UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2021/019
	Judgment No.:	UNDT/2021/154
	Date:	16 December 2021
	Original:	English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

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Introduction

1. The Applicant, a former Director of Resource Management with the World Meteorological Organization ("WMO"), contests the administrative decision of the Secretary-General of WMO to summarily dismiss him (the termination letter of 9 May 2018).

2. The Respondent contends that the application is without merits.

3. For the reasons set out below, the Tribunal grants the application on its merits and decides that the issue of relief is to be determined in a subsequent judgment.

Procedural history

4. By statement of appeal dated 7 June 2018 to the Joint Appeals Board of WMO ("JAB"), the Applicant initially appealed the contested decision.

5. On 12 February 2019, the JAB issued its report in which it recommended the WMO Secretary-General to uphold the dismissal decision, which he did on 14 February 2019.

6. On 15 April 2019, the Applicant filed an appeal to the Appeals Tribunal of the contested decision.

7. On 25 October 2019, the Appeals Tribunal issued Judgment No. 2019-UNAT-952 by which it remanded the case to the JAB.

8. On 7 February 2020, WMO submitted the former JAB case record concerning the present case to the Geneva Registry of the Dispute Tribunal for the adjudication of the matter.

9. On 30 April 2021, the case was transferred from the Dispute Tribunal's Registry in Geneva to the one in New York.

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scrutiny that must be expected by an independent and impartial judicial mechanism. These directions were, however, not addressed to the Dispute Tribunal, which per definition constitutes such a mechanism. Consequently, as the primary fact-finder

23. The Tribunal further agreed with the Respondent, as stated in the jointly-signed statement, that "the established framework for reviewing decisions regarding misconduct should apply". According to the Respondent, this meant that the judicial test should be: "a. Whether the facts on which the sanction is based have been established; b. Whether the established facts qualify as misconduct; and c. Whether the sanction is proportionate to the offence" (see, for instance, *Turkey* 2019-UNAT-955).

24. In addition to these three points, in Order No. 95 (NY/2021), the Tribunal noted that as a fourth prong of the judicial test, the Appeals Tribunal has held that the Dispute Tribunal is to examine "whether the staff member's due process rights were respected" (see para. 28 in *Siddiqi* 2019-UNAT-913, affirmed in, for instance, *Nadasan* 2019-UNAT-918).

25. Accordingly, for the sake of judicial economy and efficiency, in Order No. 95 (NY/2021), the Tribunal ordered the parties to file closing arguments on the limited issue of due process. The Tribunal would thereafter review whether any, or the accumulation of, the alleged irregularities were of such character that it/they would render the contested decision unlawful and lead to its recission. Regarding the Applicant's request for additional written documentation, the Tribunal noted that the Respondent effectively had stated that all relevant documentation was already on file. By allowing the Respondent to file a closing statement in response to the Applicant's closing statement, the Tribunal also granted the Respondent's request to file submissions directly on the relevant issue of due process.

26. In Order No. 95 (NY/2021), the Tribunal therefore held that if it were to answer the above question in the affirmative, it would issue a judgment with reasons thereon and not examine the other prongs of the judicial test. The Tribunal would thereafter allow the parties to file submissions on the question of relief in light of the Tribunal's judgment.

27. On the contrary, should the Tribunal find that no due process irregularity occurred or none were so grave that they substantively impacted the contested decision, the Tribunal would issue an order thereon and proceed with its review of

The Tribunal's limited scope of review in disciplinary cases

31. The Appeals Tribunal has generally held that the Administration enjoys a "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere" (see *Ladu* 2019-

disciplinary sanction(s). Without such information, the subject will not be able to adequately ascertain the legal and factual background for the imposed disciplinary and/or administrative sanction(s) and appropriately defend her/his position within the internal justice system (similarly, see *Muindi* 2017-UNAT-782, para. 54). Such

disagreement with the Executive Management". The WMO Secretary-General further held that this was "clearly … unacceptable behavior".

39. Subsequently in the termination letter, the WMO Secretary-General, however, also refers to the Applicant's involvement in WMO's administration of the ERP/VSP as "willful transgressions". Based thereon, the WMO Secretary-General found that the Applicant was "in serious breach of the WMO Financial Regulations, the Staff Regulations and the WMO Code of Ethics".

40. Accordingly, the Tribunal finds that, as argued by the Respondent, the WMO Secretary-General indeed based his administrative decision to summarily dismiss the Applicant on two separate alleged counts of misconduct, namely (a)

b. “The process of audit investigation undertaken by IOO, upon the instruction of the Secretary-General, revealed the extent to which departing staff members had been paid three-months’ salary, despite having served their respective notice periods. In undertaking this activity, the audit investigation had: [i] Reviewed the ERP/VSP and the payments made under the programme to ascertain their compliance with the applicable rules and procedure and their financial impact … [ii] Reviewed the documents provided by the Human

by the Applicant in the presentation he had made to the President on 9 February 2018";

e. The Tribunal should therefore consider that: "[i] … An [independent] investigation was carried out by IOO with respect to the ERP/VSP process. IOO is tasked as an independent entity of WMO to carry out all allegations or presumptions of fraud, waste, mismanagement or misconduct ... As referenced in the [Dispute Tribunal] case of *Borhom* [UNDT/2011/067], any investigation must be conducted by a neutral body free from bias and with an established mandate to conduct such reviews … IOO is such a body within the context of WMO. [ii] The Applicant was aware of the investigation in relation to the ERP/VSP: The Applicant was aware of the substance of the investigation both in meetings he had regarding the ERP/VSP and the notice of the investigation he received; [iii] The Applicant had taken part in the investigative process: The Applicant had been involved in the audit investigation and had the opportunity to respond to the findings of the IOO report before it was published … Indeed, it was the Applicant's misguided belief that his comments had not been considere

44. [illegible] embly, for instance, in res/48/218 B (Review of the effici[illegible] strative and financial functioning of the United Nations) dated [illegible] when establishing the mandate of the Office of Internal Overs[illegible] IOS"), specifically distinguishes between an "audit" and an "inve[illegible] mbular para. 5.

45. [illegible] with, OIOS's "functions" in the two areas are also described differ[illegible] 5(c)(ii) and (iv), respectively):

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> [illegible] e shall, in accordance with the relevant provisions of the [illegible] Regulations and Rules of the United Nations examine, [illegible] and appraise the use of financial resources of the United [illegible] in order to guarantee the implementation of programmes and [illegible] tive mandates, ascertain compliance of programme managers [illegible] he financial and administrative regulations and rules, as well as [illegible] the approved recommendations of external oversight bodies, [illegible] rtake management audits, reviews and surveys to improve the [illegible] cture of the Organization and its responsiveness to the [illegible] uirements of programmes and legislative mandates, and monitor [illegible] e effectiveness of the systems of internal control of the Organization
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> …
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> Investigation
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> The Office shall investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken

46. In addition, the Tribunal takes note that the Institute of Internal Auditing's definition of "internal auditing", which has been adopted by OIOS, is that this is "an independent, objective assurance and consulting activity designed to add value and improve an organization's operations" and that "helps an organizatio

47. Investigation, on the other hand, is "[a] legally based and analytical process designed to gather information in order to determine whether wrongdoing occurred and, if so, the persons or entities responsible" (see, for instance, OIOS's Investigations Manual dated January 2015, p. 2).

48. As such, an audit therefore has a broader system-wide focus than an investigation and does not entail an assessment of individual responsibility for any alleged subjective wrongdoing. An audit therefore cannot substitute the need for an investigation in a disciplinary process, also because a staff member interviewed in an audit cannot be expected to be afforded the necessary procedural due process safeguards, including those outlined in para. 35(a)-(c).

49. In the present case, the following question is therefore whether, despite being labeled as an audit, the IOO review by its objective and/or execution, nevertheless had the character of a disciplinary investigation and granted the Applicant the needed due process rights.

50. The Tribunal observes that in the IOO audit report, it was stated, as relevant to the present case, that IOO had been engaged by the WMO Secretary-General in order to "review the Early Retirement and Voluntary Separation Incentive Programmes (ERP &VSP) and the payments made under the programme, and ascertain the compliance with the applicable rules and procedures and their financial impact". It therefore follows that nothing was stated that could be interpreted as that the objective of the audit was to specifically investigate the Applicant for possible misconduct in this regard. Rather, the objective was, as relevant to the present case, a general assessment of the WMO's administration of the ERP/VSP.

51. As for the execution of the audit, IOO's findings are in line with the relevant objective of the report. While in the Executive Summary, it is stated that the ERP/VSP had been administered "inconsistent" with the WMO financial rules and the *ex-gratia* payments were considered "not admissible", no individual responsibility and/or liability is identified anywhere, including with regard to the Applicant. In

56. The Tribunal notes that the Respondent by his submissions, in effect, admits that the Applicant was not afforded any disciplinary process whatsoever regarding the allegation of misconduct related to his 3 May 2018 email to the Audit and Oversight Committee. This also only makes sense, since the IOO audit report was dated March 2018 and the email was only sent two months later—the audit therefore could not cure any due process deficiencies.

57. Also, the Tribunal finds that the mandatory procedural safeguards cannot be rendered "moot" in the manner suggested by the Respondent. The situation is that before the WMO Secretary-General imposed the disciplinary sanction a Tm0 Tq0.0000091i42 Tf1 0 [(

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60. Also, the WMO Secretary-General did not specify what the exact reason(s) was/were for summarily dismissing the Applicant, namely whether this was because (a) his 3 May 2018 email to the Audit and Oversight Committee, (b) his involvement in the ERP/VSP, or (c) a combination of the two counts of alleged misconduct

had both the intimate knowledge of the facts and the evidence of an IOO audit investigation".

66. Concerning the 3 May 2018 email, the Respondent submits that the Applicant has failed "to identify a step that could have been taken in terms of collecting any evidence with respect to a conversation that took place privately between the Secretary-General and the Applicant himself". It was the WMO Secretary-General, who "had intimate knowledge of the discussions that took place on 20 April 2018", and no "additional investigative step could therefore reasonably be forthcoming in circumstances where the issues in dispute take place during a private meeting between the Applicant and the Secretary-General".

67. The Respondent further contends that for the WMO Secretary-General to "have initiated a separate investigation into facts that took place in a private meeting would have been to pl

d. **4:00 p.m. on Tuesday, 25 January 2022**, the Applicant may file a statement of any final observations responding to the Respondent's closing statement. This statement of final observations by the Applicant must be a maximum of two pages, using Times New Roman, font 12 and 1.5 line spacing. It must be solely based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage.

e. Unless otherwise ordered, on receipt of the latest of the aforementioned statements or at the expiration of the provided time limits, the Tribunal will adjudicate on the matter and deliver Judgment based on the papers filed on record.

(Signed)

Judge Joelle Adda

Dated this 16th day of December 2021

Entered in the Register on this 16th day of December 2021

(Signed)