

Introduction

1. By application filed on 17 September 2016, the Applicant, a former staff member of the United Nations Assistance Mission in Afghanistan (“UNAMA”) challenges the decision of the Under-Secretary-General for Management (“USG, DM”) to impose on him the disciplinary measures of written censure and loss of two steps in grade, pursuant to staff rule 10.2(a)(i) and (ii).

2. The application was served on the Respondent, who filed his reply on 14 October 2016.

3. The Tribunal held a case management discussion on 14 September 2017, in which it was agreed to hold 7190015710/2016-19001 1 0 0 -160j ()Tj (ring 35.36800389 0served)TjTj 1

16. The Respondent's principal contentions can be summarized as follows:
- a. The evidence on record established that the Applicant's conduct amounts to misconduct;
 - b. The Applicant had other choices, like walking away from the complainant and desisting from engaging with her, but he did not opt for them;
 - c. The Applicant has not produced any substantial evidence of investigatory bias, nor has he indicated impropriety in the investigation;
 - d. The fact that the Applicant was living and working in difficult conditions, that he had lost his possessions as a result of the Taliban attack, and that he was experiencing heightened stress due to long working days, did not justify his actions;
 - e. The decision-maker considered the above factors when imposing sanctions against the Applicant, and found that they were not mitigating; and
 - f. The decision of the USG, DM, was reasonable, proper, and proportionate given the conduct at issue; furthermore, he acted within his authority and discretion in making it.

Consideration

The scope of judicial review in disciplinary cases

17. The Applicant challenges the decision taken by the USG, DM, to impose on him disciplinary measures of written censure and loss of two steps in grade. He requests the annulment of the disciplinary sanctions, and the commission of a new investigation into the allegations.

18. The Appeals Tribunal has held that judicial review is focused on how the decision-maker reached the impugned decision, and not on the merits of the decision-maker's decision (see *Sanwidi* 2010-UNAT-084, *Santos* 2014-UNAT-415).

19. Furthermore, the Appeals Tribunal has determined what this Tribunal's role is when reviewing disciplinary cases (see *Mahdi* 2010-UNAT-018 and

Do the established facts amount to misconduct?

22. The Staff Regulations and Rules (ST/SGB/2016/1) applicable at the time of the incident, provide the following at staff rule 10.1(a):

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct.

23. Article 1 of the staff regulations stipulates the duties, obligations and privileges of staff members. Staff regulation 1.2 specifies the “Basic rights and obligations of staff” and reads as follows in its relevant parts:

Core values

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

...

General rights and obligations

...

(f) While staff members’ personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations.

24. In *Ogorodnikov* 2015-UNAT-549, the Appeals Tribunal found that misconduct “must be viewed in terms of the nature of the mission, purpose and principles of the United Nations and the impact [that the] type of misconduct can have on the Organization’s reputation, credibility and integrity”.

25. The Tribunal is of the view that the Applicant's established behaviour, especially the threat to break the complainant's phone, amounts to misconduct since it goes against the core values and obligations of staff members enshrined in the Staff Regulations.

Applicant's due process rights during the investigation and disciplinary process

26. The Applicant questions the lawfulness of the investigation process alleging that bias and flaws tainted it. He submits that during the investigation, the witnesses did not take an oath or affirmed to speak the truth before their statements were recorded. He also claims that he was not accorded procedural fairness throughout the investigation and subsequent disciplinary process because the investigation was aimed at finding him culpable. He further argues that the investigator framed questions in such a way that the eyewitnesses' statements could not contradict each other, and that the similarity of the statements pointed at collusion. In addition, the Applicant noted that the witnesses could not properly identify what he was wearing on the day of the incident.

27. In examining the lawfulness of a disciplinary process, the Tribunal will refer to the specific legal framework that was applied

30. The ASG, OHRM decided to charge the Applicant who was given the investigation report together with the supporting documents to provide his comments in response to the allegations of misconduct. The charge letter, informed the Applicant of his right A()Tj 12.028999324.6179au68437279835Tj 750902700732 0Hj.135328

36. The principle of proportionality means that a sanction should not be more excessive than is necessary for obtaining the desired result. The Tribunal is mindful that the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case, and to the actions and behaviour of the staff member involved (see *Portillo Moya* 2015-UNAT-523). Once misconduct has been established, the level of sanction can only be reviewed in cases of obvious absurdity or flagrant arbitrariness (cf. *Aqel* 2010-UNAT-040).

37. The principle of proportionality is a general legal principle. Principles embody the essential dimension of law as a living social construct that can change over time and accommodate different social values. Consequently, proportionality can serve as an analytical tool for assessing how, in practice, authorities employ their margin of appreciation to delineate rights.

38. In the context of disciplinary cases, proportionality comes into play as an essential principle that guides the decision-maker when choosing the appropriate sanction—according to the gravity of an offence and the specific circumstances of a case—from a set of different possible ones.

39. Proportionality has to be understood as a limit to the discretionary power of the decision-maker in the name of fairness and equity. This implies that the decision-maker has to consider all aggravating *and* mitigating circumstances of a case.

40. In *Sanwidi* 2010-UNAT-084, the Appeals Tribunal held that

In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate

choices between competing considerations and priorities in exercising their judgment about what action to take.

41. It remains for the Tribunal to determine whether in light of all the circumstances, the sanctions of written censure *and* loss of steps in grade imposed on the

45. In light of the above, the Tribunal is of the view that in this case, the imposition of two concurrent sanctions, namely a written censure and the loss of two steps in grade, already

51. The Applicant's description, of the living and working conditions in Kabul after the Taliban attack was not challenged by the Respondent. In **hfs**

55. During the hearing, when asked about any mitigating factors in regard to the Applicant's conduct during the gymnasium incident, the investigator responded that the Applicant may have been exposed to prior psychological stress, especially considering the reason why he was in Kabul. However, the investigator testified that he was not a psychologist and did not have the expertise to analyse the matter further.

56. In the sanction letter, the ASG, OHRM, recounted the Applicant's response to the allegations, and noted his working in stressful conditions as well as him having lost personal belongings. However, when determining the appropriate sanction, the ASG, OHRM, reported that the USG, DM, did not find any mitigating or aggravating factors applicable to the Applicant's case.

57. The Tribunal underlines that special consideration must be given to the circumstances of each case. Not only was the Applicant facing challenges related to the performance of his official functions with regard to reviewing and reporting on civilian casualties as a result of a Taliban attack, but he also was a victim of it. He lost all his personal belongings, was evacuated to Kabul, housed in a temporary transit container, and shared office space and equipment in another container with other staff members.

58. The Tribunal appreciates that the United Nations has many staff members serving in field missions and in extreme hardship conditions, which in and of themselves are not a mitigating factor when assessing misconduct. However, when United Nations premises and staff members' accommodations are attacked must

Due to insecurity and the relocation of all staff from the UNAMA office in Kunduz, human rights officers could not conduct investigations in Kunduz city.

In addition to gathering information from primary sources on specific incidents, UNAMA obtained data from hospitals and other medical facilities. The Department of Public Health in Kunduz provided UNAMA with figures of injured civilians treated in its facilities (as well as the number of dead civilians it received) up to 3 October, after which all major health facilities in Kunduz city ceased functioning or stopped recording civilian casualty figures gathered in 2870/093 0 Td 9 0lin

This event was utterly tragic, inexcusable, and possibly even criminal. International and Afghan military planners have an obligation to respect and protect civilians at all times, and medical facilities and personnel are the object of a special protection. These obligations apply no matter whose air force is involved, and irrespective of the location.

62. The Tribunal finds that such factors must be fully considered when a decision-maker exercises discretion with respect to the disciplinary measure to be imposed on a staff member for misconduct that occurred shortly after such an attack. It is without doubt, that in this case they are essential to a full understanding and assessment of the gymnasium incident.

63. The Applicant's sense of belonging and ownership had been reduced to such a bare minimum, that he was understandably bound to be very protective of the few belongings he had been left with, irrespective of their value. As reported by the complainant, she touched and moved the Applicant's belongings from a working bench so that she could use it. In as much as this could be perceived as a simple act and the Applicant's reaction as being uncalled for, knowledge of the above-mentioned factors assist in contextualizing the Applicant's reaction.

64. In view of the foregoing, the Tribunal finds that there existed reasonable and adequate grounds that should have been considered as mitigating factors in the Applicant's case, and that the cumulative imposition of a written censure *and* the loss of two steps in grade on him was excessive, unreasonable and disproportionate to the misconduct.

Conclusion

65. In view of the foregoing, the Tribunal DECIDES:

- a. That the application is partially granted;
- b. That the cumulative imposition of a written censure *and* the loss of two steps in grade was excessive, unreasonable and disproportionate to the misconduct; and
- c. To rescind the disciplinary measure of loss of two steps in grade.

66. As a result of the above rescission, the Organization shall:
- a. retroactively place the Applicant at the step he should have been prior to the imposition of the rescinded disciplinary measure;
 - b. recalculate the Applicant's step increments accordingly; and
 - c. pay the Applicant the loss of salary that he suffered as a result of the loss in steps, with interest on that amount at the current US Prime Rate.

67. If payment of the above amount, namely loss of salary with interest, is not made within 60 days of the date at which this judgment becomes executable, five

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