



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Hafida Lahiouel

BAIDYA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Susan Maddox, ALS/OHRM, UN Secretariat

Cristiano Papile, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant contests the 1 February 2011 decision made by the Under-Secretary-General, Department of Management, to impose on him the disciplinary measures of a written censure and a fine of one month's net base salary. The Applicant seeks the rescission of the decision and for it to be removed from his Official Status File.

## **Relevant background**

2. On 9 June 2007, an interview panel consisting of the Applicant and two other staff members interviewed candidates for the position of Chief, Accounts Unit, Finance Office, United Nations Stabilization Mission in Haiti ("MINUSTAH"). The panel recommended that one of the candidates ("MT") be selected for the position.

3. On 18 June 2007, the Principal Deputy Special Representative of the Secretary-General ("PDSRSG"), prior to providing his approval of the selected candidate, contacted the Applicant via email stating:

I tried calling you and did not find you and did not want to wait and risk having more time pass before raising this issue. Regarding the [P-3 Finance Officer] recruitment, it has been noted that the selected candidate is a Bangladeshi national the same as you are. While this is not a problem in itself it will undoubtedly bring closer scrutiny to the process and the PDSRSG wants to be assured that you are aware of that possibility. If you know the candidate personally, or know people who know him, or he is a distant relative, etc. If this were to be investigated any ties to friendship or family would be potentially damaging. The PDSRSG wants you to be completely comfortable with the selection considering the above and should you not feel absolutely certain he would recommend not to proceed. Please advise.

4. Following the Applicant's receipt of the 18 June 2007 e-mail from the PDSRSG, the Applicant and the Special Assistant to the PDSRSG had

a conversation about MT's selection. MT was selected and joined MINUSTAH on 14 July 2007.

5. On 25 June 2008, the Investigations Division, Office of Internal Oversight

7. On 10 March 2010, OIOS provided the Under-Secretary-General, Department of Field Support with its findings and recommendations regarding the allegations that the Applicant had tampered with a post selection process.

8. On 21 April 2010, the Assistant-Secretary-General, Department of Field Support, sent the Assistant-Secretary-General, Office of Human Resources Management (“ASG/OHRM”), a memorandum regarding the “investigation report on irregular recruitment process by [the Applicant]”. The memorandum recommended that the Applicant be subject to disciplinary action for having provided a staff member confidential information during a selection procedure and failing to disclose the nature of his relationship with the successful candidate, MT.

9. By memorandum dated 10 May 2010, the Applicant was charged with misconduct for “improperly interfering with the recruitment process for the P-3

However, the ASG/OHRM considered that there was sufficient evidence to conclude that the Applicant had failed to disclose the nature of his relationship with MT, thereby violating former staff regulations 1.2(b), (e), (f) and (g) as well as former staff rule 101.2(e). It was accordingly decided that disciplinary measures be imposed on the Applicant in the form of a written censure plus a fine of one month's net base salary. A copy of this memorandum, which constituted the letter of censure, was placed in the Applicant's Official Status File.

12. On 13 April 2011, the Applicant requested management evaluation of the ASG/OHRM's decision. On 15 April 2011, the Management Evaluation Unit ("MEU") advised the Applicant that he was not required to request management evaluation of a decision to impose disciplinary measure following the completion of a disciplinary process. The Applicant was further advised that should he wish to contest the decision, an application could be made directly before the Dispute Tribunal. On 25 May 2011, the Applicant filed his application. On 22 June 2011, the Respondent filed his reply.

13. By Order No. 343 (NY/2013), dated 17 December 2013, the Tribunal requested that the parties indicate by 20 January 2014, on the basis of supporting evidence, the date on which the Applicant received the contested decision. On 24 December 2013, the Respondent informed the Tribunal that the decision was received by the Applicant on 8 March 2011.

14. By Order No. 355 (NY/2013), dated 27 December 2013, the Tribunal requested that the parties indicate the exact nature of the Applicant's current professional status, whether there were any disclosure issues or other issues that needed to be addressed by the Tribunal; whether an oral hearing was warranted; and

The Respondent submitted that he did not object to a judgment on the papers

being notified of the disciplinary decision. The application therefore meets all of the receivability requiremen

- (iii) Deferment, for a specified period, of eligibility for within-grade increment;
- (iv) Suspension without pay;
- (v) Fine;
- (vi) Demotion;

21. ST/SGB/2007/4 (Staff regulations of the United Nations) dated 1 January 2007 states in relevant parts:

**Regulation 1.2**

**Basic rights and obligations of staff**

**Core Values**

...

- (b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in

*Scope of the review*

22. As stated in *Yapa* UNDT/2010/169, when the Tribunal is seized of an application contesting the legality of a disciplinary measure, it must examine whether the procedure followed is regular, whether the facts in question are established, whether those facts constitute misconduct and whether the sanction imposed is proportionate to the misconduct that was committed.

23. In *Hallal* UNDT/2011/046, the Tribunal held that:

30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred. (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

24. In *Zoughy* UNDT/2010/204 and *Hallal*, the Tribunal held that it is not sufficient for an Applicant to allege procedural flaws in the disciplinary process. Rather, the Applicant must demonstrate that these flaws affected his or her rights.

*Regularity of the procedure*

25. The Applicant submitted that the disciplinary measures imposed on him were based on unfounded, unproven, biased allegations, and the result of a flawed OIOS investigation, contrary to th

The Applicant was interviewed twice, on 22 October 2008 and 10 July 2009. On both occasions, the Applicant acknowledged the accuracy of the transcripts of OIOS' interview by signing off on them. The draft investigation report was provided to the Applicant on 11 February 2010 and he provided OIOS with his comments on 25 February 2010. The investigation report was finalized on 10 March 2010 and sent to the Under-Secretary-General, Department of Field Support. On 21 April 2010 the case was referred to OHRM.

28. By memorandum dated 10 May 2010, the Applicant was charged with misconduct for: (1) having improperly interfered with the recruitment process for the P-3 position of Chief of Accounts Unit in MINUSTAH's Finance Office; (2) his failure to disclose his personal relationship with MT, including to members of the panel, which he chaired; that interviewed MT; and (3) not answering truthfully when specifically asked about his relationshi

31. During OIOS's investigation, the Applicant was duly informed of the charges and allegations made against him. He was interviewed and he signed off on the content of interview transcripts. Further, when notified of the charge of misconduct on 10 May 2010, he had an opportunity to provide his comments, which were analyzed and duly taken into consideration by OHRM given that the first charge was subsequently dropped. The Tribunal therefore finds that the Applicant's due process rights were respected during each phase of the disciplinary process.

32. In the present case, the allegations were only put forward by MT in June 2008 as part of the rebuttal of his performance appraisal and after the Applicant's departure from MINUSTAH. The duration of the disciplinary process was, in relation to the complexity of the case and the parties' position vis-a-vis the facts, reasonable.

*Misconduct*

33. The Tribunal will further analyze whether, as determined by the Respondent, the facts in the present case constitute misconduct. The existence of misconduct is determined by the following cumulative conditions:

- a. The objective element which consists of either:
  - i. an illegal act (when the staff member takes an action which violates a negative obligation);
  - ii. an omission (when the staff member fails to take a positive action); or
  - iii. mixture of both which negatively affects other staff members including the working relationships and/or the order and discipline in the workplace;
- b. The subjective element which consists of the negative mental attitude of the subject/staff member who commits an act of indiscipline either intentionally or by negligence;

c. The causal link between the illegal act/omission and the harmful result;

d.

to make recommendations to decision-making bodies. Although they do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence of the decision to be taken.

37. The Tribunal considers that the Applicant had a legal obligation and therefore should have, on his own initiative, withdrawn himself from the interview panel since his objectivity as a chairperson could reasonably be open to questioning.

38. Consequently, being a matter of law and not a matter of fact, the Applicant's inaction to withdraw from the interview panel was in and of itself a breach of law. The Tribunal further considers that the Applicant should have been reasonably aware that his behavior was immoral. By virtue of the relations of subordinations that characterize social relations in the workplace, the employees must observe not only general contractual obligations and the staff regulations and rules, but also general principles of moral conduct.

39. The Administration has a statutory duty to offer selection processes which are both fair and seen to be fair (*Finniss* 2014-UNAT-397). In the present case, the Applicant wrongly considered that his prior relationship with one of the candidates (who was to be considered the best candidate by the members of the interview panel) was not relevant and that it was not necessary to inform the other members of the panel of his pre-existing contacts and relation with MT. Furthermore, the Applicant also failed to disclose this upon receiving an official and specific inquiry from the PDSRSG's Special Assistant. Rather, as part of his response to the allegations of misconduct, the Applicant stated that: "there is no question of me denying anything [...]. I informed [the Special Assistant to the PDSRSG] MC that there is no relationship and [...] that the selection was purely based on skills and qualifications, not based on friendship and that the recommendation of the panel was unanimous".

40. The Special Assistant to the PDSRSG informed OHRM by e-mail dated 21 December 2010 that he had informed the Applicant that the purpose of his email and conversation was to clarify whether the Applicant had any connection with MT.

He further stated that while he did not recall if he specifically asked if they were friends, he did recall being very clear about the PDSRSG inquiring as to “whether he knew him in any capacity whatsoever” to which the Applicant responded that he did not know MT and that he was simply the most qualified.

41. The Tribunal, in light of the documents filed by the parties regarding the conversation between the Applicant and the Special Assistant, considers that there is no factual dispute regarding the content of their conversation and that there was therefore no need to call upon the Special Assistant to the PDSRSG to testify.

42. The Tribunal considers that by stating that there was no “relationship” between himself and MT, the Applicant covered all aspects of the PDSRSG’s inquiry, namely whether the Applicant knew MT personally, or knew people who knew him, or was a distant relative. The Applicant was further clearly notified on 18 June 2007 that should the matter be investigated “any ties to friendship or family would be potentially damaging”.

43. The Applicant admitted that he had told MT that he would “guide him and he should keep it confidential [...]. Because he has a lot of friends that would ask for assistance and he cannot help everybody”. The Tribunal considers that it is clear from the Applicant’s own statement that he considered MT to be a friend and yet, when asked directly, he failed to recognize it. While the Applicant indicated that he and MT were not related, the Applicant intentionally omitted to deny the existence of a relation which could reasonably be considered as more than an acquaintance, possibly a friendship. The inquiry made by the PDSRSG, prior to the completion of the selection process, served the purpose of identifying and preventing both the existence and the appearance of conflict, including by protecting the candidate and the members of the deciding bodies.

44. The Applicant’s actions, which were based on his personal understanding and perception of how one defines relationship, friendship, impartiality or honesty, cannot possibly be considered appropriate. Even if the Applicant, both prior to and during



49. The necessary and sufficient condition for the disciplinary liability to be determined by the employer is the existence of misconduct.

50. The individualization of the sanction is very important because only a fair correlation between the sanction and the gravity of the misconduct will achieve the purpose of a disciplinary measure. Applying a disciplinary sanction, in order to respect a staff member's right to a proportionate sanction, cannot occur arbitrarily but rather it must be based solely on the application of rigorous criteria. The Tribunal also considers that the purpose of the disciplinary sanction is to punish adequately the guilty staff member while also preventing other staff members from acting in a similar way.

51. Former staff rule 110.3 provides for sanctions which can be applied to the Applicant once a finding of misconduct has been reached. The Tribunal will further verify whether the staff member's right to a proportionate sanction was respected and that the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct. The nature of the sanction relates to the finding of conduct which is in breach of the applicable rules. The "gravity" of the misconduct is related to the subjective element of misconduct (guilt) and to the negative impact of the illegal act/omission.

52. In order to appreciate the gravity of a staff member's misconduct, all the circumstances that surround the disciplined behavior, which are of equal importance, have to be considered and analyzed in conjunction with one another, namely the exonerating, aggravating and mitigating circumstances.

53. The Tribunal notes that there are some circumstances which can exonerate a staff member from disciplinary liability such as: self-defense, state of necessity, force majeure, disability or error of fact.

54. As stated in *Yisma* UNDT/2011/061:

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 Organisation; 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 Organisation and any of its entities; and the degree of financial loss and harm to the reputation of the Organisation. 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.

55. The sanctions which can be applied to the Applicant in the present case are listed under former staff rule 110.3. They are listed from the lesser sanction to the most severe and, generally, they must be applied gradually based on the particularities of each individual case.

56. The consequences of the misconduct, prior behavior, as well as prior disciplinary record can either constitute aggravating or mitigating circumstances. Sometimes, in exceptional cases, they can directly result in the application of even the harshest sanction (dismissal), regardless of whether or not it is the staff member's first offence.

57. As the Tribunal held in *Galbraith* UNDT/2013/102:

79. The Tribunal notes that the Termination of Employment Convention adopted by the General Conference of the International Labour Organization on 2 June 1982 states in art. 4 (Justification for termination) that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".



*Disposition:* a written censure after waiver of referral to the Joint Disciplinary Committee

62. ST/IC/2008/041 (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2007 to 30 June 2008), dated 15 August 2008, states:

**Gross Negligence**

...

19. A staff member who was head of the Contracts Unit, Procurement Section, and Acting Chief Procurement Officer in a peacekeeping mission failed to perform duties pursuant to the correct procurement procedures, as demonstrated, inter alia, by poor file management practices and allowing brand-specific items to be included in scope-of-work and bill-of-quantity documentation.

*Disposition:* a written censure after waiver of referral to the Joint Disciplinary Committee.

...

**Other**

...

45. A staff member attempted to cheat on an official language examination administered to internal and external candidates. The staff member refused to cooperate in an official investigation on the incident.

*Disposition:* demotion, no possibility of promotion for two years and written censure after receipt of the advice of a Joint Disciplinary Committee.

63. ST/IC/2009/30 (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2008 to 30 June 2009), dated 19 August 2009, states:

**Fraud/Misrepresentation**

...

25. A staff member misused a United Nations-issued mobile telephone for private calls, and deliberately failed to declare these private calls through the United Nations mobile billing systems in order to avoid payment.

*Disposition:* written censure and a fine of two months' net base salary after advice of a Joint Disciplinary Committee.

64. ST/IC/2010/26 (Practice of the Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2009 to 30 June 2010), dated 7 September 2010, states:

**Fraud/Misrepresentation**

...

29. A staff member knowingly submitted false information and supporting documentation in support of a claim for medical expenses.

*Disposition:* dismissal.

65. ST/IC/2011/20 (Practice of the Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2010 to 30 June 2011), dated 27 July 2011, states:

**Fraud/Misrepresentation**

38. A staff member submitted to the Organization, in connection with his recruitment, a secondary school report card containing altered grades.

*Disposition:* demotion of one grade with deferment, for three years, of eligibility for consideration for promotion.

39. A staff member cheated on a written test administered by the Organization by submitting the model answers prepared by others for the test.

*Disposition:* demotion by one grade with deferment, for a period of three years, of eligibility for consideration for promotion.

66. In *Sow* UNDT/2011/086, the Tribunal found that the principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offence, the penalty, in general, should be comparable.

67. Furthermore, as stated by the Dispute Tribunal in *Meyo* UNDT/2012/138:

31. Where an offence has been committed the Tribunal may lessen the imposed sanction where there are mitigating circumstances that have not been previously considered. [see *Sanwidi* 2010-UNAT-084, *Abu Hamda* 2010-UNAT-022]

32. A factor in considering whether a disciplinary measure taken against an individual is rational may be the extent to which the measure is in accordance with similar cases in the same organization.

68. In the present case, the Tribunal considers that there are no exonerating circumstances. The Tribunal did, however



**Conclusion**

In the light of the foregoing the Tribunal DECIDES

76. The application is rejected.

*(Signed)*

Judge Alessandra Greceanu

Dated this 24<sup>th</sup> day of July 2014

Entered in the Register on this 24<sup>th</sup> day of July 2014

*(Signed)*

Hafida Lahiouel, Registrar, New York