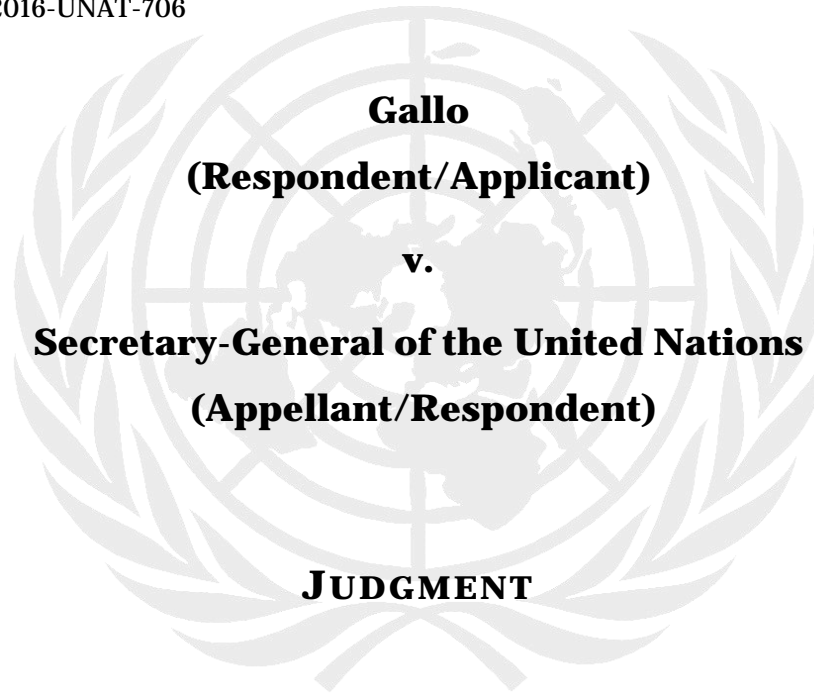




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-706



**Gallo
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Richard Lussick Judge Martha Halfeld
Case No.:	2016-940
Date:	28 October 2016
Registrar:	Weicheng Lin

Counsel for Mr. Gallo:	Self-represented
Counsel for Secretary-General:	Ernesto Bondikov

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/038, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 22 April 2016 in the case of *Gallo v. Secretary-General of the United Nations*. On 21 June 2016, the Secretary-General filed the appeal. On 16 August 2016, Mr. Gallo filed his answer. On 29 August 2016, the Registry informed Mr. Gallo that his answer would not be accepted for failure to conform to the Practice Direction on Filing of Documents and Case Management of the Appeals Tribunal (Practice Direction).¹

Facts and Procedure

2. The facts as found by the Dispute Tribunal read as follows:²

... [Mr. Gallo], a former Investigator at the P-4 level in the Office of Internal Oversight Services (“OIOS”), contest[ed] the 1 April 2015 decision, signed by the Deputy Secretary-General, on behalf of the Secretary-General, and based on the recommendation of the then Director of the Division for Human Resources (“DHR”) of the United Nations Children’s Fund (“UNICEF”), to place a written letter of reprimand in [his] Official [Status] File. As relief, [Mr. Gallo] request[ed] the rescission of the decision finding him guilty of misconduct, the rescission of the decision to impose a written reprimand, and financial compensation for him not having sought to renew his employment contract and having separated from the Organization.

...

... On 14 January 2014, on a white board in the Investigation[s] Division of OIOS (“ID/OIOS”), was written: “If the facts don’t fit the theory, change the facts – Albert Einstein”. In reference to the Dispute Tribunal’s judgment in *Nguyen-Kropp & Postica* [UNDT/2013/176, issued on 20 December 2013] and for satirical purposes, [Mr. Gallo] changed the ending to read: “If the facts don’t fit the theory, change the photographs” and attributed the quote to another staff member in OIOS.

¹ The same day Mr. Gallo filed his answer, the Registry informed him that his filing would not be accepted for failure to conform with the requirements and asked him to correct and refile. The Registry referred Mr. Gallo to the Appeals Tribunal’s Practice Direction and provided him with contact information to clarify any questions. On 18 August 2016, Mr. Gallo refiled his answer; the Registry informed him that the filings still did not conform with the format requirements and granted him leave to refile only the answer brief by close of business on 19 August 2016. On 21 August 2016, Mr. Gallo notified the Registry that he would not reformat his answer. On 22 August 2016, the Registry informed Mr. Gallo that as his answer brief did not conform to the requirements it would not accept it, a position which it confirmed on 29 August 2016.

² Impugned Judgment, paras. 1 -33.

... By memorandum dated 17 January 2014, [Mr. Gallo]'s first reporting officer requested the Director of ID/OIOS to initiate a formal investigation into the matter in accordance with sec. 5.11 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

... By memorandum dated 31 January 2014, the then Under-Secretary-General of OIOS ("USG/OIOS") appointed a fact-finding panel to investigate the first reporting officer's report against [Mr. Gallo] for prohibited conduct under ST/SGB/2008/5. On the same date, by memorandum, the then USG/OIOS informed [Mr. Gallo] of the initiation of the fact-finding investigation and the establishment of a fact-finding panel.

...

... On 31 March 2014, the fact-finding panel submitted its investigation report concluding that [Mr. Gallo]'s actions and behavior towards one of his OIOS colleagues constituted harassment under sec. 1.2 of ST/SGB/2008/5.

... By a memorandum dated 9 April 2014, the USG/OIOS forwarded the fact-finding panel's investigation report to the Assistant Secretary-General, Office of Human Resources Management ("ASG/OHRM") for her consideration of disciplinary action against [Mr. Gallo] and informed the ASG/OHRM that the USG/OIOS concurred with the finding that [Mr. Gallo]'s behavior together with continuing [actions] following the complaint [...] constituted [...] misconduct.

... By a note dated 29 October 2014, the Under-Secretary-General, Department of Management ("USG/DM") advised the then Chef de Cabinet that the matter would be more suitably assessed and administered by an entity outside the United Nations Secretariat in order to avoid the appearance of any potential conflict of interest, and therefore it would be transferred to UNICEF.

... On 6 November 2014, the USG/DM requested the Executive Director of UNICEF to assess and administer the possible disciplinary matter concerning [Mr. Gallo] and, on the same day, approval was provided on behalf of the Secretary-General for delegating authority with regard to this matter to UNICEF.

... By memorandum dated 1 December 2014, the USG/DM informed [Mr. Gallo] that the fact-finding panel had found that the available evidence supported the allegations that he had engaged in conduct amounting to harassment, as defined by sec. 1.2 of ST/SGB/2008/5. The USG/DM further stated that the Secretary-General had decided to delegate to UNICEF the authority to assess and make a final recommendation on the resolution of the matter.

... On 5 January 2015, [Mr. Gallo] presented his comments to the fact-finding panel's investigation report.

... On 11 February 2015, the then Director of DHR/UNICEF, informed the USG/DM of his decision not to pursue the matter with reference to sec. 5 of ST/AI/371 (Revised

disciplinary measures and procedures) and of his recommendation for a written reprimand to be issued against [Mr. Gallo].

... On 16 March 2015, [Mr. Gallo] separated from service with the United Nations Secretariat following the expiration of his fixed-term appointment.

... By letter dated 1 April 2015, the Deputy Secretary-General, on behalf of the Secretary-General, informed [Mr. Gallo] that the Secretary-General had accepted the recommendation of the then Director of DHR/UNICEF and that “the current letter will serve as a written reprimand, issued pursuant to Staff Rule 10.2(b), which shall be placed in [Mr. Gallo’s] Official Status File”.

... [Mr. Gallo filed an] application [with the UNDT] on 2 July 2015.

3. On 22 April 2016, the UNDT issued the impugned Judgment. It found Mr. Gallo’s application receivable *ratione materiae* on the grounds that the written reprimand had been issued pursuant to Staff Rule 10.2(b) (i) as a non-disciplinary measure following the completion of disciplinary proceedings under ST/AI/371, Amend.1.; and, thus, Mr. Gallo was exempted from the requirement to seek management evaluation prior to filing his application with the UNDT in accordance with Staff Rule 11.2(b).³

4. On the merits, the UNDT held *inter alia* that the decision to issue the written reprimand and place it in Mr. Gallo’s Official Status File was unlawful and ordered the rescission of that decision and the removal of the 1 April 2015 letter from Mr. Gallo’s file.⁴ In reaching its decision, the UNDT held that a “disciplinary or non-disciplinary measure [could] not be imposed on a former staff member, since the Secretary-General’s authority to sanction [ceases to] exist... from the date of separation from the Organization”.⁵ Thus, although the investigation had taken place prior to Mr. Gallo’s separation, the contested decision was unlawful because he had already separated from the Organization when it was issued. In the UNDT’s view, both disciplinary and non-disciplinary measures had the effect of sanctioning or imposing an administrative measure on staff members, and that the Secretary-General could impose such measures upon a staff member only where there was a contractual relationship between the Organization and the staff member.⁶

³ *Ibid.*, paras. 51-66.

⁴ *Ibid.*, paras. 67-75 and 79.

⁵ *Ibid.*, para. 72.

⁶ *Ibid.*, paras. 71-75.

5. The UNDT rejected Mr. Gallo's requests to rescind the decision finding him guilty of misconduct, since it found that no decision was taken in that regard, and to grant him financial compensation, since it found that the record did not demonstrate any economic loss suffered.⁷

Submissions

The Secretary-General's Appeal

8. The UNDT erred in law when it held that the reprimand, issued after separation, was unlawful and that a written reprimand had the effect of a disciplinary sanction, thereby erroneously equating a reprimand to a disciplinary sanction. Both the Staff Rules and relevant jurisprudence are clear that a written reprimand is, by statutory definition, not a disciplinary measure and does not amount to a sanction. Its character and effect does not depend on the context in which it is issued as Staff Rule 10.2(b)(i) does not distinguish between a written reprimand issued by management in the regular course of a staff member's service, and one issued after the completion of a disciplinary process.

9. The UNDT further erred in law when it held that a written reprimand could be issued and placed in a staff member's file only while the staff member was in active service of the Organization. Such a conclusion would mean that actions by a staff member in his or her last days of service could not be recorded unless done so prior to the staff member's separation, and that the Secretary-General's broad discretion and authority in administrative matters could be obviated by a staff member simply resigning or otherwise separating from the Organization. There is no requirement in the Staff Regulations or Rules that conditions the Secretary-General's discretionary authority to issue a written reprimand as a non-disciplinary measure pursuant to Staff Rule 10.2(b)(i) on the existence of an ongoing appointment; nor is there any jurisprudence requiring a subsisting employment relationship for purposes of administrative non-disciplinary measures. Such a requirement would render nugatory those standards of conduct that survive active service (e.g., ongoing confidentiality obligations per Staff Regulation 1.2(i), the post-employment restrictions set forth in ST/SGB/2006/15, etc.); it also would prevent the Secretary-General from dealing with the consequences of such after-service conduct.

⁷ *Ibid.*, paras. 78 and 80.

10. The Secretary-General acted within his authority when, based on Mr. Gallo's conduct as a staff member, he decided to issue a non-disciplinary administrative measure in the form of a written reprimand and place it in Mr. Gallo's Official Status File. Accordingly, the UNDT erred in law when it rescinded this decision and when it ordered the removal of the letter from Mr. Gallo's Official Status File.

11. The Secretary-General respectfully requests the impugned Judgment be vacated with respect both to the UNDT's holding that the written reprimand was unlawfully issued and to the order to remove the reprimand from Mr. Gallo's Official Status File.

Considerations

Preliminary matter – Mr. Gallo's answer to the appeal

12. As noted above, Mr. Gallo's filings were rejected by the Registrar for failure to conform to the Appeals Tribunal's Practice Direction. The Appeals Tribunal notes that pursuant to Section I.F (Manifestly inadmissible filings) of the Practice Direction, Mr. Gallo had the opportunity to appeal the Registrar's decision to reject his filing to the President of the Appeals Tribunal within five days of receipt of the decision. Mr. Gallo did not do so. Accordingly, this Tribunal does not review this decision. We simply note that the Practice Directions are publicly available, are applicable to all parties and that it is always possible to request clarification from the Registrar when preparing submissions.

Errors in law or fact

13. The main issue on appeal is whether the UNDT erred in law or fact when it concluded that "the decision to impose a non-disciplinary measure against [Mr. Gallo], who was no longer a staff member at the date of issuance of the written reprimand, [was] unlawful".⁸

14. In reaching its decision, the UNDT first reviewed the applicable Staff Rules and noted that "[i]t clearly results that the Secretary-General, as the Chief Administrator, or the official with the delegated authority, has the discretionary authority to ... impose [a] disciplinary or an administrative (non-disciplinary) measure against a staff member."⁹ We agree, and note that

⁸ *Ibid.*, para. 79.

⁹ *Ibid.*, para. 68.

Staff Rule 10.2 provides in clause (a) for a spectrum of disciplinary measures which can be instituted against staff. It also provides for the imposition of non-disciplinary measures:

Staff Rule 10.2

(b) Measures other than those listed under staff rule 10.2(a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

(i) Written or oral reprimand

15. Accordingly, there is no dispute that the Secretary-General has the discretionary authority to issue a non-disciplinary administrative measure in the form of a written reprimand as provided for under Staff Rule 10.2(b)(i); this written reprimand is not a disciplinary measure or sanction even when issued following a disciplinary proceeding.

16. The UNDT erred, however, when it went on to conclude that a written reprimand could only be placed on the file of a staff member in active service in the Organisation and not, as in this case, on the file of a former staff member. In the UNDT's view, "all the legal provisions mentioned [in its Judgment, i.e., the Staff Rules] have a common mandatory element, notably that they apply only to an existing, valid contract based on which the Secretary-General, as the employer, can exercise his discretionary authority".¹⁰ The UNDT's focus was on the word "staff member" and it found this determinative. Because the administrative measure was imposed upon Mr. Gallo when he was no longer a staff member (by virtue of the expiration of his fixed-term contract), the UNDT concluded it was unlawful. The UNDT further "underlined" that "[i]f the decision to impose a disciplinary or non-disciplinary measure is not finalized before the expiration of the contract, no course of action can be taken after this date, except if both parties (the staff member and the Organization) agree for the contract to be extended".¹¹ We could not disagree more.

17. First, there is no requirement in the Staff Regulations or Rules that provides that the Secretary-General's discretionary authority to issue a written reprimand as a non-disciplinary measure pursuant to Staff Rule 10.2(b)(i) is predicated upon and limited to the existence of an ongoing employment contract. Nor is there any jurisprudence from this Tribunal requiring such an existing employment relationship in order to issue administrative non-disciplinary measures.

¹⁰ *Ibid.*, para. 70.

¹¹ *Ibid.*, para. 74.

18. Second, we agree with the Secretary-General that this reasoning, were it to prevail, would render nugatory those standards of conduct (e.g., confidentiality obligations pursuant to Staff Regulation 1.2(i), amongst others) that survive active service. More importantly, from a practical perspective, it would also stymie the Secretary-General's ability and discretionary authority to properly manage investigations and discipline staff. The Secretary-General clearly has the authority to administer the Organization's records, including those of former staff members, and to ensure they reflect the staff member's performance and conduct during his or her period of employment.¹² This authority does not lapse upon the staff member's separation from service. In this regard, we are persuaded by the Secretary-General's submission that to conclude otherwise would mean that the conduct by a staff member in his or her last days of service could not be recorded in the Organization's files if the staff member separated prior to such conduct being recorded. As the Secretary-General argued, a staff member could essentially obviate the Administration's broad discretion and authority in administrative matters by simply resigning or otherwise separating from the Organization.

Judgment

19. The appeal is granted and Judgment No. UNDT/2016/038 is hereby vacated in part, with respect to the UNDT's holding that the issuance of the written reprimand regarding conduct committed during employment was unlawful and its order to remove the reprimand from the former staff member's Official Status File. We order, pursuant to Article 2(3) of the Statute of the Appeals Tribunal, that a copy of Judgment No. UNDT/2016/038 and the present Judgment be placed as well in Mr. Gallo's Official Status File, so that it also reflects his views as presented before the Tribunals.

¹² See *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/069/Corr.2, para. 11.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Halfeld

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar