UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1267/Corr. 1

AAD[1]

(Appellant/Respondent)

v.

Secretary-General of the United Nations

(Respondent

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Counsel for Applicant: Omar Yousef Shehabi, OSLA

Counsel for Secretary-General: Angélique Trouche

[1] This unique three-letter substitute for the party's name is used to anonymize the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. AAD, a staff member of the Department for General Assembly and Conference Management (DGACM), contested the Administration's finding of misconduct in a range of unauthorized, outside activities such as the provision of assistance to the benefit of third parties. These activities were potentially inconsistent with her obligations as an international civil servant. The Administration imposed disciplinary sanctions of loss of two steps in grade, plus a written censure (the sanction decision).

2. In Judgment No. UNDT/2021/066 (Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) granted AAD's application in part. The Dispute Tribunal held that the Secretary-General committed errors in the allegation and sanction letters phase and this, together with the minor degree of gravity of the offences, supported the Dispute Tribunal's determination that the sanction of loss of two steps in grade was disproportionate. The loss of two steps was overturned, but the written censure was confirmed. The Secretary-General appeals and requests the original sanction decision be reinstated. AAD cross appeals and says there was no misconduct and asks for damages.

3. The appeal concerns the standard of conduct of international civil servants engaging in "outside" activities and when those activities can become a basis for misconduct. The underlying facts of the conduct complained of and the outside activities are i e6Dn gra0.6-6e6 Tw 0.85 (h)- (

Facts and Procedure

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Submissions

Secretary-General's Appeal

17. The Secretary-General disagrees with the Dispute Tribunal that the Administration had committed errors regarding the allegation memorandum because it wrongfully took issue with the introduction in the memorandum with respect to OIOS findingsthetroduce A/(65[illegible]

20. Finally, the Secretary-General says the Dispute Tribunal erred in finding the sanctions were disproportionate to the misconduct. The imposition of sanctions is within the Administration's discretion. The Dispute Tribunal erroneously discarded part of the inculpatory facts as previously noted. Two mitigating factors had been considered which were the time taken to resolve the matter and the lack of financial gain by AAD. The aggravating factors

24. However, AAD says the Dispute Tribunal took an overly broad view of the requirement for prior approval for outside activity (as per Section 4.2 of ST/AI/2000/13) as much of her assistance to the NGO were activities seemingly "of benefit to the Organization or the achievement of its goal". Therefore, AAD says the Dispute Tribunal erred in finding misconduct, in its failure to rescind the sanctions entirely, and in its failure to award compensation for harm.

to the "excessive disciplinary sanction," and dismissing her compensation claim on the basis that the alleged harm occurred before the sanction was imposed. While the UNDT lacks the authority under its Statute to award compensation exclusively for procedural breach or delay (see), compensable harm may flow from delay or procedural errors in the investigative and disciplinary processes rather than the disciplinary sanction itself.

28. Thus, this Tribunal in vacated the award of compensation for an "unlawful procedural delay" not because delays are lawful and/or non-compensable, but because the award violated Section 10.5(b) of the Statute insofar as a staff member had not alleged or demonstrated harm resulting from the delay.

29. Finally, AAD alleges that the Dispute Tribunal failed to exercise jurisdiction or competence vested in it by failing to recognize her claim for harm to that arises from conduct which would reasonably (i.e., objectively) be expected to have "detrimental effects on [her] state of mind, , and personhood" (see). Claims for harm to are established by "a direct link between facts and harm, by means of evidentiary presumption, corroborated by the context in which the situation occurred and the expected impact the acts would have on an average person" (see). She says that she has endured five years of trauma as a result of this matter, and specifically the protracted investigation and disciplinary process; she is entitled to compensation for harm to in addition to compensation for physical harm resulting from the inordinate delay.

Secretary-General's Answer to Cross-Appeal

30.

31. The Secretary-General also says AAD raises a new argument on appeal that should not be receivable, namely her reliance on ST/AI/2000/13 to assert that her activities were not subject to prior approval because they would be covered by Sections 4.1 and 5.1 of this Administrative Instructions. Notwithstanding this, AAD's argument is inconsistent with the Staff Regulations and Rules. She is suggesting that ST/AI/2000/13 radically limits the application of the Staff Regulations and Rules in that no prior approval is required, according to her, when a staff member assists an NGO. The Staff Regulations and Rules are very clear that staff members are not allowed to engage in outside activities, whether with an NGO or otherwise, without the Secretary-General's prior approval. The fact that South-South News was incorporated as an NGO does not make AAD's assistance to South-South News consistent with the Staff Regulations and Rules.

32. Section 5.1 of ST/AI/2000/13 provides that "social or charitable activities", which have "no relation to the staff member's official functions or to the Organization [...] may be engaged in at the staff member's discretion". It is very clear that AAD's assistance to South-South News had direct relevance to the United Nations. Staff Rule 1.2(t) clarifies instances when prior approval is required. It also makes it clear that the listed activities may be performed without prior approval only if they are part of a staff member's official duties. It is clear that the activities carried out by AAD were not part of her official duties. In case of doubt, the Ethics Office is available to staff members to seek assistance, but AAD did not seek any such clarification.[5]

33. The Secretary-General contends the Dispute Tribunal correctly found that AAD's use of her official UN e-mail address amounted to misconduct. It is undisputed that she used her UN e-mail address to conduct part of her unauthorized outside activity. In particular, the Talking Points, the Concept Note and the Draft Letter were communicated to Mr. X. from her UN e-mail address. Contrary to AAD's contention, the fact that it benefited an NGO, South-South News, does not mean that her acts did not amount to misconduct.

34. Further, the Secretary-General submits that AAD does not show that the Dispute Tribunal failed to exercise its jurisdiction when determining compensation. Under the Appeals Tribunal's consistent case law, for a delay to be compensated, "the staff member's due process rights must have been violated by the delay and the staff member must have been

[5] Section 6.1 of ST/AI/2000/13.

harmed or prejudiced by the violation of his or her due process rights".[6] There is no legal provision setting out a timeline, neither can the time the investigation and disciplinary process took be considered unlawful, particularly considering the complexity of the file. AAD fails to identify any illegality or demonstrate how the purported delay violated her due process rights. She does not show what was the direct prejudice she allegedly suffered. In addition, as rightly noted by the Dispute Tribunal, the medical report dated 15 November 2018, filed by AAD as part of the application, refers to "an event in the workplace -2.7 (t)pomedical5 Td( )Tj0.003 f3c 0 Tw1T.7

38. In an application concerning disciplinary cases, the Dispute Tribunal must establish: i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, and iii) whether the sanction is proportionate to the offence.[7]

39. However, the Appeals Tribunal has also held that the Administration has a broad discretion in disciplinary matters which will not be lightly interfered with on judicial review.[8] This discretion is not unfettered and can be judicially reviewed to determine whether the exercise of the discretion is lawful, rational, procedurally correct and proportionate. This includes considering whether relevant matters have been ignored and irrelevant matters considered, whether the decision is absurd or perverse, or affected by bias, etc. Assuming compliance with these legal standards, it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action lawfully open to it or to substitute its own decision for that of the Administration.[9]

40. In the present case, we find that the Dispute Tribunal erred in determining whether the established facts qualify as misconduct and whether the disciplinary sanctions were proportionate. In the Judgment, the Dispute Tribunal also erred by substituting its determination of the appropriate disciplinary sanction for that of the Administration and, as such, the Judgment must be vacated. AAD says her actions do not amount to misconduct and seeks a rescission of the Administration's finding on this. We disagree and find AAD's actions amounted to misconduct that attracts discipline. Given the finding of misconduct, there can be no compensation award as requested. We set out our reasons for these findings below.

7 , Judgment No. 2018-UNAT-859, para. 21.
8 , Judgment No. 2019-UNAT-956, para. 40.
9 , Judgment No. 2010-UNAT-084, para. 40.

41. The "Administration bears the burden of establishing that the alleged misconduct for which a disciplinary

"no relation" to the staff member's functions or the Organization as long as that activity is "compatible" with their status of international civil servants. The activities engaged in by AAD were clearly related to the Organization's initiatives and activities, and as a result, she should have sought prior approval before engaging in those outside activities. There is no supporting evidence that AAD had prior approval for any of the alleged activities. Finally, the activities engaged in by the staff member must still be compatible with the standards and regulatory framework set out below that is applicable to an international civil servant.

47. The Organization has set high standards for international civil servants in the

> (0) Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without approval of the Secretary-General; ...
>
> (q) Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets; ...

49. The use of UN ICT resources by staff members is also addressed in Section 5.1 of ST/SGB/2004/15 that provides:

> Users of ICT resources and ICT data shall not engage in any of the following actions:
>
> (a) Knowingly, or through gross negligence, creating false or misleading ICT data;
>
> (b) Knowingly, or through gross negligence, making ICT resources or ICT data available to persons who have not been authorized to access them;
>
> (c) Knowingly, or through gross negligence, using ICT resources or ICT in a manner contrary to the rights and obligations of staff members[.]

50. ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) sets out that "unsatisfactory conduct" is any conduct where a staff member fails to comply with their obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issues or "to observe the standards of conduct expected of an international civil servant", and includes conduct of "sufficient gravity that rises to the level of misconduct".

51.

52.

v) AAD's recommendation letter for Mr. X. to a property management company using her name, full title, the name of department and division and location of the United Nations Headquarters of New York that the Dispute Tribunal held gave the "overall impression" that this was a recommendation given on behalf of the Administration in her professional capacity as a staff member.

54. As indicated, AAD does not dispute the facts underlying the allegations but says they do not amount to misconduct as she was assisting an NGO in good faith. However, for each of the above actions, AAD did not have prior approval of the Secretary-General in her involvement in United Nations initiatives such as the short concept note, the Global Business Incubator, the Global South-South Development Expo Center, or the invitation of a DGACM official to a high-level meeting. These were outside of her formal job duties. She used her UN e-mail to effect these communications.

55. The fact that AAD believed that her assistance to the NGO were activities seemingly "of benefit to the Organization or the achievement of its goal" or done in "good faith" is not a defense here. As an international civil servant, AAD is required to act according to the standards of conduct set out in the Staff Regulations and Rules and administrative issuances, which she did not do.

56. We also note that AAD had to amend her answers after the investigation interview to either clarify or contradict answers given in her interview. In the written clarification after the interview, she relies on Mr. X.'s "association" with the "top echelons of the Secretariat". For example, she stated in her interview that she wrote a recommendation letter for Mr. D.N. to a property management company wherein she stated she knew Mr. D.N. even though she did not know him. She stated she did so because Mr. X. requested her to do so and she had "trust and faith" in him. By not adhering to the high standards of an international civil servant and the regulations, AAD acted contrary to the Staff Rules and Regulations and to the relevant standards of conduct at the request of Mr. X., a person who did not work for the United Nations but who she thought had some stature and power. This is problematic as it shows conduct and the use of United Nations resources in order to provide benefit to those she considered "powerful" and well-connected. This type of staff member conduct seriously undermines

it may be considered “harmless”

64. The allegation memorandum expressly states that "findings in the OIOS investigation report which are not specifically discussed below (e.g., your alleged engagement in the re-issuance of document A/66/748) are not being pursued further as part of formal allegations of misconduct". The Dispute Tribunal held that allegations relating to A/66/748 should not be considered due to the ambiguity and confusion in the allegation memorandum which resulted in a violation of AAD's right to respond to allegations.

65. The Secretary-General argues, however, the allegation memorandum clearly distinguished the re-issuance of document A/66/748 from its revision by AAD through her unauthorized outside activities, an allegation which was maintained in the allegation memorandum. Therefore, the Dispute Tribunal could not decide that part of the allegations had been "effectively withdrawn" just because it considered that the allegation memorandum should have possibly included additional details. AAD argues that the Secretary-General conflates the formal requirements for allegation memoranda (as defined in Section 8.3 of ST/A/2017/1) with the requirements for due process and procedural fairness.

66. With regard to due process, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.[13]

67. The Dispute Tribunal correctly held it was a very basic principle of due process in a disciplinary case that each of the relevant facts and allegations of misconduct be presented to the employee or staff member in such a manner that they can easily understand them, and they be afforded an adequate opportunity to respond to those allegations.

68. We agree with the Dispute Tribunal that the allegations pertaining to A/66/748 were too ambiguous and confusing based on the statement in the introduction of the allegation memorandum that AAD's alleged engagement in the re-issuance of document A/66/748 was not being pursued further. Although the statement in the introduction references the "re-issuance" of the document as not being pursued, the allegation memorandum could have specifically stated and made clear that AAD's involvement in "revising" that document was being pursued. By not doing so, the allegation memorandum could be interpreted as being equivocal

[13] , para. 43.

72. In , the Appeals Tribunal held that "[t)he most important factors to be taken into account in assessing proportionality of a sanction include the seriousness of the office, then length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency".

73. In the present case, we find the Dispute Tribunal inappropriately interfered in the exercise of the Secretary-General's discretion on disciplinary sanctions. The Dispute Tribunal considered that

irrelevant considerations or failed to consider relevant considerations in exercising his discretion.

75. In assessing the disciplinary sanctions in the present case, the Secretary-General considered past practice of the Organization in matters of comparable misconduct involving unauthorized outside activities. He considered relevant mitid 63-5.8 ( )]TJ-0.0431tC3.9 (ai)-3.8ctrit.1 BT/TT3s

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82. Finally, there can be no causal link between the disciplinary sanction (which we find 233 ((i))-0.8h

Judgment

83. The Secretary's General appeal's is granted, and the Judgment is vacated. The cross-appeal is dismissed. The contested decision is reinstated.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022 in New York, United States.

Judge Sandhu, Presiding Judge Colgan Judge Halfeld

Judgment published and entered into the Register on this 19th day of August 2022 in New York, United States.

Weicheng Lin, Registrar