
Judgme

Before

Case N

Date:

Regist

Counse

Counse

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/109, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 16 August 2016, in the case of *Ouriques v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 17 October 2016, and Mr. Reinaldo Ouriques filed his answer on 9 December 2016.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant joined the Organization in June 1999, as a Messenger (G-3) with the United Nations Office at Geneva (“UNOG”), where he worked until the contested decision was implemented on 7 May 2015. There is no record of any previous disciplinary incident.

... From late August to early October 2014, the Applicant was in Brazil, his home country, visiting his father who was then gravely ill and passed away on 12 February 2015. Upon his return to Geneva, in October 2014, the Applicant’s wife told him that she had been advised in September that she had a suspected tumour requiring surgery. The Applicant visited his treating doctor, who advised him to go on sick leave to avoid a breakdown, as he was suffering from loss of appetite and sleeplessness. The Applicant did not follow this advice.

... On 5 November 2014, while driving to work on his motorcycle, the Applicant had a verbal dispute with another motorcyclist who allegedly insulted and criticised him for driving on French and not Swiss plate numbers. This motorcyclist happened to also be a staff member and the Applicant recognized him in the course of their argument.

... Upon arriving at the UNOG premises drive-in entrance, the Applicant stopped in front of the security guard posted there and stepped off his scooter. The other motorcyclist arrived at the entrance moments later and also stopped behind the boom gate and in front of the gate’s guard. The Applicant approached the other staff member, who was wearing a helmet, and punched him repeatedly in the head. Several security guards immediately intervened to stop the altercation. The incident at the gate, which lasted approximately four seconds, was recorded by security cameras.

... Shortly after the incident, the other staff member complained by email to the Security and Safety Service (“SSS”) and, following instructions received, he provided a description of the incident by email of the same day.

1

... After talking with him at his workplace, SSS took the Applicant's official statement on the very same afternoon. He described the traffic altercation that occurred prior to his arrival at the United Nations premises gate, and stated that his recollection of the incident itself was blurred and that he believed that he had hustled the complainant without injuring him.

... The complainant went to the Medical Service Section ("MSS"), UNOG, which certified that he had a swollen cheek and a small laceration in the internal face of the cheek. The following day, 6 November 2014, an external doctor certified that he had a bruise on his right cheek and a laceration of approximately one centimetre in the buccal mucosa [i.e., the inner lining of the cheeks and lips].

... After the incident, the Applicant saw his doctor and was prescribed antidepressants.

... On 7 November 2014, the complainant reported the incident to the Swiss police.

... By letter of the Director, Division of Administration, dated 7 November 2014, the Applicant was informed that an investigation of the incident had been launched and that he was placed, with immediate effect, on administrative leave with pay pending the investigation.

... On 11 November 2014, SSS rendered its preliminary investigation report. It concluded that the Applicant had physically assaulted the complainant within the United Nations territory and that both had previously engaged in a verbal altercation on the road to the United Nations on their respective motorcycles, during which the complainant had insulted the Applicant. The conclusions of the preliminary investigation were based on: the initial report of the complainant, the Applicant's statement, the medical certificates provided by the complainant, the video footage, and the statement of one of the guards who witnessed the incident.

... On or about 13 November 2014, the Applicant provided the investigators with

... The Applicant produced a medical certificate, dated 24 November 2014, stating that he was fit to resume full time work, and that he would remain under psychotherapeutic treatment.

... The Applicant returned to work on 25 November 2014.

... On 25 November 2014, the Officer-in-Charge, Division of Administration, UNOG, transmitted the 11 November 2014 report on the incident, with supporting documents, to the Office of Human Resources Management (“OHRM”) for appropriate action.

... By memorandum dated 11 December 2014, the Chief, Human Resources Policy Service, OHRM, issued formal charges of misconduct against the Applicant and requested him to provide comments on them, which he did on 19 January 2015.

... On 24 April 2015, the Swiss judicial authorities decided not to press charges following the criminal complaint lodged by the staff member who sustained the assault. This decision was reiterated and made known to the Applicant by an order (*Ordonnance de non-entrée en matière*) dated 25 June 2015.

... By letter dated 29 April 2015, the Applicant was informed of his separation

imposed was disproportionate to the nature and gravity of the behaviour triggering it. The UNDT ordered (i) rescission of the disciplinary measure of separation from service with compensation in lieu of notice and replaced it with a two-year deferment of eligibility for consideration for promotion; (ii) compensation in lieu of rescission in the amount of 24 months' net base salary, corresponding pension fund contributions and medical insurance less the termination indemnity paid; and (iii) three months' net base salary in moral damages on the basis of medical evidence that the sanction "had a direct and serious impact on [Mr. Ouriques'] mental health state".³

Submissions

The Secretary-General's Appeal

4. The UNDT erred in law by concluding that the disciplinary measure imposed was disproportionate to the nature and the gravity of the misconduct. It is established jurisprudence that the Administration has broad discretion in disciplinary matters, that the Tribunals will not lightly interfere and, furthermore, that they will only review the level of the sanction imposed in cases of misconduct where there is obvious absurdity or flagrant arbitrariness. The UNDT itself found that the fact that Mr. Ouriques assaulted another staff member had been established. In view of the seriousness of the misconduct, the disciplinary sanction imposed was clearly reasonable and proportionate and was not the most severe of the available sanctions. He received both termination indemnity and compensation in lieu of notice upon his separation.

5. The UNDT erred by substituting the Secretary-General's sanction with its own lesser measure. The Administration considered the entirety of the record before it and determined the appropriate sanction. The UNDT did not establish that the sanction was blatantly illegal, arbitrary, absurd, excessive or otherwise warranted a different sanction.

6. The UNDT erred in law and in fact when finding that there were fundamental mitigating factors that had not been considered. The decision-maker did properly consider the entirety of the record, including the verbal altercation preceding the assault, Mr. Ouriques' medical information as provided by him, and the e-mail apology and expression of remorse. The pre-assault abusive language was considered a mitigating factor in Mr. Ouriques' favor. His mental health status was also considered and it is not the role of the Administration to "inquire

³ *Ibid.*, para. 62.

THE UNITED NATIONS

12. There was no error by the UNDT in its award of compensation, which correctly took into consideration the relevant factors and provided its reasoning and evidentiary support. The Secretary-General conflates compensation under Articles 10(5)(a) with 10(5)(b) of the Dispute Tribunal Statute (UNDT Statute), advancing arguments clearly contrary to the plain wording and intention of those provisions. Neither harm nor evidence thereof is required for an award under Article 10(5)(a) as it obligates the UNDT to order compensation as an alternative to rescission. Damages under Article 10(5)(b) do require harm supported by evidence, which the UNDT had before it in the form of the physician's note, and moral damages not relating to financial loss can be awarded under Article 10(5)(b) on the basis of a physician's report alone.

13. Mr. Ouriques respectfully submits that the appeal be

17. There is no dispute that those factors existed.

18. What is in contention is whether the Dispute Tribunal erred in fact and law when it concluded that the Administration's decision was unlawful and that the sanction imposed was disproportionate to the nature and gravity of the behaviour triggering it; and, further, whether it erred in law when it ordered rescission of the sanction and compensation in lieu thereof and

22. Accordingly, we hold that the Administration's decision was lawful and that it exercised its discretion in a reasonable manner. As stated in *Toukolon*:⁷

... [T]he Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose. The Appeals Tribunal finds, again, that it was a reasonable exercise of his discretion to determine that assault, together with the other charges, rendered Mr. Toukolon unfit for further service with the Organization and is satisfied that separation from service with compensation in lieu of notice and with termination

Judge Halfeld’s Dissenting Opinion

1. I respectfully dissent from the majority opinion in this case, as I agree with the well-reasoned, comprehensive and meticulous judgment of the UNDT and find no error in law or in fact resulting in a manifestly unreasonable decision in the UNDT’s conclusion that Mr. Ouriques “was disciplined on the basis of a significantly incomplete preliminary investigation, which was deemed as a complete investigation”⁸ and, in that respect, was unlawful; and, further, because all relevant facts, circumstances and mitigating factors were not properly before the decision-maker, the sanction imposed was disproportionate. I, therefore, would have affirmed the UNDT’s Judgment, except insofar as it replaced the sanction imposed.⁹

2. Disciplinary cases deal with one of the most important areas in administrative law; namely, the scope of judicial review in administrative discretionary powers and raise issues going to the heart of the relationship between administrative authorities and staff members. As noted by the majority, the role of the Dispute Tribunal in disciplinary cases is established by the consistent jurisprudence of the Appeals Tribunal¹⁰ and the assessment is made on a case-by-case basis. While the Organization has broad discretion in disciplinary matters, it also has a duty of fairness in its discretionary powers and that includes responding to individual situations such that — in the language of Staff Rule 10.3(b) — “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the *nature and gravity* of his or her misconduct”.¹¹

3. As reasonably found by the UNDT pursuant to the Tribunal’s standard of review in these cases, an administrative decision tainted by procedural unfairness should be considered unlawful. The facts in this case show that some elements were not investigated, although they should have been. Like the UNDT, I would have held that the investigation was strictly limited to the assault itself, which lasted a few seconds, in disregard of the alleged surrounding circumstan07le5.9(h)-321.4372 0 Trn55191 Tc.2396 Tw[(anction)-583g.1(w)-1onds, in e TO

Mr. Ouriques' misconduct.¹² In this way, although the decision-maker mentioned some of the mitigating factors, he was not aware of the whole context of the situation, as the investigation did not probe all the elements to appropriately assess the specific situation.

Unlawfulness: the Administration's failure to investigate the surrounding circumstances

4. There is no evidence that there was any investigation into the discrepancies between Mr. Ouriques' oral statements and the other staff member's e-mails regarding the origin of the confrontation that resulted in

7. The medical certificate presented by Mr. Ouriques in November 2014, while on administrative leave,¹⁴ clearly states that Mr. Ouriques at the time of the event had been undergoing psychotherapy treatment for two months due to a difficult family situation, which could explain a change of mood and

involved “failed in their duty to ensure the decision-maker had all relevant information upon which to base the decision”.¹⁹

10. It is not clear to me that, at the time of the event, Mr. Ouriques was able to understand the nature and quality of his actions. Obviously, this does not justify the deplorable assault by a staff member of another staff member. However, it means that a proper inquiry should have been carried out regarding Mr. Ouriques’ mental health after the presentation of the medical certificate²⁰ put the Administration on notice of Mr. Ouriques’ ongoing psychotherapy treatment—which it received just a day or two after the issuance of the 11 November 2014 preliminary report by the SSS—in order to establish what impact his medical condition had on his misconduct. This information—particularly if it substantiated a medical condition beyond “stress”—could have been a mitigating factor leading the Administration to choose a less severe disciplinary measure than termination for a staff member with long, satisfactory service and no prior history of misconduct.

Effect of the flaws on the administrative decision

11. Neither provocation nor Mr. Ouriques’ mental state had been properly investigated before the final administrative decision, although he was on administrative leave for an initial period of two weeks, subject to extension.²¹ There is no information on the record about what kind of investigation was conducted during this administrative leave. The preliminary report (and not a final report) appears to be the only basis for the termination decision.

12.

gave his statements that same day, during which he expressed willingness to visit the victim in his office to apologize.²⁴ That reveals not only a willingness to fully collaborate with the investigation (which is a staff member's duty), but also a particular and quick expression of contrition for his misconduct.

13. It follows from the foregoing that all the relevant facts on which the sanction was based in this case had not been satisfactorily and/or fully established such that the decision-maker was not in a position to adequately weigh all mitigating factors.²⁵ The Administration failed in its duty to properly investigate the facts, which were only partially established in the preliminary report.

Proportionality

14. Even if I were to be persuaded of the lawfulness of the Administration's decision, I nonetheless agree with the UNDT's conclusion that the sanction imposed was disproportionate. The record does not persuade me that the above-mentioned factors and the totality of the facts and circumstances were taken into account by the decision-maker as mitigating factors.

15. With respect to the UNDT's observations regarding an apparent trend in misconduct cases suggesting that termination with indemnity is the Administration's minimum sanction acceptable for an act of physical assault,²⁶ I note the following: While the application of a "parity of sanctions" is in general appreciated, this cannot lead to a fixed and inflexible minimum sanction to certain types of misconduct—at least not without prior notice to that effect being given via administrative issuance. As the UNDT observed, such a practice "would be inconsistent with the duty to issue proportionate sanctions because it would mean that the general nature and characterization of the misconduct would almost exclusively dictate the penalty".²⁷

16. Here, I agree with the UNDT that the Administration did not apply the pedagogic principle of progressive discipline, since Mr. Ouriques had a long and unblemished career, with no unbecoming conduct during the 15 years of service to the Organization.

²⁴ E-mail dated 10 November 2014, page 57 of the record before the Appeals Tribunal.

²⁵ Impugned Judgment, para. 57.

²⁶ Impugned Judgment, paras. 39-40.

²⁷ *Ibid.*, para. 40.

T

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Halfeld

Entered in the Register on this 22nd day of June 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar