UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1357

Elmira Ela Banaj

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Gao Xiaoli, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2022-1723
Date of Decision:	30 June 2023
Date of Publication:	17 July 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	George G. Irving
Counsel for Respondent:	Amanda Stoltz

recruitment of the newly created P-4 Advisor Post in the UNODC Albania Office.[4] Having -

undertaken no proportionality analysis and has failed to explain why the sanction is appropriate. The imposed demotion creates a financial penalty with implications for her pension, career and professional reputation.

40. She asserts that compensation for the stress and loss of opportunity should be awarded, considering that the reduction of her functions was broadly communicated outside the Organization, her degrading work conditions violated her rights and dignity, impaired her physical and mental health and compromised her reputation, the RR continuously excluded her from the exercise of her functions, provoked stress and uncertainty about her employment, and denied acknowledgement of her professional accomplishments.

The Secretary-General's Answer

41. The Secretary-General requests the Appeals Tribunal to dismiss Ms. Banaj's appeal in its entirety.

42. The Secretary-General argues that the UNDT properly found the contested Decision to be lawful. Ms. Banaj has failed to establish any grounds of appeal. She failed to establish that the UNDT erred in its (a) consideration of her claims of improper motive and of "flaws" in the OAI investigation; (b) consideration of the facts upon which the sanction was based and whether those facts qualified as misconduct; (c) determination that the sanction was proportionate to her conduct; and (d) consideration of remedies.

43. The Secretary-General contends that, contrary to Ms. Banaj's allegations of having overlooked specific facts and evidence, the UNDT had explicitly addressed each of those facts and evidence. Moreover, the UNDT had correctly noted that the fact that the TORs were accompanied by her personal criticisms of the proposal, suggested that she acted in her personal interest. Contrary to her submission, the consent or approval of the Albanian and United States Governments was not necessary for the creation of the Advisor Post. Ms. Banaj's denial does not demonstrate any error in the UNDT's finding that she had authored and shared the document containing the critical comments. Contrary to her contention, the UNDT correctly found that the embargo on the World Drug Report applied to her.

44. The Secretary-General submits that Ms. Banaj's allegation that none of the aggravating factors have been subjected to due process and are thus inapplicable, is not

48. Our jurisprudence has consistently held that when termination is a possible outcome, the standard of proof for fact-finding is that misconduct must be established by clear and convincing evidence, while in other disciplinary cases, it is "preponderance of evidence" which means that it is more like than not that the facts and circumstances underlying the misconduct exist or have occurred. In this case, we will examine whether the UNDT has established the following facts by a preponderance of evidence: (1) the Appellant intentionally disclosed internal information without prior authorization; and (2) the Appellant shared personal criticism about the activities

53. Contrary to her allegation, the UNDT did look into and answer her contention. The

demonstrate, contrary to what she claimed, that the tentative Advisor Post was of concern to the Appellant at least in her mind, and thus she shared the draft TOR with her comments attached in her personal interests.

62. The Appellant submits other gro3 Tw 0.576 0 Td[(ot)N(rn)]T001 TrDP[s f(ot)N(o)1.7 (o3 g)2.9

comply with the embargo until 26 June 2018. The fact that the report had been previously shared through official channels did not entitle the Appellant to share it without authorization.

68. Lastly, the Appellant claims that the Respondent and the UNDT did not point to any adverse effects on UNODC policy resulting from her actions of sharing the report.

69. We find that any adverse effect is irrelevant to the facts on which the disciplinary measure was based, namely unauthorized sharing of the report that was still under embargo.

Whether the Appellant shared personal criticism about the activities and policy decisions of UNODC with officials of the Albanian and United States Governments

70. The Appellant argues that the document entitled "information" which she sent to Mr. S.B. at the United States Embassy in Albania on 23 March 2018 had been written by a United States official several years earlier, and neither OAI nor UNODC interviewed that person.

71. We note that this issue has been addressed by the UNDT. The UNDT found that the metadata of the disputed document listed the Appellant as the author and the Appellant provided inconsistent accounts regarding the source of the document. The Appellant claims on appeal that in disciplinary matters the burden of proof lies with the Respondent, therefore, the Respondent should bear the burden of verifying the source of the document. This is a misinterpretation of the burden of proof. The Administration bears the burden to prove that the facts underlying the disciplinary measure have been established and the Appellant bears the burden to provide sufficient and credible evidence to substantiate her allegations adduced in her defense. It is a principle in evidence law that the burden of proof lies with the party who presents a claim. In this case, the metadata listed the Appellant as the author of the "information" document, which demonstrated a *prima facie* fact in favor of the Administration'-14.2 2 (i)2.2 (n)6.8 (g8ss a)6.8 (001 Tw [(w7g

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90. We recall that while the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision.[45] In doing so, even if the UNDT does not agree with the administrative decision, this would not change the assessment of the reasonableness of the decision. Similarly, if the UNDT does not agree with the choice of the sanction imposed by the Administration, this would not make the implementation of the sanction arbitrary and/or disproportionate.[46]

91. In the present case, we find that the UNDT fully followed our settled jurisprudence in reviewing whether the imposed sanction was proportionate to the misconduct of the Appellant. Specifically, the UNDT examined whether the Administration duly considered any aggravating and mitigating factors, and whether the sanction applied was consistent with prior precedent. We cannot detect any error in the UNDT's approach and its conclusion that the disciplinary measure applied was proportionate to the offence.

92. Specifically, the Appellant argues that (1) the UNDT erred in considering as an aggravating factor the Appellant's refusal to hand over her private SIM card; (2) the UNDT failed to cite examples of similar cases because there are none; (3) the sanction was disproportionate and harsh, effectively removing the Appellant from her position permanently; (4) prior to its imposition, no proportionality analysis was undertaken pursuant to our Judgment in *Kennedy*[47] and no explanation was given as to why this penalty, as opposed to lesser sanctions or warnings, was appropriate; (5) none of the alleged aggravating factors have been verified or subjected to due process; and (6) there is no demonstrable benefit to the Organization, and all parties suffer a loss due to this ineffective and unnecessary action. [illegible]

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> Secretary-General. (...) Without the "why" in the reasons, the test of rational connection or relationship to the misconduct and the purpose of discipline cannot be met.

100. Furthermore, based on what has been expounded in *Rajan*,[51] the UNAT listed four aspects as relevant considerations for the proportionality analysis: (1) the staff member's intent or whether the action was accidental, careless, reckless or deliberate; (2) the nature of the misconduct or whether the misconduct was minor or technical, or substantive or severe; (3) the harm or damage to the Organization, employer, colleagues and other staff members, and clients and the public, which can range from none to significant; and (4) the disciplinary history or future of the staff member, namely whether the staff member has a history of disciplinary violations or other misconducts and sanctions.[52] Under each aspect, specific examples were enumerated.

101. In *Rajan*,[53] the Appeals Tribunal noted in relevant part:

> (...) The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the 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.

102. From *Rajan* to *ve[illegible]*

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IV. Whether the staff member's due process rights were respected during the investigation and the disciplinary process

108. Regarding a staff member's due process rights afforded during the investigation and the disciplinary process, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.[56] This means that even if there are 4(n)6l. (o(r)

against her by the charge letter and the attached formal investigation report, was given

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at the grade that she encumbered at the time of the Reassignment Decision, as compensation for moral damages, when it considered the Appellant's temporary reassignment case.[65]

120. In light of the foregoing, the Appellant's claim for damages is rejected.

Judgment

121. Ms. Banaj's appeal is dismissed, and Judgment No. UNDT/2022/060 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 30th day of June 2023 in New York, United States.

(Signed) ersor