FICSA Federation of International Civil Servants' Associations

Laura Papasodaro
Consultant at Modulaw

Tips and Information Newsletter for International Civil Servants

October 2026

The role of the Tribunal in disciplinary cases

Introduction

How closely should an international administrative tribunal look at a disciplinary decision? In Order No. 105 (NY/2026) made on 19 June 2026, the UNDT restates an important principle: in disciplinary matters, the Tribunal's function is not confined to checking that the Administration followed a fair process; it extends to establishing the facts, testing them against the applicable standard of proof, and reviewing the sanction. This article sets out why disciplinary review is structurally different from administrative review, and what that difference means for the Tribunal in receiving and assessing evidence.

Facts of the case

The Applicant, in this case, is a former Senior Coordination Officer with a United Nations Mission who was separated from service, with compensation in lieu of notice, without termination indemnity, and listed in the ClearCheck database. The Applicant has appealed to the UNDT, arguing that their alleged misconduct was not properly proven by the record, and has requested a hearing at which the relevant witnesses can be heard.

The Applicant's substantive application challenges the credibility, veracity and genuineness of the witnesses in the investigation, and further argues that the investigation record was superficial and incomplete. The application contends that these issues can only be resolved by testing the evidence of the allegedly unreliable witnesses, and hearing testimony from other witnesses to clarify the factual findings in the investigation.

Two models of review

Outside of the disciplinary context, the Tribunal's role is deferential on factual findings. It only assesses whether a decision was lawful. It does not ask whether

the Administration made the right choice among the courses of action open to it. As UNAT has repeatedly put it, "*In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process, the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision*".[1] The Tribunal's task is, in short, to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner.

This approach to administrative review rests on an assumption that does not hold in disciplinary cases: that the impugned decision benefits from an inference of regularity, so that in practice the staff member bears the burden of showing that something went wrong.

The 105-NY-2026 order is a reminder that a different framework applies in the review of disciplinary cases: "*the impugned decision, as a disciplinary administrative decision, does not carry an inference of regularity or legality*".[2] A disciplinary sanction is treated as an accusation to be proven by an organisation, and the Tribunal has a broader role.

The 105-NY-2026 order recalls two premises that frame the whole exercise: the Applicant is the beneficiary of the presumption of innocence, and the Administration bears the burden of proving that misconduct occurred.[3]

Disciplinary review: a four-part test

Where a disciplinary sanction is under review, the UNAT's settled formulation is that the Tribunal must examine (i) whether the facts on which the sanction is based have been established; (ii) whether the established facts qualify as misconduct; and (iii) whether the sanction is proportionate to the offence.[4] To this, the Tribunal has added a fourth criterion: (iv) whether the staff member's due process rights were respected during the disciplinary process.[5]

This means that on the facts of any case, the Tribunal does not defer to the Administration's factual findings; it must independently assess whether they have been established to the required standard. Similarly, the Tribunal has to decide for itself whether the established facts amount to a breach of the applicable standard of conduct; it is not bound by the Administration's characterisation.

[1] 2010-UNAT-084, para 42.
[2] Order No. 105 (NY/2026), [16].
[3] Order No. 105 (NY/2026), [16].
[4] 2012-UNAT-195, see also: 2010-UNAT-098, 2010-UNAT-028 and 2010-UNAT-024.
[5] 2023-UNAT-1375, [63].

While the choice of sanction lies with the Administration in the first instance, the Tribunal will intervene where the measure imposed is manifestly disproportionate to the offence. Finally, the Tribunal will assess if due process rights were respected.

This is a materially heavier form of scrutiny than what is required for an administrative review, and it is heavier precisely because a disciplinary sanction engages the staff member's reputation, employment and life.

Evidence and the hearing: the judicial phase matters

Article 16.3 of the UNDT Rules of Procedure provides that "*a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure*" and the 105-NY-2026 order confirms that this is the norm "*under the jurisprudence of the Appeals Tribunal*".[6]

In the 105-NY-2026 order, Judge Ghita explains that the investigation report forms part of the body of evidence available to meet the burden of proof, but the investigative phase cannot accommodate the procedural guarantees proper to an adversarial process, in particular the right to be heard in relation to the taking of witness evidence. It is only in the judicial phase that equality of arms and the right to be heard are properly respected, and only there that the party under investigation is entitled to legal counsel.[7]

The practical consequence set out in the 105-NY-2026 order is that the Tribunal has scheduled a hearing and asked the parties to specify which witnesses they intend to call. This order does not address any substantive issues in the case but has been made as a matter of due process. The onus is now on the Applicant, during the hearing, to identify the issues properly in dispute, to cross-examine the respondent's witnesses sufficiently to raise doubt as to the factual findings made in relation to their evidence, and to lead relevant evidence from the Applicant's own witnesses.

Constraints on judicial review

One week after the 105-NY-2026 order, the UNAT clarified the boundaries of judicial review of disciplinary sanctions in the case of *Herrera*.[8] In this case, the complainant made a historical sexual assault allegation against Mr Herrera in 2023 in relation to events which occurred in 2014. Mr Herrera submitted some evidence in response but resigned before any disciplinary process could be commenced against him. UNHCR issued a final determination letter, one year later in 2024, finding that the allegation had been established and entering Mr Herrera's name in ClearCheck.

[6] Order No. 105 (NY/2026), [16].
[7] Order No. 105 (NY/2026), [16].
[8] 2026-UNAT-1670: decision dated 25 June 2026, published on 17 July 2026.

Mr Herrera appealed the decision to the UNDT. The Tribunal considered that the material evidence in the case was limited and the outcome depended largely on a credibility assessment of the witnesses, including the complainant. The UNDT dealt with this by issuing orders for the production of evidence from the complainant's university and the FBI, and to engage an "outside expert in forensic psychology or forensic psychiatry", based on Article 17 of the Dispute Tribunal Rules of Procedure. UNHCR lodged an interlocutory appeal against these orders.

The UNAT rescinded the UNDT's orders on the basis that the Tribunal of first instance is limited to assessing the record the Administration relied upon. The UNDT could not launch its own independent investigation into matters outside of that record, or otherwise delegate the core judicial task of assessing witness credibility to an outside expert, and could not compel the Administration to pressure a third party into releasing private records unconnected to the contested decision. The Appeals Tribunal considered that this would be akin to the UNDT exercising an inquisitorial or investigative function, or conducting a *de novo* investigation, which would clearly exceed the judicial review jurisdiction in Article 9(4) of the UNDT Statute.

Conclusion

The 105-NY-2026 order is a useful reminder that disciplinary review in the UN system is not a mere check of the administration's process. The presumption of innocence, the Administration's burden of proof, the absence of any inference of regularity, and a fair hearing in which witnesses are examined all serve the same end: ensuring that a sanction with career-ending consequences is tested through an adversarial process before it is confirmed. The Tribunal's review starts from the record assembled by the Administration and the facts on which the sanction was based, and the parties may supplement and challenge that record through evidence and cross-examination. The Tribunal may not, however, step outside this role to conduct its own investigation.

For similar updates, subscribe to Modulaw's monthly blog *or follow Modulaw on* LinkedIn
Website: **Modulaw**

Disclaimer

These resources and articles are provided for the convenience of FICSA members and do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you or your organization may have. The views expressed are those of the author(s) and do not necessarily reflect those of FICSA.