



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1341

Josef Reiterer
(Appellant)

JUDGMENT

Judge Kanwaldeep Sandhu
Judge John Raymond Murphy

Case No.: 2022-1680
Date of Decision: 24 March 2023
Date of Publication: 9 May 2023
Registrar: Juliet Johnson

Counsel for Appellant: George G. Irving
Counsel for Respondent: Noam Wiener

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. Mr. Josef Reiterer, a staff member of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), contested before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the Administration's decision to impose upon him a disciplinary measure of "demotion by one grade with deferment, for one year, of eligibility for consideration for promotion and threatened reassignment". The UNDT dismissed his application and upheld the Administration's imposed disciplinary measure. Mr. Reiterer appeals to the United Nations Appeals Tribunal (Appeals Tribunal).

2. For the reasons set out below, we dismiss the appeal.

Facts and Procedure

3. As of June 2013, Mr. Reiterer acted as the Chief of Civil-Military Coordination Section (CMCS), OCHA.

4. In Apr9(e)3.5()nfsnf

9. During its investigation, the second panel came across *prima facie* evidence related to Mr. Reiterer's involvement in the alleged irregular recruitment of a consultant and it recommended to separately investigate this matter. The same fact-finding panel was thus appointed and tasked to investigate that recruitment (third panel).

10. On 19 June 2018, the first panel issued its investigation report.

11. On 28 June 2018, the third panel issued its investigation report.

12. By memorandum dated 17 August 2018 and following a review of the first and third panel's investigation reports, the USG/OCHA referred the matter for appropriate action to the ASG/OHRM.

13. By memorandum dated 19 February 2019 and following a review of the three investigation reports and supporting documentation, the Officer-in-Charge, OHR informed Mr. Reiterer that the following formal allegations of misconduct had been issued against him:

(a) Between 2015 and 2017, Mr. Reiterer created a hostile, offensive and humiliating work environment for the second complainant by one or more of the following: (i) shouting at him in his office about a work assignment; (ii) instructing him not to move away from his desk during working hours, even after he raised concerns of being less productive following the instruction; (iii) replacing him with an intern in the emergency response to Hurricane Matthew; (iv) cancelling his training mission to the United Nations Disaster Assessment and Coordination (UNDAC) without consulting or informing him of such action; and/or

(b) In 2017, Mr. Reiterer abused his authority of Chief, CMCS, OCHA by one or more of the following: (i) facilitating the recruitment and an extension of a daughter of a friend, as a consultant, who had no special skills or knowledge in the areas of civil-military coordination training; and/or (ii) facilitating her official travels that were not included in her terms of reference, including the two-month mission to Jordan for the purpose of helping her gain field experience.

14. On 30 April 2019, the Office of Staff Legal Assistance (OSLA) submitted, on Mr. Reiterer's behalf, comments on the allegations of misconduct.

15. By letter dated 27 June 2019, the ASG/OHR informed Mr. Reiterer that based on the review of the entirety of the record, including his comments, it had been concluded that the allegations had been established by clear and convincing evidence; and decided to impose on him the disciplinary measure of demotion by one grade with deferment, for one year, of eligibility for consideration for promotion.

16. On 28 August 2019, Mr. Reiterer filed an application before the UNDT contesting the imposition of the disciplinary sanction.

17. On 27 September 2019, the Respondent filed his reply.

18. By Order No. 147 (GVA/2021), the Dispute Tribunal *inter alia* requested comments from the parties about its intention to hold a hearing on the merits. In response to this Order, the Secretary-General submitted that a hearing was not necessary, whereas Mr. Reiterer agreed with the holding of a hearing.

19. By Order No. 158 (GVA/2021), the UNDT *inter alia* confirmed to the parties the holding of a hearing and communicated to them a tentative hearing schedule.

20. On 8 November 2021, the parties filed a joint bundle of documents and a list of authorities for the oral hearing. That same day, Mr. Reiterer filed a motion for submission of evidence.

21. On 12 November 2021, the Secretary-General filed, at the UNDT's request, his response to Mr. Reiterer's 8 November 2021 motion.

25. On 11 February 2022, the UNDT issued Judgment No. UNDT/2022/011, dismissing the application.

26. On 1 April 2022, Mr. Reiterer filed an appeal, and on 3 June 2022, the Secretary-General filed his answer.

Submissions

Mr. Reiterer's Appeal

27. Mr. Reiterer submits that the UNDT erred in

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34.

The Secretary-General's Answer

37. Mr. Reiterer has not explained how any of the alleged errors of procedure affect the Judgment and thereby warrants reversal. Other than listing that the UNDT took certain decisions,

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43. The former supervisor of the second complainant supported the latter's testimony. He testified that Mr. Reiterer was aggressive in his relationship to the second complainant; that he often cut him short during team meetings; that the second complainant was often away from his desk because his job entailed coordinating with the other humanitarian agencies in Geneva and that consequently Mr. Reiterer's instructions to him to remain at his desk for at least six out of eight hours when at the office, as if he was not working when not at his desk, were inapposite. He also agreed that the tone of the e-mail sent by Mr. Reiterer to the second complainant, instructing him to spend at least six out of eight hours a day seated at this desk, and limiting his lunch break to the hour between 12:30 to 1:30, was highly irregular, and that he had never seen anybody else send such an e-mail to a subordinate.

44. The testimonies by both the former supervisor of the second complainant and the former Director of OCHA, Geneva offered further corroboration. In particular, the former and limtiong ainate.o, werø (e forg wn73012 T[78he former superv)56n at 7sM that

atmosphere at the Section. Contrary to the Mr. Reiterer's argumentation, they did not "refuse"

50. The UNDT did not commit an error of law in determining the proportionality. Mr. Reiterer errs both in the manner in which he cites the UNAT Judgment in *Kennedy* and in his representation of the impugned Judgment when he submits that the UNDT erred in law by not considering whether his conduct was severe enough to amount to misconduct warranting the disciplinary measure imposed on him, adding that the UNAT's judgment in *Kennedy* required the UNDT to explain why Mr. Reiterer's conduct could not be "addressed administratively". Nothing in *Kennedy* suggests that the Secretary-General must explain why he chose not to consider a non-disciplinary response to misconduct. Moreover, contrary to Mr. Reiterer's claim, the UNDT did address the proportionality of the disciplinary measure. The UNDT took Mr. Reiterer's conduct into consideration, compared the disciplinary measure to past cases and found the disciplinary measure imposed could have been more severe. Contrary to Mr. Reiterer's assertion, his demotion and reassignment to a new position with no managerial responsibilities was not "a new policy with no legal foundation"; rather, the Secretary-General imposed the disciplinary measure of demotion with deferment in line with Staff Rule 10.2(a) (vii).

51. The Secretary-General requests that the UNAT uphold the contested decision and the impugned Judgment and dismiss the appeal in its entirety.

Considerations

Whether the UNDT erred on a question of law or fact in establishing Mr. Reiterer's misconduct

Standard of review in disciplinary cases

52. In disciplinary cases, the Tribunals will examine the following: (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 the sanction imposed, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable.² In all other cases preponderance of the evidence is sufficient.³

² *Mohammad Yahya Al Othman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2022-UNAT-1196, para. 56; *Abdulhamid Al Fararjeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2021-UNAT-1136, para. 11; *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, para. 21.

³ *Suleiman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1006, para. 10.

recalling the two formal allegations of misconduct levelled against Mr. Reiterer set forth in the 19 February 2019 charge letter, namely:

- a. [Count 1:] Between 2015 and 2017, [he] created a hostile, offensive and humiliating work environment for [the second complainant], by one or more of the following6(n)c

Mr. Reiterer's such behavior. Some of these incidents (i.e., the matter related to Mr. Reiterer's reassignment of the Hurricane Matthew file to an inexperienced intern), taken isolated, might not appear serious incidents. But, looked at overall, in the context of other incidents, they support the UNDT's finding of Mr. Reiterer's "failure to create a harmonious work environment and of his inability to solve and prevent conflicts, foster team spirit and encourage others' views, as well as of his difficulty with hearing criticism and an inclination for favouritism".⁸ That finding is in line with and confirms the second panel's similar one, -referring to the reassignment of the Hurricane Matthew file to an inexperienced intern-, that "as an isolated incident it may not appear a serious incident, but if it is seen in the context of other incidents it supports the pattern of harassment and abuse of authority against [the second complainant]".⁹

62. Notably, as per the findings of the second panel concerning the four incidents of count one:¹⁰

... The panel reviewed the matter related to Mr. Reiterer's shouting at [the second complainant] when he wanted to seek clarification on an email dated 8 September 2015 addressed to [the second complainant] and four other addressees. The panel reviewed the email exchange between Mr. Reiterer and [the second complainant] and found the query raised by [the second complainant] to be appropriate. The panel have considered the statements of complainant, subject and the witness and is of the view that Mr. Reiterer shouting at [the second complainant] is inappropriate and demeaning. The panel is of the view that it is the supervisor's responsibility to guide and coach his team mates. Shouting by the supervisor when asked for clarification in the presence of others amounts to demeaning or humiliating treatment and can reasonably be considered as harassment.

... The panel reviewed the matter related to Mr. Reiterer's directions by emails to [the second complainant] to spend more time at his desk and to keep the office door open. The panel have considered the statements of complainant, subject and witnesses and is of the view that the corridor is a noisy place and the instruction to keep the door open affects efficiency, as does being required to remain in the office as acknoT4(tnt1(knt)4.1(o)4.5(1(kn)-7.1(o)-5(Tr3(er)h8()-6t-3

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64. Likewise, the thorough and considered assessment of the witness statements of the second complainant, the first complainant, and the former Head, OFSU, CMCS, OCHA by the UNDT Judge are very revealing in this respect. As the UNDT correctly found they corroborate the occurrence of the above alleged incidents and support the pattern of harassment and abuse of authority against the second complainant by Mr. Reiterer. The UNDT did not err in relying on them and in finding all these testimonies to be credible and supportive of the second complainant's complaints. Notably, the UNDT Judge ascribed considerable evidentiary weight upon the latter's testimony, noting that he "was very esteemed in the field, and he was one of the most frequent travelers in CMCS, in many countries all over the world and often in emergency situations, which confirms his skills and experience"¹¹.

65. After carefully and thoroughly considering the evidence on which the Administration had

complainant and, moreover, that its rationale, namely the second complainant's being on sick leave or returning shortly before the start of the training, was unreasonable as the training took place one month after the second complainant's return from sick leave.

67. These are accurate conclusions from the evidence on record and common knowledge and we find no reason to differ from them. The Dispute Tribunal has broad discretion under its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of

Management and shall keep them centrally in the department, office or mission, including for monitoring and audit purposes.

...

4.3 In the process of selecting a consultant or individual contractor, heads of departments, offices and missions are responsible for instituting competitive selection procedures. The competitive selection procedure can take several forms, including the evaluation of individuals identified from a roster of qualified individuals maintained by the executive, administrative or human resources offices, through the issuance of a consultancy or individual contractor opening in the electronic platform provided for this purpose, through the department, office or mission website or through any other appropriate means. For each assignment, every effort shall be made to shortlist for consideration a minimum of three candidates from the widest possible geographical basis. Travel costs may be considered but may not distort the geographical balance in the awarding of contracts.

70. Coming to count 2, there is sufficient evidence on file establishing on a preponderance of probabilities that Mr. Reiterer abused his authority

and directly selected her. There is also incontrovertible evidence that several travels/missions that the selected consultant undertook were out of the contract's provisions, in particular the mission to Jordan, and although carried out to perform official functions, their main rationale was to make the selected consultant "gain experience".

74. A review of the evidence on record, including the witnesses' testimonies at the hearing before the UNDT, reveals further the existence of a conflict of interest Mr. Reiterer faced due to his personal relationship with the selected consultant's family, which should have prevented him as a hiring manager to deal, even indirectly or through subordinates with said recruitment process. Instead, as the UNDT Judge rightly held, Mr. Reiterer "concealed his personal knowledge of the candidate, or at the very least was not clear in disclosing it to the Administration from the very beginning of the process and, moreover, he directly and personally led the recruitment process of the selected consultant and infringed the above-mentioned rules".¹⁶

75. In light of the above proven facts and absent any countervailing evidence from Mr. Reiterer, the UNDT was correct to hold that his conduct was incompatible with the standards of conduct expected from an international civil servant. We find that the conclusion reached by the Dispute Tribunal was open to it on the evidence and, accordingly, we find no error of law or fact such as would serve to undermine the Dispute Tribunal's overall conclusion on that issue.

76. In sum, the documentary evidence on file, as well as the strong circumstantial evidence and the inherent probabilities of the situation, taken cumulatively, suggest to the appropriate evidentiary standard of the preponderance of evidence, as correctly held by the UNDT, that Mr. Reiterer had committed the alleged misconduct. Therefore, his contentions to the contrary are

78. Notably, Mr. Reiterer's conduct in relation to the second complainant constituted harassment and abuse of authority under ST/SGB/2008/5 and also violated Staff Regulation 1.2(a) (by failing to uphold and respect the dignity and worth of the human person) and Staff Rule 1.2(f) (by engaging in harassment and abusive conduct at the workplace). While, his conduct relating to the hiring of the selected consultant etc. violated Staff Regulations 1.2(b) (by failing to uphold the highest standards of integrity, including impartiality and fairness), 1.2(f) (by engaging in an activity that is incompatible with the proper discharge of his duties as the manager of the section), 1.2(g) (by using his office or his knowledge gained from his official functions for the selected consultant's private gain), and 1.2(m) (by failing to disclose an actual conflict of interest arising from his personal connection to the selected consultant's family in connection with his facilitation of her appointment).

Whether the sanction was proportionate to the offence

79. The Appeals Tribunal has previously held that:¹⁷

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 such as a sanction within the limits stated by the respective norms, 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.

80. Further, as we stated in *Samandarov*:¹⁸

... [D]ue deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own

¹⁷ *George M'mbetsa Nyawa op. cit.*, para. 89 (internal footnotes omitted); *Ganbold v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-976, para. 58; *Ladu, op. cit.*, paras. 39 and 40.

¹⁸ *Samandarov op. cit.*, paras. 24-25.

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then compared the disciplinary measure imposed to past practice and found that “the level of sanction imposed on the Applicant... is proportionate even if it had only been applied to [just one]

witnesses proposed by Mr. Reiterer; and (iii) denying Mr. Reiterer's motion to submit additional evidence into the record.

88. It is our settled case-law that the UNDT has broad discretion under its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence.²¹ Our jurisprudence has consistently held that the Appeals Tribunal will not lightly interfere with the broad discretion conferred on the first instance tribunal in the management of its cases to enable cases to be judged fairly and expeditiously and for dispensation of justice. We will intervene only in clear cases of denial of due process of law affecting a party's right to produce evidence.²²

89. In the instant case, we do not accept Mr. Reiterer's argument that this threshold has been met.

90. With regard to the number of witnesses, the UNDT issued Order No. 147 in which it considered appropriate to hold a hearing on the merits. A list of witnesses was included, and the parties were provided with an opportunity to opine on the necessity of holding a hearing and on the suggested list of witnesses. Subsequently, the UNDT took into account the parties' submissions and in Order No. 158, accepted Mr. Reiterer's request to hear his testimony and the testimony of one of his previous supervisors but denied the request to hear two other witnesses. The UNDT also denied the Secretary-General's request to adjudicate the case on the documents on the record without a hearing. Following the issuance of the case management orders, and the submission of the Joint Bundle, the UNDT held five days of hearings during which Mr. Reiterer had ample opportunity to advocate his position.

91. While, with regard to Mr. Reiterer's motion to submit additional evidence, the UNDT found that there were no grounds to grant the motion, namely to accept such evidence - which Mr. Reiterer sought to introduce less than two weeks before the commencement of the hearings on the merits of the case though he had ample time to do so before that time - and noted that the

²¹ *Abdeljalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-960, para. 43; *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, para. 37, citing *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 26.

²² *Abdeljalil, supra*, para. 43; *Uwais v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-675, para. 27, citing *Wu v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-597, paras. 34 and 35.

period for the introduction of evidence closed with the submission of the Joint bundle approximately two weeks before the start of the hearing.²³

92. Under Article 2(1)(d) of its Statute, the Appeals Tribunal is competent to hear and pass judgment on an appeal filed against a judgment rendered by the Dispute Tribunal in which it is asserted that the latter has committed an error in procedure, such as to affect the decision of the case. It follows that a party, in order to be successful on appeal, not only has to assert and show that the Dispute Tribunal committed an error in procedure but also that this error affected the decision on the case.²⁴ Hence, even if there was a procedural error Mr. Reiterer would need to show that this error would have had an impact on the decision of the case, which, in the present case, he has not done.

93. Indeed, we find that Mr. Reiterer failed to demonstrate in what way the alleged violations of his due process rights prejudiced him within the context of the present case and impacted the outcome of his case. Additionally, we take note that due process rights of a staff member are complied with as long as s/he has a meaningful opportunity to mount a defense and to question the veracity of the statements against her/him. The Appeals Tribunal is satisfied that the key elements of Mr. Reiterer's right to due process were met, and that the interests of justice were served in this case.

94. Moreover, the Appeals Tribunal has gone itself through the evidence on file and found the UNDT's management of the case at hand correct. Again, we recall that due process does not always put the UNDT under an obligation to hear every single witness proposed by the parties and that it has broad discretion in this context. Mr. Reiterer has not persuaded us that the way in which the UNDT addressed the witnesses issue in the present case, namely by hearing only two out of the four witnesses, amounts to a denial of due process of law warranting our intervention. Further, Mr. Reiterer's ability to challenge the contested decision was not prejudiced by the UNDT's decision not to hold a case management hearing which at any rate fell within its discretion. An objective review of the impugned Judgment reveals that the UNDT Judge meticulously and carefully examined the existing evidentiary material and weighed the credibility of the witnesses' testimonies in a proper way. As evident, on the face of the impugned Judgment, read as a whole,

²³ Order No. 168 (GVA/2021), para. 6.

²⁴ *Nimer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*

he took stock of the totality of the evidence, including the testimonies of the witnesses for the defense who had given written statements and correctly exercised his discretion to determine the admissibility of any evidence and the weight to be attached to such evidence.

Request for compensation

95. Mr. Reiterer's claim for compensation is rejected. Since no illegality was found, there was no justification for the award of any compensation. As this Tribunal stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".²⁵

96. For the foregoing reasons, we find that Mr. Reiterer has failed to establish that the UNDT made any error of law or failed to exercise its competence in its review of the disciplinary measure imposed by the Secretary-General. It follows that the appeal must fail.

²⁵ *Appellant op. cit.*, para. 62; *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 33.

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