

▼

Judgme

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2014/059, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 5 June 2014 in the case of Ogorodnikov v. Secretary-General of the United Nations .

Facts and Procedure

2. The following facts are uncontested:

Laissez Passer (UNLP)], showing a re-entry stamp to Afghanistan dated 2 October 2008.

iii. Around the second week of October 2008, the Applicant submitted his UNLP to the UNAMA Personnel Section for renewal. While reviewing his UNLP, a Human Resources Assistant in the UNAMA Personnel Section noticed a discrepancy between the stamp in his UNLP which showed a re-entry date of 4 October 2008, and the copy of page 26 of his UNLP previously submitted, as described in point (ii) above.

iv. The Human Resources Assistant alerted her supervisor to the apparent discrepancy. By memorandum dated 28 November 2011, the matter was reported to the Conduct and Discipline office by [HO], UNAMA Chief Civilian Personnel. The Conduct and Discipline Office transmitted the matter to the UNAMA Security Section by memorandum dated 7 December 2008, and informed the Applicant of the same by memorandum of the same date. This documentation and material attached thereto is appended to the Special Investigations Unit (SIU) investigation report [...]. The SIU commenced an investigation into the matter.

v. As part of the investigation, on 15 December 2008 the SIU interviewed the Applicant and obtained an interview statement signed by the Applicant. The key points from the Applicant's interview statement are set out in paragraphs 7 through 11 of the allegations of misconduct [added below]:

7. According to your statement to the SIU investigators, when you left for your Welfare and Health trip on 1 October 2008, you thought it would only be for two nights and three days. However, you admitted that you did not return to Afghanistan until 4 October 2008.

8. Also according to your statement, while you were at the border of Afghanistan and Turkmenistan, you noticed that the Afghan border officer "did a test stamp of his immigration stamp " and "[you] asked him if [you] could have the paper that the test stamp was on ". You further declared that "it was only later when [you had] returned to [your] office in Herat that [you] noticed that the date on the test stamp said 2nd of October 2008". However, it is noted that at no point during the investigation did you provide the SIU with an explanation as to why you requested the "test stamp" from the border officer while you declared "being in a rush " when you were at the border.

9. You admitted using the "test stamp" which indicated 2 October 2008 "by cut[ting] and pasting it over the stamp in [your] UNLP that said 4th of October 2008 ". You also admitted that you then completed your Annual Leave Report to match the forged stamp

THE U

of his right to seek the assistance of counsel. On 18 June 2009, the Applicant signed for receipt of the allegations of misconduct.

ix. The Applicant submitted his comments to OHRM via email dated 4 September 2009. In particular:

The Under-Secretary-General for Management, on behalf of the Secretary-General, has further concluded that, in so doing, [the Applicant]: (i) failed to uphold the highest standards of efficiency, competence and integrity required by staff regulation 1.2(b); (ii) violated [his] obligation under former staff rule 101.2(b) to follow directions and instructions issued by the Secretary-General and their supervisors; and (iii) breached the prohibition on[,] inter alia, [internally] altering any official document, record or file, prescribed by former staff rule 101.2(g).

...

... the explanations for [his] actions which [the Applicant] provided in [his] comments do not justify [his] conduct, or amount to mitigating circumstances in [his] case. Accordingly, the Under-Secretary-General for management, on behalf of the Secretary-General, has decided to impose on [the Applicant] the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity[.] ... The imposition of this measure is proportionate to the gravity of [the Applicant's] misconduct.

.... On 4 November 2013, the parties attended a hearing on the merits in front of the Dispute Tribunal in New York for the purpose of clarifying facts at issue in the case.

... By Order No. 305 (NY/2013), dated 11 October 2013, the Tribunal requested that the parties each file closing submissions. Following the granting of extensions of time to file closing submissions, for the purpose of enabling the parties to attempt to resolve the matter informally, they each filed their closing submission on 14 January 2014.

3. On 5 June 2014, the UNDT rendered its Judgment. The UNDT noted that Mr. Ogorodnikov had not taken any leave days for his trip since the period of 1 to 4 October 2008 was a holiday weekend in UNAMA. It had therefore not been necessary for him to submit an Annual Leave Report, and he had done so only in accordance with a UNAMA practice. The UNDT concluded that “the documents containing incorrect information [...] were not supposed to be part of the official record”² and that although Mr. Ogorodnikov had included in his Annual Leave Report a “false statement regarding his return date”, this “had no effect on the information related to his annual

² Impugned Judgment, para. 70.

Submissions

The Secretary-General's Appeal

8. The UNDT erred in law and fact by finding that Mr. Ogorodnikov's inclusion of a false statement regarding his return date in his Annual Leave Report did not amount to misconduct. In addition to recording use of leave days, the Annual Leave Report is needed to establish eligibility for occasional recuperation break (ORB). By submitting false information on his leave report and attaching a document with a falsified Afghan police entry stamp, Mr. Ogorodnikov sought to claim an entitlement to ORB for which he was not eligible.

9. The UNDT erred in finding that the Organization failed to consider a number of mitigating factors. Contrary to the UNDT's conclusion, Mr. Ogorodnikov did seek to obtain personal gain from his misconduct. He committed misconduct by forging a government record and submitting false information to the Organization, so that he could claim a benefit – five days of paid leave – to which he was not entitled.

10. The UNDT also erred in fact by ruling that Mr. Ogorodnikov was sincere and cooperated with the investigators. He did not provide a satisfactory explanation of his actions in obtaining a stamp dated 2 October 2008 to falsify his return date on the copy of his UNLP. On the contrary, he gave different and inconsistent explanations of his actions at different points. In the circumstances of the case, it was reasonable for the Secretary-General to consider that Mr. Ogorodnikov's descriptions of his actions did not constitute a mitigating factor.

11. The UNDT also erred in ruling that the fact that this was Mr. Ogorodnikov's first offence was a mitigating factor. All staff members are expected to abide by the Organization's regulations and core principles, and the fact that a staff member has done so for many years before engaging in misconduct does not lessen the gravity of his or her actions.

12. The UNDT erred in ruling that Mr. Ogorodnikov's continued employment and satisfactory performance appraisals with UNAMA were a mitigating factor. A decision to continue employment of staff members who are under investigation reflects nothing more than the Organization's compliance with the relevant legal framework governing disciplinary proceedings. Moreover, the kind of misconduct of which Mr. Ogorodnikov was found culpable did not preclude him from completing his other functions satisfactorily, so his performance evaluations are irrelevant in this regard.

13. The UNDT erred in ruling that the delay in imposing a sanction constituted a mitigating factor. This point was not raised by Mr. Ogorodnikov and the Administration was not given the opportunity to address this matter. Had the Administration been given the opportunity, it would have explained that it had taken into account the issue of delay and such consideration resulted in a more lenient sanction.

14. The UNDT erred in concluding that the sanction was disproportionate when compared with other cases. While the cases cited by the UNDT involved the submission of false information to the Organization to obtain a benefit, they did not involve the additional element of improperly obtaining and falsifying an official government record. The sanction imposed in the present case is consistent with that involved in other disciplinary cases where staff members were dismissed or separated from service because they falsified government documents.

15. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Mr. Ogorodnikov's Answer

16. Mr. Ogorodnikov submits that the Secretary-General's appeal is not receivable *ratione temporis*. The UNDT Judgment was communicated to the parties on 6 June 2014 and accordingly, the filing deadline was 5 August 2014. The Secretary-General's appeal is dated 8 August 2014. While the Secretary-General contends that he only received the UNDT Judgment on 9 June 2014, the official e-mail record of 6 June 2014 contradicts this statement.

17. The UNDT correctly concluded that there should not be any consequences for Mr. Ogorodnikov's falsifying information on an unnecessary leave report. The submission of an annual leave report was of no factual or legal consequence to his entitlement for ORB as the cycle was not interrupted. The dates in issue, notably 1 to 4 October 2008, when Mr. Ogorodnikov travelled out of Afghanistan, were Eid holidays and the weekend for UNAMA staff. The UNDT correctly concluded that Mr. Ogorodnikov did not benefit from any leave days to which he was not entitled.

18. The UNDT's conclusion that the imposed sanction was disproportionate was supported by the law and the facts, and did not exceed its scope of review. The UNDT was further justified in examining the totality of the circumstances, including mitigating factors, as a part of the UNDT's consideration of proportionality.

19. The sanction letter makes only passing reference to "mitigating circumstances in your case". It provides no particulars or details of what mitigating factors were considered or whether or how they were considered, applied or rejected. The UNDT correctly found that the mitigating factors presented by Mr. Ogorodnikov in his response to the allegations of misconduct were only partially analysed and they were not "entirely or correctly evaluated by the Organization".

20. Mr. Ogorodnikov submits that there is a requirement for "parity of sanctions" among cases of similar misconduct. He contends that the principle of equality of treatment applies to all staff members in determining whether a sanction was proportionate to the misconduct. In order to do so, similar cases or policy guidelines or formal issuances should be considered. The Information Circulars on the Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour suggest that cases involving similar allegations of fraud have resulted in disciplinary measures far below separation from service.

21. Mr. Ogorodnikov asks that the Appeals Tribunal reject the appeal in its entirety and affirm the UNDT Judgment.

Considerations

Receivability *ratione temporis*

22. The first issue is whether the Secretary-General's appeal is receivable *ratione temporis*. Mr. Ogorodnikov submits that the UNDT Judgment was communicated to the parties on 6 June 2014 and therefore the filing deadline was 5 August 2014. He argues that the Secretary-General's appeal is dated 8 August 2014 and therefore is not receivable *ratione temporis*.

23. The official records indicate that a copy of the Judgment was transmitted to the parties on 5 and again on 6 June 2014. A corrigendum was transmitted to the parties on 9 June 2014, which, together with the main Judgment constitutes the final Judgment of the Dispute Tribunal. As a result, the day on which the corrigendum was transmitted to the

parties is the day when time starts to run for the purpose of filing an appeal. Thus, we find that the Secretary General's appeal date

regarding his return date”, this “had no effect on the information related to his annual leave”.⁸ The inclusion of the false statement did therefore not amount to misconduct.

28. Since the parties have agreed to and identified the facts in their Joint Statement, we find that it is not open to the UNDT to conduct its own evaluation and then to substitute its view for that of the parties.

Did the UNDT err in concluding that the sanction which was imposed by the Secretary-General was disproportionate?

29. Staff Rule 10.3(b) provides, *inter alia*, that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”. In the present case, this means that the Dispute Tribunal must determine whether the Secretary-General’s imposition of the ultimate sanction of separation from the Organization meets the justice of the case, after due consideration is given to the entire circumstances of the case.

30. In *Sanwidi* and more recently in *Cobarrubias* the Appeals Tribunal clearly enunciated that:⁹

... The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:

[w]hen judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The

sanction imposed by the Secretary-General does not make the implementation of the sanction arbitrary and/or disproportionate. It is certainly not the role of the Dispute Tribunal to select what it believes to be the most appropriate sanction for the Secretary-General, but rather it is only to examine the fairness and reasonableness of the decision.

32. The misconduct of Mr. Ogorodnikov must be viewed in terms of the nature of the mission, purpose and principles of the United Nations and the impact which this type of misconduct can have on the Organization's reputation, credibility and integrity. This type of criminal misconduct, namely, the falsification and the illegal use of official government documents, if allowed, can have a substantial reputational impact on an organization such as the United Nations. It can also adversely impact on the trust and confidence which Member States repose in the system.

33. The UNDT opined that "[t]he Applicant's behavior also breached the highest

serious nature and in these circumstances the sanction of separation was not disproportionate and/or arbitrary, but reasonable. We find that the UNDT erred when it reversed the Secretary-General's decision to separate Mr. Ogorodnikov from service with compensation in lieu of notice and with termination indemnity.

36. For the foregoing reasons, the Judgment of the UNDT should be vacated.

Judgment

37. We grant the appeal and order that Judgment No. UNDT/2014/059 be vacated in its entirety.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Chapman

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar