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Judgment No. UNDT/2020/193 Sheds Light on Determining the Lawfulness of Disciplinary Sanctions and Administrative Measures Following Investigations into Misconduct

In Brief

The United Nations Dispute Tribunal (Judge Joelle Adda) recently decided in favour of a staff member who contested a decision to apply a disciplinary sanction and administrative measure following an investigation by the Office of Internal Audit and Investigations (OIAI) when there was scant and contradictory evidence of her having committed the misconduct alleged. The Tribunal examined the burden of proof involved in applying the disciplinary sanction and whether it was proportionate to the conduct alleged. More significantly, it reviewed the standard of review in applying administrative measures and the effect of administrative measures on a staff member's employment within the Organization, which previously has not received much attention before the Tribunal. It found in this case, that both the disciplinary sanction and administrative measure were unlawful, ordered their rescission, and granted the staff member compensation.

Facts and Decision

The staff member (level D-1) was placed on administrative leave shortly after learning that she was the subject of an OIAI investigation. After completion of the OIAI process, the Deputy Executive Director, Management (Deputy ED) determined that the staff member shouted at a supervisee on three occasions. The Deputy ED sanctioned the staff member by placing a written censure in her official status file for five years and removing her from her supervisory functions for a period of two years. The staff member appealed, arguing, among other things, that the Respondent Organization did not meet its standard of proof in showing misconduct, that it violated the staff member's due process rights, that the decision to place her on administrative leave was a disguised disciplinary measure,[1]

[1] Unfortunately, the staff member did not contest this administrative decision within the time limits allowed. Counsel argued in the pleadings that the Tribunal should nonetheless review the decision as it made up part of the investigative process, which was concluded with the

that the sanction was disproportionate to the conduct alleged, and that it was tainted by bad faith, ill-will, bias, and prejudice.

Burden of Proof[2]

Upon review of the issue of whether the disciplinary sanction of placing a written censure in the staff member's official file for five years was lawful, the Tribunal examined whether the facts upon which the sanction was based were sufficiently established to prove misconduct.

Recalling that the basis for imposing the disciplinary sanction was that the staff member had shouted at a supervisee on three occasions, the Tribunal dissected each alleged occasion. The Tribunal found that, regarding the first and second occasions of alleged shouting, only the witness who had filed a complaint against the staff member alleged that she had shouted, and no other witnesses came forward to corroborate this.

Regarding the third alleged instance, the UNDT found that the sanction letter made no reference to any witness statements affirming that the staff member had shouted, and it was only in the pleadings before the Tribunal that Respondent made that claim.

The Tribunal concluded that, by the Deputy ED's own accounts, the staff member only shouted on two occasions, but that:

> […] the two testimonies to this effect were both given by staff members who had already filed misconduct complaints against the Applicant. […] These two witnesses therefore had a vested interest in the outcome of the disciplinary process, and the evidentiary weight of their testimonies is therefore to be assessed in this light. Also, it is telling that according to the Deputy ED's own account, no other witnesses—even though they were present at both occasions—stated that the Applicant had actually shouted at either [staff member].

The Tribunal also noted that "the Deputy ED based her decision on the fact that 'it was reasonable *to assume* that such conduct would cause embarrassment and/or humiliation". The UNDT found that such assumption held no evidentiary value, *i.e.*, it was not established that either witness in fact suffered embarrassment and/or humiliation.

The Tribunal determined that the facts were not lawfully established.

Proportionality of the Disciplinary Measure (Censure)

The Tribunal next reviewed whether the sanction imposed was proportionate to the misconduct alleged.

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transmission of the disciplinary sanction, but the UNDT did not accept this argument, holding firm to the policy that staff must first request management evaluation of a disciplinary decision pursuant to Staff Rule 10.2(a) and (b). Counsel hopes to be able to address the issue of administrative leave being used as a disguised disciplinary sanction in the future, as similar cases are currently undergoing litigation.

[2] In this case, because the sanction fell short of dismissal, the proper standard of proof for the Organization to prove the facts was through a preponderance of the evidence.

The Tribunal noted that neither the Deputy ED in the sanction letter, nor the Respondent in its submissions, qualified whether the staff member's actions amounted to misconduct or what category of misconduct she had committed, according to CF/EXD/2012-005, art. 1.4, or whether the complainants actually were humiliated or embarrassed.

In short, "the basic reason and legal foundation for imposing the disciplinary sanction of written censure placed in the Applicant's official status file for five years is missing". Nonetheless, the Tribunal examined the case as one of harassment and abuse of authority, which are actions considered to be misconduct, because the OIAI investigation report was titled, "Investigation report on harassment and abuse of authority […]".

The Tribunal reviewed the definitions of harassment in sec. 1.1(b) of CF/EXD/2012-007 and sec. 1.1(d) of CF/EXD/2012-007 and found that, as the Respondent had not established the facts according to the requisite standard, it would review the facts "not in dispute", which included the subject staff member's admissions that she may have "expressed irritation", that things "became contentious" during one of the subject meetings, and that she "lost [her] cool" and "spoke sharply", none of which met the definitions of harassment set out in the above cited policies. Thus, the established facts were not determined to qualify as misconduct and the disciplinary sanction was found to be unlawful, rendering the issue of proportionality irrelevant.

Standard of Review of Administrative Measure (Removal from Supervisory Functions)

The Tribunal took note of the fact that the legal framework provided by the Respondent did not provide any provisions regarding how and on what basis a decision to impose an administrative measure of removal of all supervisory functions could be taken. Still, it considered that *Yassin* (2019-UNAT-915) held that, because an administrative measure can have an adverse impact on a staff member's career, "it must be warranted on the basis of reliable facts, established to the requisite standard of proof […] [*i.e.,* preponderance of evidence] […] and be reasoned in order for the Tribunal to have the ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals[…]". The UNDT further looked to *Elobaid* (2018-UNAT-822) in determining that administrative measures, while not as consequential as disciplinary sanctions, must nonetheless be transparent, proportionate, and fair., and a staff member must be allowed to comment on the action imposed. And, while not as formal as disciplinary sanctions, they are more flexible in order to allow for greater efficiency for the Organization and likewise involve acts of discretion.

In this case, the staff member presented that she was subject to an annual Senior Staff Rotation Exercise and was less than five years from retirement. She argued that the disciplinary sanction of censure and the administrative sanction of being unable to supervise for two years would take her out of the running for just about any D-1 level post, as most directorships involve managing staff. She further maintained that the measures went beyond merely highlighting or correcting certain behaviour and were therefore excessive and appeared aimed at removing her from the Organization.

The UNDT found that:

> […] the impact of an administrative measure on a staff member must, per definition, be less punitive than a disciplinary sanction, as also set out in

> *Elobaid*, paras. 26 and 27 […] Otherwise, the administrative measure could open a window to circumvent the exhaustive list of disciplinary sanctions in sec. 4.3 of CF/EXD/2012-005 and impose non-authorized, but disguised, disciplinary sanctions without granting the corresponding due process safeguards that necessarily follows a disciplinary process (in line herewith, see also *Elobaid*).

The Tribunal further considered that D-1 level posts are indeed typically senior manager positions, and that depriving the staff member of undertaking any supervisory responsibility would put her in a precarious situation, particularly as she served on a fixed-term appointment and was part of the rotational program. Furthermore, she would have to disclose the existence of the disciplinary measure when applying for posts, further jeopardizing her ability to find a job. The administrative measure, in combination with the disciplinary sanction, had "some degree of probability [to] have led to her eventual separation from service with the United Nations", and "[t]he actual effect of the administrative measure on the Applicant's professional career might consequently have been harsher than the majority of the disciplinary sanctions listed in sec. 4.3 of CF/EXD/2012-005[…]". The Tribunal stated that this must have been evident to the Deputy ED when she imposed the administrative measure.

In short, the administrative measure was not lawful and, in accordance with *Yassin*, was not "warranted on the basis of reliable facts, established to the requisite standard of proof, namely that of 'preponderance of evidence'", and "on the established facts before the Tribunal, the measure was not proportionate to the Applicant's established wrongdoings".

Bad Faith, Ill-Will, Bias, and Prejudice

The Tribunal held, on the issue of there being an ulterior motive for the impugned decision, that the staff member had not proven that to be the case, even though it earlier recognized that the Deputy ED had to have been aware of the impact that the administrative decision imposed upon the staff member (*i.e.,* that the decision could result in her removal from the Organization, which would appear, in Counsel's opinion, to evidence bad faith).

Remedies

In determining damages, the Tribunal rescinded the disciplinary sanction and administrative measure under art. 10.5(a) of the Tribunal's Statute. In light of the "severity of the illegality combined with the Applicant's reputational damage and her distressed efforts to find new employment", the Tribunal ordered compensation in the amount of three months net salary.[3]

Commentary

It is Counsel's observation that cases involving investigations and disciplinary process have been on the rise in recent years. Judgment No. UNDT/2020/193 is helpful as it

[3] The Respondent appealed only the damages portion of the Tribunal's Judgment to the United Nations Appeals Tribunal. Counsel is not clear why it did not appeal the substantive elements of the case, especially as it has been its habit to do so in recent years. Counsel has responded to the appeal which, at the time this article is being written, is still before the UNAT.

provides guidance on how to litigate such cases, in addition to the few staff-friendly cases that exist (*Sanwidi, Elobaid, Yassin*).

The burden of proof has long been established for disciplinary cases, but in determining whether that burden of proof was met, an appellant can look to whether contradictory and inconsistent evidence was relied upon in taking an impugned decision, and at what stage such evidence was inconsistent. Here, the Tribunal made a point of noting that the decision-maker's (Deputy ED's) own account of the facts was inconsistent, and that the Respondent presented a different version of the facts as those presented by the Deputy ED, and therefore vitiated the impugned decision based on those inconsistencies.

It is also important to scrutinize the language used throughout the investigations and disciplinary process. In this case, the Tribunal recognized that it was, essentially, wishful thinking that the decision-maker "assumed" that subordinate staff "could be" humiliated or embarrassed by the alleged misconduct, not that they were. It also determined that the decision-maker had not stated what category of misconduct the staff member was alleged to have violated.

Perhaps more significantly, the Tribunal clarified some especially important issues surrounding the application of administrative measures. It recognized that such measures must be less punitive than disciplinary measures, or else the Administration could call what are essentially disciplinary measures an administrative measure and get away with it, avoiding due process protections that go along with the disciplinary process. This case provided a great example of that, where the staff member was banned from supervising staff for two years but was less than five years from retirement and unlikely to obtain a D-1, almost assuring her removal from the Organization. The Tribunal recognized that, and it is noteworthy that it called out management for having known as much.