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UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D 'APPEL DES NATIONS UNIES

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Judgment No. 2024-UNAT-1453



Timothy Kennedy

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Counsel for Appellant: George G. Irving

Counsel for Respondent: Angélique Trouche

JUDGE NASSIB G. ZIADÉ , PRESIDING .

1. Timothy Kennedy (Mr. Kennedy), a staff member with the Department of Safety and Security (DSS), contested the decision of the Administration to impose on him the disciplinary measures of written censure, loss of four steps in grade, and deferment, for two years, of eligibility for consideration for promotion . These measures were imposed due to mishandling e-mail communications that became public and for failing to report the loss.

2. On 15 December 2020, by Judgment No. UNDT/2020/209 (first UNDT Judgment),<sup>1</sup> the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed Mr. Kennedy's application .

3. Mr. Kennedy appealed the first UNDT Judgment before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) . On 29 October 2021, the Appeals Tribunal issued Judgment No. 2021-UNAT-1184 (UNAT Judgment),<sup>2</sup> in which it found that the “ UNDT did not err in fact or in law on the question of whether the established facts qualify as misconduct but did err on the proportionality of the disciplinary sanctions”.<sup>3</sup> Consequently, the Appeals Tribunal partially granted Mr. Kennedy's appeal (. 9.4 (o)1.3 (t 20.60.1 (p)-3..K6.8 (cts ) (d M)4.9 (r (,))4.3 (t))4.3 ([o7.5 (r )-15

Facts and Procedure 6

8. Mr. Kennedy has been serving with the United Nations since September 1993. At the relevant time of events, he was a Security Officer with DSS in New York, United States, and an outgoing Vice President of the Headquarters Staff Union (Staff Union).

9. On 16 March 2017, a staff member acting in his role of Security Analyst (the Analyst) initiated two e-mail exchanges. Both e-mail exchanges began with the same subject line, i.e., "Confidential".

10. The first e-mail exchange referenced a recent and serious security incident at an international entity, which had resulted in staff injuries.

11. In the second e-mail exchange, the Analyst brought the issue of the recent security incident to the Under-Secretary-General of DSS (USG/DSS) and set out his belief of potential wrongdoings by senior managers of the department in question. He indicated that he would also seek specific guidance and direction from the Ethics Office, the Staff Union and the Office of Internal Oversight Services (OIOS). The Analyst then mentioned an incident in 2016, assessments that were made towards it, and "operational concerns" for the premises and a named high-level official for that location. In addition, details regarding death threats were referenced. The Analyst then alleged that an official DSS assessment was "buried" due to personal political implications for individuals involved. The Analyst then requested an independent investigation into the matter.

12. On 17 May 2017, Mr. Kennedy printed the entire e-mail exchanges with the intention of delivering it to the Staff Union office so that the new leadership of the Staff Union, who had been recently elected, would be informed of the issues and have a hard copy file. According to him, he placed the envelope of the printed e-mails in a box labeled "Confidential" and placed it in the Staff Union office. The Analyst then requested an independent investigation into the matter.

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finding that no rational connection or relationship between the evidence and the objective of the disciplinary action has been established' and, that as a result, it "was unable to assess the proportionality and lawfulness of the imposition of the disciplinary sanctions".<sup>24</sup>

25. Therefore, the Appeals Tribunal granted Mr. Kennedy's appeal in part, rescinded the decision imposing the disciplinary sanctions and concluded that it was "open to the Administration to issue a new administrative decision on disciplinary sanctions with adequate reasons".<sup>25</sup>

Contested decision

26. On 22 February 2022, the USG for Management Strategy, Policy and Compliance (USG/DMSPC) informed Mr. Kennedy by letter of her decision to impose on him the disciplinary measures of written censure with loss of four steps in grade in accordance with Staff Rule 10.2(a)(i) and (ii). She provided detailed reasons in support of her conclusion in an annex to the letter. In particular, the USG/DMSPC considered the past practice of the Organization in matters of comparable misconduct and also conducted a proportionality analysis using the various factors detailed in the UNAT Judgment. Moreover, the USG/DMSPC considered as aggravating factors the fact that Mr. Kennedy's actions: "(i) exposed the Organization to a potential reputational risk; and (ii) put in jeopardy both the Security Analyst who sent the e-mails containing confidential information, and the high-level [United Nations] official referred to in the e-mails".<sup>26</sup>

27. The USG/DMSPC concluded that the commensurate sanction would have been demotion, but considered as mitigating factors the fact that Mr. Kennedy had more than 20 years of service and that he expressed sincere remorse. The USG/DMSPC further confirmed that the disciplinary measures of written censure with loss of four steps in grade and deferment, for two years, of eligibility for consideration for promotion, previously imposed, were proportionate. However, considering that more than two years had elapsed since the first disciplinary

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to the two most lenient options in the list of disciplinary measures available under Staff Rule 10.2(a)".<sup>39</sup>

#### Submissions

Mr. Kennedy's Appeal

39. Mr. Kennedy requests the Appeals Tribunal to rescind the contested decision, to remove the written censure, and





58. Similarly, the Secretary-General submits that Mr. Kennedy's reference to the UNDT's conclusion that he appeared "not to have suffered any excessively severe professional consequences as a result of the disciplinary measures imposed on him" does not establish that the contested decision is disproportionate.<sup>42</sup>

59. The Secretary-General highlights that both instances referred to the evidentiary standard of clear and convincing evidence. Nevertheless, as such standard is higher than that of preponderance of evidence, the Secretary-General argues that "if the standard of clear and convincing [evidence] was met, the standard of preponderance of evidence was also met".

60. The Secretary-General asserts that the Administration provided clear explanations on how Mr. Kennedy could have prevented the loss of confidential information.<sup>43</sup> Consequently, the Secretary-General maintains that the UNDT accurately concluded that Mr. Kennedy's misconduct amounted to gross negligence.

61. The Secretary-General contends that the UNDT correctly determined that Mr. Kennedy had ample opportunity to report the loss of confidential information, and by failing to do so, acted recklessly. In this regard, the Secretary-General also highlights that both the Administration and the UNDT took into consideration his sincere remorse.<sup>44</sup> As a result, the Administration reduced the appropriate sanction from a potential demotion.

62. Next, the Secretary-General contends that Mr. Kennedy failed to demonstrate any of the purported errors of law in the impugned Judgment. In this regard, relying on *Cabrera*, the Secretary-General recalls that a sanction is not deemed unfair or disproportionate solely because "the Secretary-General, in his discretion, could have come to a different conclusion".<sup>45</sup> Therefore, in the present case, Mr. Kennedy's mere disagreement with the sanctions imposed on him does not constitute an error in the impugned Judgment.

63. The Secretary-General submits that the UNDT correctly identified two instances of misconduct in Mr. Kennedy's actions, i.e., the loss of confidential information and the failure

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, para. 12. The Secretary-General also refers to paragraph 15(a) of the annex to the sanction letter dated 22 February 2022.

<sup>44</sup> Impugned Judgment, paras. 39-40. The Secretary-General also refers to paragraph 7(b) (initially misquoted as paragraph 16(b)) of the annex to the sanction letter dated 22 February 2022.

<sup>45</sup> *Cabrera v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-089, para. 27.

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in a rational manner consistent with the facts.<sup>53</sup> This was the correct approach, which we adhere to as well,<sup>54</sup> giving due consideration to the UNDT's analysis, as our function is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction.<sup>55</sup>

74. In light of the detailed explanation for the contested decision, there can be no meaningful claim that the appropriate factors were not considered. Instead, Mr. Kennedy takes issue with how those factors were analysed.

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Staff Rules and Staff Regulations. Mr. Kennedy, an experienced professional with a long history of security-sensitive responsibilities, made a significant error of judgment which exposed sensitive material to unauthorized persons, resulting in public disclosure. He also

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