.

75. The Dispute Tribunal affirmed that repetition of the acts of misconduct shall be taken as an aggravating circumstance in imposing a sanction in a disciplinary case. The Tribunal also ruled that long and satisfactory service with the Organization, a clean disciplinary record; and confessing the misconduct shall be taken as mitigating circumstances.<sup>5</sup>

76. Therefore, the Tribunal concludes that the Respondent did not err in considering the Applicant's repeated similar misconduct, untruthfulness and lack of cooperation as aggravating factors. Likewise, the Respondent was correct in considering the Applicant's nine years of satisfactory service with a clean disciplinary record and his apology as mitigating factors.

77. To conclude, the Tribunal believes that the Respondent acted within his discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction in this case.

Was the sanction proportionate?

78. The jurisprudence of the Appeals Tribunal establishes that the Administration has an obligation to issue proportionate sanctions to staff found to have committed similar types of misconduct.

79. Staff rule 10.3(b) states that any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

80. The Dispute and Appeals Tribunals have repeatedly held that the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result.<sup>6</sup>

81. In *Sanwidi* 2010-UNAT-084, the Appeals Tribunal held that:

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<sup>5</sup> *Yisma* UNDT/2011/061, para. 29.

<sup>6</sup> *Sanwidi* 2010-UNAT-084, para. 39; *Samandarov* 2018-UNAT-859, para. 23.

In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.

82. When reviewing the Secretary-General's discretion in administrative matters, the Dispute Tribunal checks if the decision is legal, rational, procedurally correct and proportionate. It can also see if relevant or irrelevant matters are considered, and if the decision is unreasonable or illogical. But the Dispute Tribunal does not judge the Secretary-General's choice among different options. Nor does it replace the Administration's decision with its own.<sup>7</sup>

83. In *Samandarov* 2018-UNAT-859, para. 23, the Appeals Tribunal held that the Administration's discretion is limited by the proportionality principle:

The proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end.

84. While the Appeals Tribunal has repeatedly found that the proportionality of a sanction is usually within the discretion of the Administration, this discretion is not absolute, and, in particular circumstances, a sanction may be changed after judicial

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<sup>7</sup> *Arvizu Trevino* UNAT-1231, para. 50; *Samwidi* 2010-UNAT-084, para. 40.



review by the Dispute Tribunal. The Administration has an obligation to act in good faith and comply with applicable laws.

85. In *Portillo Moya* 2015-UNAT-523, the Appeals Tribunal held in part:

That is only if 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, that the judicial review would conclude in its unlawfulness and change the consequence (i.e., by imposing a different one). This rationale is followed in the jurisprudence of this Tribunal. If that is not the case, judicial review should not interfere with administrative discretion.

86. The Appeals Tribunal further determined that excessiveness, in relation to the objective of staff discipline is the ultimate test as to the standard for judicial interference. In accordance with the jurisprudence of the Appeals Tribunal, the standard for interference depends on the sanction being clearly illegal, arbitrary, excessive, abusive, discriminatory or absurd. The main test is whether the sanction is too harsh for the objective of staff discipline. A harsh sanction will be arbitrary and irrational, and therefore illegal and disproportionate, if it does not match the misconduct and the need for discipline.<sup>8</sup>

87. To decide this case and review the challenged disciplinary measure, this Tribunal examined both sides' arguments carefully based on the principles and jurisprudence of the Tribunal as outlined above.

88. In the present case, the Applicant argues that the imposed sanction is disproportionate to the offense. He claims that the practice of the High Commissioner in similar cases shows that "no one else ever" was separated for similar conduct.

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<sup>8</sup> *Samandarov* 2018-UNAT-859, para.25.

89. The Applicant points to the practice of the High Commissioner in disciplinary matters between 2017 and 2022, arguing that UNHCR staff members who engaged in cheating were imposed less severe disciplinary sanctions than separation for similar misconduct, ranging from loss of steps to demotion with deferment for consideration of promotion. He cites various cases of cheating by UNHCR staff or affiliates in recruitment exams from 2017 to 2022 to back his argument. The Applicant stresses in his application that the sanction uniquely inflicted on him is severe and disproportionate to the misconduct he committed.

90. The Respondent contends that the Applicant's claim of unfair disciplinary sanction is based on the practice of the High Commissioner between 2017 and 2022, when UNHCR staff members who cheated received milder penalties than separation, such as loss of steps or demotion with deferred promotion. However, the Respondent points out that the Applicant ignores the fact that the Secretary-General has also imposed various sanctions on staff members who cheated, from demotion to separation from service.

91. The Respondent further states that the Secretary-General's past practice shows that the sanctions for cheating, or for helping someone else cheat, were not uniform but depended on the circumstances of each case, and that in several cases, staff members were separated from service, with or without notice, compensation, or termination indemnity. The Respondent supports this argument by citing examples of staff members who cheated in recruitment exams and were terminated from service.

92. The Tribunal examined these arguments and found many cases<sup>9</sup> where the Respondent separated staff members for cheating once on the test questions. In the present case, as outlined above, the Applicant cheated twice, not just once. The Applicant's separation from service was carried out in line with the past practice of the Secretary-General. The Secretary-General's practice demonstrates that separation from

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<sup>9</sup> Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2015 to 30 June 2016, at para. 31.

service is not an excessive sanction for cheating in a competitive recruitment exercise setting. Hence, the Tribunal rejects the Applicant's argument raised in this regard.

93. With regard to violations of the standards of integrity, in *Hassan Abdel Majid Saleh* 2022-UNAT-1239, the Appeals Tribunal ruled that:

Fraud and dishonesty are serious misconduct. Any form of dishonest conduct, deception or fraud compromises the necessary relationship of trust between the Organisation and a staff member and will generally warrant the termination of employment. While the decision to terminate employment necessarily involves the consideration and weighing of a number of factors, both mitigating and aggravating, in instances of dishonesty the severity of the misconduct tends to outweigh other mitigating considerations such as length of service, a clean disciplinary record, difficult personal circumstances, expressions of remorse and the like. The reason for that is dishonesty by a staff member invariably seriously damages or destroys the relationship of mutual trust and confidence in a way that renders the continuation of a quasi-fiduciary employment relationship untenable or even intolerable.

94. As mentioned in paras. 53 and 54 above, the Applicant cheated in an exam by copying from UNHCR documents, gaining an unfair advantage and breaching honesty standards, thereby damaging trust with the organization.

95. The Applicant cheated on the exam administered in connection with the job opening for the post of Associate PSP Officer with UNHCR. He tried to deceive the Organization and get a benefit for himself. His conduct was dishonest. Any kind of plagiarism in a written exam in the context of a selection process will be considered a violation of the principle of integrity. The Appeals Tribunal in *Vijay Neekhara* held that:

Plagiarizing in a written test obviously demonstrates a lack of integrity because it can be considered as a form of cheating. A staff member who plagiarizes in a written exam puts himself/herself in an advantage over other candidates. Not only does he or she save a lot of time by presenting external sources without proper citation and quotation, but the relevant parts of the text will also appear to be written by the staff member himself/herself.

96. In addition, pursuant to the UNHCR Strategic Framework for the Prevention of Fraud and Corruption (IOM/FOM No. 044/2013), the Applicant's conduct amounts to fraud.

97. Section 3 of the above-mentioned UNHCR Strategic Framework defines fraud as follows:

Any act or omission, including misrepresentation or concealment of a material fact, that knowingly or intentionally misleads or attempts to mislead, a party to obtain a benefit, whether directly or indirectly, whether for oneself or for a Third-party. Fraud could involve misappropriation of cash (such as fraudulent claims/disbursements) or other assets (such as fraudulent shipments, falsifying inventory records), or fraudulent statements (purposefully misreporting or omitting information).

98. The Applicant received a letter of caution from the UNHCR Representative and Deputy Representative in Jordan for the incident on 8 June 2021, in which he was involved in unduly helping the external candidate sitting the exam by giving the Organization's laptop and also helping in his reply to the test questions. Two months after receiving this letter of caution, he again cheated on an exam. He copied extensive and substantial information from two UNHCR documents into his response to a written test for the recruitment to a position of Associate PSP Officer with UNHCR in Amman on 2 March 2022. The Applicant pasted large and significant information from two UNHCR documents into his test answer, against the instruction that no other documents should be consulted during the test.

99. The Applicant gave false and misleading statements to the Representative and Deputy Representative, concealing his actual involvement in the incident of 8 June 2021. In addition, the Applicant was actively hampering the IGO investigation by repeatedly providing untruthful and misleading information to IGO on several occasions.

100. The Applicant not only engaged in repeated incidents of dishonesty and cheating but, also, when confronted with his conduct, he repeatedly lied about his actual involvement and his behaviour of cheating and tried to cover it up. His attitude of untruthfulness clearly demonstrates that he is not fit to be an international civil servant and shows his lack of compliance with the Organization's highest standards of integrity.

101. The Appeals Tribunal held in *Rajan* 2017-UNAT-781, para. 49, that:

[a] [s]ingle incident of dishonesty or material non-disclosure in some circumstances may justify separation from service. In this case, the conduct was repeated. The Secretary-General must be afforded an appropriate margin of appreciation in setting a high standard of probity.

102. The Applicant's repeatedly dishonest conduct undermines the integrity of the recruitment process for a personal benefit; all demonstrates that the nature and gravity of the Applicant's misconduct is serious. His conduct damaged the trust relationship to a degree that rendered the continuation of the employment relationship intolerable for UNHCR.

103. For these reasons, the Tribunal believes that the UNHCR High Commissioner acted within his discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction in this case. A sanction of separation from service, with compensation in lieu of notice and with half termination indemnity pursuant to staff rule 10.2(a)(viii) was a proportionate disciplinary measure. This sanction is correctly determined and carried out in line with the past practice of the Secretary-General.

104. The sanction was therefore not arbitrary, excessive, or abusive, and was thus a reasonable exercise of the Secretary-General's discretion.

105. Thus, UNHCR did not err in this regard.

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Whether the Applicant's due process rights were respected

106. The Applicant does not dispute any violation of the due process right and, hence, the Tribunal affirms that the investigative disciplinary process observed due process.

**Conclusion**

107. In light of the above, the Tribunal upholds the disciplinary measure imposed on the Applicant.

108. The application is DISMISSED.

*(Signed)*

Judge Solomon Areda Waktolla

Dated this 15<sup>th</sup> day of November 2023

Entered in the Register on this 15<sup>th</sup> day of November 2023

*(Signed)*

René M. Vargas M., Officer-in-Charge, Nairobi