



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/048

Judgment No.: UNDT/2021/020

Date: 8 March 2021

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PAPAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Marisa Maclellan, UNHCR
Francisco Navarro, UNHCR

Introduction

1. The Applicant is staff member of the United Nations High Commissioner for Refugees (“UNHCR”). He is contesting the High Commissioner’s decision to impose on him the disciplinary measure of a fine of two months’ net base salary pursuant to staff rule 10.2(a)(v) and the placement of the disciplinary measure in his official status file (“the contested decision”). The Respondent argues that the application is without merit because the disciplinary measure is proportionate to the gravity of the Applicant’s misconduct. For reasons set out below, the Tribunal rejects the application.

Facts and Procedure

2. The Applicant joined UNHCR in 1993 and has served in different positions in various countries over the course of his career. Between February 2013 and May 2017, he held the position of Senior Desk Officer (P-4) in Geneva. From 1 June 2017, he has been the UNHCR Head of Operations (P-5) in Laayoune, Western Sahara.¹

3. On 22 February 2018, the Office of Internal Oversight Services (“OIOS”), reported to the UNHCR Inspector General’s Office (“IGO”) that, during the course of an audit on the use of telecommunication devices and telecommunication expenditure control and billing at UNHCR, they had discovered that the Applicant had not reimbursed UNHCR approximately CHF2,838 for private telephone calls and CHF634.67 for use of the internet between January 2016 and October 2017.²

4. The IGO opened an investigation and, on 24 May 2018, shared the draft findings of the investigation with the Applicant and invited him to provide his comments, which he did on the same day.³

¹ Reply, para. 5.

² Reply, annex R/1, annex 7 to the OIOS Investigation Report.

³ Reply, annex R/1, annex 6 to the OIOS Investigation Report.

5. On 28 May 2018, the IGO transmitted the final version of the investigation report to the Division of Human Resources (“DHR”).⁴ The IGO concluded that the available evidence supported a finding that the Applicant engaged in misconduct by failing or neglecting to declare some private telephone calls and short message services (“SMSs”) on his official mobile phone invoices or paying for them which could constitute fraud and/or gross negligence. It was estimated that he had failed to reimburse a total amount of CHF2,838.

6. By letter dated 10 October 2018, the Director/DHR transmitted the allegations of misconduct to the Applicant for his response.⁵

7. The Applicant responded to the allegations on 21 November 2018. He did not deny that he had incurred the charges but pleaded for leniency in view of the stressful circumstances he was undergoing at the time as mitigating factors.⁶

8. By letter dated 18 March 2019, the Director/DHR transmitted the contested decision to the Applicant.⁷

9. On 9 May 2019, the Applicant filed this application challenging the contested decision.

10. The Respondent filed a reply on 11 June 2019.

11. The Applicant filed a rejoinder to the reply on 24 June 2019.

12. The Tribunal held a case management discussion (“CMD”) on 10 February 2021. At the CMD, the parties agreed that the application would be determined based on their pleadings and supporting documentation without the need for an oral hearing.

13. The parties filed closing submissions on 25 February 2021.

⁴ Application, annex 6.

⁵ Reply, annex R/3.

⁶ Reply, annex R/4.⁶

⁷ Application, annex 1.

Submissions

The Applicant

14. The disciplinary measure is unreasonably harsh. He cooperated with the investigation throughout. He immediately offered to reimburse any amounts owing. The fact that he laughed and questioned the wisdom of spending resources on an exercise as long and expensive as an investigation has been taken out of context, weaponised and used against him. The imposition of such an extreme disciplinary measure is not warranted.

15. The financial penalty if imposed would cause him irreparable harm. The amount in question, approximately USD16,500, is unreasonably high and out of all proportion to the offence. When the unpaid phone calls were brought to his attention, he immediately reimbursed the Organization the amount indicated, USD2,500. The Applicant submits that there was no malice, ill will or intent to defraud on his part.

16. The inequality of arms where the Administration can interpret a laugh or a comment on administrative waste as reckless and thereby impose such brutal sanctions amounts to an abuse of authority. Moreover, the term reckless implies a degree of wilful and conscious agency on his part. This was not the case, as he made clear in his initial response to the IGO's report where he emphasised the emotional stress that he was undergoing. In the distracted state that he was in it was inevitable that he would make errors and oversights such as with identifying whether a phone number was private or official.

17. The disciplinary measure imposed is not warranted in view of his long record of exemplary service not only to refugees but also to fellow staff in the field and at Headquarters, but also through serving on joint bodies, social committees and working groups where he helped countless colleagues and the Administration over a period spanning more than 26 years of unstinting loyalty to the Organization.

18. It is unethical and inappropriate to raise a case that was closed 10 years ago with the Director/DHR's memo having been removed from his file. This slanderous insinuation should not be receivable by the UNDT.

19. It is disingenuous of the Respondent to suggest that he can afford to pay the disciplinary measure in instalments of USD3,300 because his gross salary amounts to over USD15,000. His net take home pay is currently not more than USD9,500 as a single parent on one salary supporting a son at university and paying a mortgage for the family home as well as having to rent accommodation at his duty station. A deduction from his income of this amount would be devastating for them.

20. This type of unethical comparison, gross salary versus instalment recoveries by the Respondent shows a pathological degree of disrespect not only to him but to the UNDT and the whole United Nations internal justice system. It is a malicious statement and should be rejected by the Tribunal.

21. The Applicant submits that he has filed documents showing the major living expenses that he has been incurring including: fees for his son's university studies; rent for his son's university accommodation; quarterly mortgage payments for his home; and rental payments for his accommodation at his field posting in Laayoune. Since his function is similar to that of an ambassador and as part of his functions, he needs to receive and entertain other diplomats appropriately.

22. The Applicant further submits that he is a widowed father with no other source of income for his family and that the UNHCR salary is declining in value because of the weakening of the United States of America dollar. His salary is only enough to cover his and his son's living expenses.

23. Given these extenuating circumstances, the Applicant submits that the financial penalty should be waived and instead a more reasonable form of disciplinary measure such as a reprimand, that can be placed on his file be imposed instead.

The Respondent

24. The Respondent submits that the facts are undisputed. The Applicant has not contested that he failed to declare thousands of personal calls and reimburse UNHCR. The Applicant has not questioned that he committed misconduct and has not raised any questions of due process.

25. The Applicant has only asserted that the disciplinary measure is unreasonably harsh. Accordingly, the sole point in issue is whether the disciplinary measure was proportionate to the gravity of the Applicant's misconduct.

26. The Applicant's misconduct is serious. All staff members have a duty under the Staff Regulations and Rules to uphold the highest standards of integrity and competence, to exercise reasonable care when utilizing the Organization's property and assets, and to exercise reasonable care in any matter affecting the financial matters of the Organization. The Applicant is a senior official at the P-5 level whose current and previous responsibilities include managing and overseeing UNHCR's humanitarian operations. He occupies a position of trust and responsibility. Therefore, a high standard of integrity and thoroughness is expected of him in matters involving the use of UNHCR assets and the expenditure of its resources.

27. Instead of discharging his obligation with diligence and care, however, the Applicant certified hundreds of personal calls as official and failed to reimburse UNHCR month after month for nearly two years. The Applicant knew that 70% of all calls he made from his official UNHCR-issued phone were personal, since he made those calls. The Applicant also knew that he regularly called his son. Indeed, he did so 100 times per month on average. Yet, the Applicant failed to identify any of those 2,240 calls to his son as personal. He failed to declare an additional 2,000 personal calls. He only reimbursed CHF252, 8% of the costs, and let UNHCR pay for the remaining CHF2,838. The sheer volume of undeclared personal calls shows the extent to which the Applicant failed to comply with his duty, which goes well beyond making a handful of inevitable mistakes.

28. The Applicant's view, expressed repeatedly during his interview with the investigators, that the Division of Information Services Technology ("DIST") should have alerted him to the fact that he was certifying personal calls as official further illustrates the Applicant's reckless attitude with respect to both the use of UNHCR resources and the discharge of his obligations. It was manifestly unreasonable for the Applicant to expect UNHCR to identify for him his calls to relatives, friends, hotels, restaurants, shops and various other service providers. If the Applicant had no time to identify his personal calls, he should not have made those calls from his official UNHCR-issued phone in the first place.

29. The Applicant's misconduct is thus serious on account of its nature and scale as well as the high standards expected from the Applicant. In addition, consistent with the jurisprudence of the United Nations Appeals Tribunal ("UNAT"), the High Commissioner considered as an aggravating circumstance the prolonged period of time during which the Applicant was reckless and failed to exercise reasonable care in the use of his official UNHCR-issued phone.

30. The High Commissioner also considered as an aggravating factor the contempt for the investigation displayed by the Applicant during his interview. A review of the verbatim transcript shows that he did not take the investigators or the investigation seriously. The Applicant laughed when he asked to confirm that he had understood the explanation about the investigation process and commented that he had heard it all before. The Applicant laughed and responded, "Is this serious?", when he was asked to swear to tell the truth.

31. The Applicant's scornful attitude during his interview is not consistent with his obligation to cooperate with duly authorized investigations in accordance with staff rule 1.2(c). It is also illustrative of the Applicant's lack of remorse. The Applicant's explanation that he was questioning the wisdom of spending resources on an exercise as long and expensive as an investigation rings hollow in light of his own conduct. The consideration of the Applicant's attitude as an aggravating circumstance is therefore a reasonable exercise of the High Commissioner's discretion.

32. As mitigating factors, the High Commissioner took into account the Applicant's admission of the facts and his offer to reimburse UNHCR. The Applicant's personal circumstances and stress in connection with the situation of his son were also considered as a mitigating circumstance – even if the information relayed by the Applicant did not concern the entire relevant period and in spite of the fact that the Applicant's stress did not affect his performance during 2016.

33. The Applicant also asserts that the disciplinary measure is not warranted in light of his long record of exemplary service to the Organization. The Respondent notes that the Applicant was the subject of an investigation into allegations of misconduct in 2009. Although the then Director/DHR considered that the Applicant had committed misconduct, he decided not to institute disciplinary proceedings on compassionate grounds related to the Applicant's personal circumstances. As the case was closed, the Applicant was specifically reminded of his duty to make responsible use of the information and resources to which he has access by reason of his employment with UNHCR. The letter was removed from the Applicant's Official Status File three years later. The High Commissioner did not take this matter into account as an aggravating factor. The Applicant, however, does not have an unblemished record that may be considered as a mitigating circumstance.

34. The High Commissioner considered the parity principle, which requires equality and consistency in the treatment of employees, by examining the disciplinary measures applied in similar cases. The disciplinary measure of a fine of two months' net base salary is thus fully within the range of sanctions imposed in similar cases. The High Commissioner was actually more lenient in that he did not impose a demotion or a written censure. The adopted sanction was not the most severe available. The Applicant could have lost multiple steps in grade, resulting in a greater financial detrimental impact for him, or been demoted. There is no merit to the Applicant's assertion that his case is distinguishable from the cases in which the Secretary-General imposed a harsher disciplinary measure

35. The Applicant's submission that it is impossible for him to pay the fine at once disregards the fact that, on 12 April 2019, four weeks before he filed his application, UNHCR offered that he pay it in five instalments, one instalment equal to USD3,356 and four instalments equal to USD 3,200. Considering the Applicant's monthly gross earnings were then USD15,374.44, the Applicant's claim that the fine will cause him an irreparable harm is not substantiated.

36. After the sanction was imposed, and after he repaid the financial loss to UNHCR, the Applicant has asked that his personal circumstances after the misconduct, particularly his financial situation, be taken into account with respect to the choice and execution of the disciplinary measure. The Respondent submits that there is no basis in the regulatory framework or the jurisprudence for that consideration and that, even if there were, the Applicant's financial hardship has not been established.

37. There is no precedent in the case law supporting the consideration of a staff member's financial situation as a relevant or mitigating circumstance in levying a disciplinary sanction. The UNAT has upheld a disciplinary measure even when an applicant submitted that his family lived below the poverty line and he was the sole supporter. The UNDT has recently dismissed an application for the suspension of the placement of a staff member on administrative leave without pay even though the applicant submitted that he could not sustain himself or his family.

38. All sanctions cause a harm of some measure. Dismissal and separation from service entail a staff member's loss of employment and all related entitlements. Demotion and loss of steps always entail a decrease in a staff member's emoluments. While the Applicant cites irreparable harm in describing his circumstances, this legal term is only applied to the test for injunctive relief before the UNDT. It has never been used in case law describing any benchmark for the proportionality of disciplinary measures. Even in the context of injunctive relief, the jurisprudence is that mere financial loss is not sufficient to satisfy the requirement of irreparable harm.

39. The Applicant asserts that he is a single parent of one son and maintains various monthly expenses which make repayment of the two months' net base salary fine in instalments very difficult. By continuing this logic, single parents, parents of multiple children, or staff members who take out larger loans to buy more expensive houses would receive less harsh sanctions than those staff members without children or other dependents, or who lead more modest lifestyles, because the financial impact of a fine, loss in steps, or demotion, might have varying impacts on their monthly expenses. This would lead to an absurd and unjust result.

40. Even if it were accepted, *in arguendo*, that a staff member's personal financial situation is a relevant consideration, the Applicant has failed to show that the disciplinary measure would put him in dire financial straits. The unofficial documents filed by the Applicant paint a very partial picture of his financial situation, as they do not show his full income or assets. It is nevertheless possible to infer from the documents that they are significant. The salary and other financial benefits that the Applicant receives from UNHCR alone put him in the 99th percentile globally for per-person income. The Applicant's claim that he struggles to cover his living expenses is unreasonable.

41. A main aspect of the Applicant's disagreement with the imposition of the fine is the modality of its execution. This modality is not germane to whether the sanction itself was proportionate.

42. The Respondent showed good faith and was willing to mitigate the impact of the fine by allowing the Applicant to pay in instalments. The Applicant, however, plainly rejected the proposal, and he has never engaged in any good faith negotiation or counterproposal. The approach is not "all or nothing". Within reason, the Respondent is willing to work with the Applicant to arrive at a mutually agreed amount to be deducted from his salary over a period of time. The Respondent exceptionally showed good faith in refraining from making any deductions pending the current proceedings, even though staff rule 11.3(a) provides, and the common practice is, that the implementation of disciplinary measures is not suspended pending

UNDT applications. The Applicant has had ample time to prepare for the possibility of the fine, and his take-home pay is now approximately USD1,000 higher than at the time of his application.

43. The Applicant's reiteration that he paid back the financial loss owing to his misconduct as soon as the matter was brought to his attention is factually wrong. During the investigation, the Applicant offered to reimburse UNHCR. He was fully aware of the amount owed as he received the draft findings of the investigation on 24 May 2018 and the full investigation report on 14 November 2018. While the Applicant was under an obligation to reimburse UNHCR, his good disposition was considered as a mitigating factor. Yet, the Applicant only reimbursed UNHCR on 27 March 2019, after the disciplinary measure was imposed and he was notified of the High Commissioner's decision to recover the amount of financial loss to UNHCR under staff rule 10.2(b)(ii).

44. In light of the foregoing, the Respondent submits that the Applicant has failed to establish that the disciplinary measure was unfounded or disproportionate. Consequently, this application has no merit and should be dismissed.

Considerations

45. The Tribunal is requested to determine whether the disciplinary measure imposed on the Applicant is disproportionate. The Applicant argues that he cannot afford to pay the disciplinary measure in instalments of USD3,300 because his net take home pay is currently not more than USD9,500 as a single parent on one salary supporting a son at university and paying a mortgage for the family home as well as having to rent accommodation at his duty station and another for his son's university. A deduction from his income of this amount would be devastating for them. He avers that the sanction if implemented with cause him irreparable harm.

46. The legal principle developed by UNAT is that the Administration has broad discretion in determining the disciplinary measure imposed on staff members as a consequence of wrongdoing. It is best suited to select an adequate sanction within the

limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance⁸.

47. When faced with an application to review the Secretary-General's exercise of discretion in matters of sanctioning staff members for proven acts of misconduct, the test of proportionality requires a comparison between the misconduct and the sanction⁹. Thus, in its determination, this Tribunal should observe a measure of deference, but more importantly, it must not be swayed by irrelevant factors or ignore relevant considerations¹⁰.

48. Bearing this principle in mind, the Tribunal finds that the recovery of CHF2,838 constituting financial loss occasioned to the Respondent through the Applicant's private phone calls is not a relevant consideration to the determination of the proportionality of the sanction. This is because the recovery is not a disciplinary measure within the meaning of staff rule 10.2(b)(ii) which expressly clarifies that recovery of monies owed to the Organisation is a not a disciplinary measure¹¹.

49. The Tribunal also notes that the Applicant has not pursued a claim regarding the placement of the disciplinary measure in his official status file.

50. The relevant aspect of the impugned decision to resolve is whether a fine of the equivalent of two months' salary, approximately USD16,500, is unreasonably high and out of all proportion to the misconduct.

51. The Respondent is mandated to impose a fine as a disciplinary measure pursuant to staff rule 10.2 (a)(v). He has discretion to determine the value of the fine based on the circumstances of the case. In determining the amount, the Respondent shall be guided by the principle of proportionality providing that an administrative action should not be more excessive than is necessary for obtaining the desired

⁸ *Ali Halidou* 2020-UNAT-1070 para.34.

⁹ *Ibid.*, para. 32.

¹⁰ *Ibid.*, para. 34

¹¹ See also *Sawenja* 2020-UNAT-986, para. 33.

result¹². Once imposed, the appropriateness of the level of sanction can only be reviewed in case of obvious absurdity or flagrant arbitrariness.¹³ The Tribunal may interfere with the sanction if it finds that it is too excessive in the circumstances of the case.¹⁴

52. Some of the relevant factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the misconduct, 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 in dealing with comparable cases¹⁵.

53. The Respondent has outlined the factors that he considered when determining the appropriate sanction to impose. He has shown that he considered both aggravating and mitigating factors and he has shown that he tried to be as consistent with past practice in similar cases of misconduct as possible. In particular, the Respondent considered as an aggravating circumstance the prolonged period of time during which the Applicant was reckless, failed to exercise reasonable care in the use of his official UNHCR-issued phone by certifying private calls as official and making the Respondent pay for them. He considered this as serious misconduct on account of its nature and scale as well as the high standards expected from the Applicant. The Respondent also considered the contempt for the investigation displayed by the Applicant during his interview as a failure to fully cooperate with investigations. In mitigation, the Respondent considered the Applicant's admission of the facts and his offer to reimburse UNHCR. The Applicant's personal circumstances and stress in connection with the situation of his son were also considered as a mitigating circumstance.

¹² *Sanwidi* 2010-UNAT-084, para. 39; *Applicant* 2013-UNAT-280, para. 120; *Abu Jarbou* 2013-UNAT-292, para. 41; *Akello* 2013-UNAT-336, para. 41; *Samandarov* 2018-UNAT-859, para. 23.

¹³ *Aqel* 2010-UNAT-040, para. 35; *Konate* 2013-UNAT-334, para. 21; *Shahatit* 2012-UNAT-195, para.25; *Portillo Moya* 2015-UNAT-523, para. 22.

¹⁴ *Rajan* 2017-UNAT-781, para. 48.

¹⁵ *Ibid.*, paras. 48-49.

54. Having proved that the Respondent took all relevant factors into account in coming up with the sanction, the burden shifts to the Applicant to prove that in the exercise of his discretion to impose a sanction the Respondent violated the proportionality principle as described above in this judgment.

55. To that effect, the Applicant has argued that the sanction will cause him irreparable damage. He has cited his financial obligations summarised in this judgment at paras. 19, 21 and 22 to show that if he pays the fine, he will be in dire financial need. The Tribunal finds that this argument is untenable for someone whose monthly gross earnings are in excess of USD15,000.00 and is asked to pay a fine of the equivalent of two months' salary in five instalments for violating core United Nations values of integrity and competence by acting recklessly and in unexemplary manner for a staff member holding a senior position and entrusted with United Nations property.

56. The Applicant is the UNHCR Head of Operations, at the P-5 level whose current and previous responsibilities include managing and overseeing UNHCR's humanitarian operations. He occupies a position of trust and responsibility which he was found to have breached. The Respondent is obliged under art. 101(3) of the United Nations Charter to secure and hold staff members to the highest standards of efficiency, competence and integrity, as expected of international civil servants.

57. The Tribunal finds that the Applicant has failed to show that he deserves a more lenient sanction than the one imposed. His impecuniosity, resulting from the sanction is self-imposed as argued by the Respondent, hence an irrelevant factor.

Judgment

58. The Tribunal finds that the fine is an appropriate sanction with the desired effects of punishing and deterring the Applicant from future reckless conduct. The Applicant has not shown that it is unlawful, absurd, excessive, arbitrary or unreasonable under the circumstances. The application is dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 8th day of March 2021

Entered in the Register on this 8th day of March 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi