

14. On 21 June 2016, the Applicant completed his psychometric test. He later received an invitation to take the English language test anytime between 7 and 12 July 2016. In the meantime, the Applicant found out that another colleague, Mr. P. K., was scheduled to take the English language test on 9 July 2016.

15. According to the findings of the investigation report, the Applicant invited Mr. P. K. to take the test from his house on 9 July 2016. Mr. P. K. agreed. While Mr. P. K. was completing his test, the Applicant took pictures of the questions appearing on the computer screen with his iPad. The investigation report also indicates that the Applicant and Mr. A. B. “exchanged information (cheated) concerning the language tests (both oral and written) between 9 and 12 July 2016”.

16. The Applicant did the oral part of his English language test on 11 July 2016 and the written part on 12 July 2016.

17. On 19 July 2016, the Inspector General’s Office (“IGO”) received allegations made against the Applicant and Mr. A. B. that they had cheated during the psychometric test of the EHP administered in June 2016. The IGO opened an investigation and assigned the case to an investigator.

18. From 6 September to 4 November 2016, the IGO investigator interviewed nine witnesses including the Applicant. On 3 November 2016, a notice of investigation was sent to the Applicant to advise him about allegations that prompted an investigation.

19. The Applicant was interviewed on 4 November 2016.

20. On 23 December 2016, the IGO shared the draft investigation findings with the Applicant and invited him to provide his comments and observations, which he did on 29 December 2016.

21. In the investigation report, dated 3 January 2017, the IGO concluded that “the evidence available support[ed] a finding that [the Applicant] committed misconduct by engaging in fraud through cheating and helping others cheat in the psychometric and language tests of the EHP”. The IGO also concluded that there was no evidence to substantiate the 26.9999923 (him)Tj1Tj 3C9p60 Td (fraud)T()Tj 21.066986

22. On 3 January 2017, the IGO transmitted the final version Corr.1

j. The Administration did not consider several mitigating factors when deciding on the level of the disciplinary measure to be imposed, mainly that the Applicant did not have to take the language test as he was an internal candidate; and

k. The disciplinary measure imposed is disproportionate to the alleged misconduct.

28. The Respondent's principal contentions are:

a. Since the disciplinary measures did not result in the Applicant's separation from service, the facts need only be established on the balance of probabilities or on preponderance of the evidence;

b. The allegation that the Applicant cheated on the psychometric test by photographing the questions that appeared on the screen T812 gs4T6

34. The Applicant was charged with having engaged in three acts of misconduct as follows:

a. The first act was allegedly committed on 20 June 2016, when the Applicant and Mr. A. B. took pictures of Ms. T. S.' psychometric test with the Applicant's iPad;

b. The second act allegedly occurred on 9 July 2016, when the Applicant invited Mr. P. K. to take the English language test at his house. The Applicant then allegedly took pictures of the screen with his iPad; and

c. Thirdly, the Applicant was charged with having exchanged information about the content of the English language test with Mr. A. B. over the phone between 9 and 12 July 2016.

35. These facts were established during the investigation and confirmed at the hearing by the testimony of one direct Ms. T. S., in conjunction with the testimonies of four other namely Ms. I. S., Mr. P. P., Ms. A. J. and Mr. A. K.

36. The Tribunal is satisfied that the investigation report clearly states the facts and the alleged misconduct. It also provides substantial and critical assessment of the evidence presented to the investigator either in documentary or testimonial form.

37. The Applicant denies the arguing that a group of colleagues—who provided testimony during the investigation and at the hearing—were conspiring against him.

38. After consideration

39. The Tribunal underlines that the witnesses who testified in court were all very clear, objective and presented a coherent version of the facts at stake as indicated below.

The allegation of cheating in the psychometric test

40. At the hearing, Ms. T. S. confirmed that the Applicant called her and asked her if they could do the test together, which she accepted. She also testified that she started her test and that, at first, the Applicant was reading the questions and Mr. A. B. was taking pictures of the computer screen with the Applicant's iPad. However, when she got to questions related to mathematics, Mr. A. B. helped her to answer the questions and the Applicant took pictures of the screen.

41. Ms. T. S. also told the IGO investigator and the Tribunal that she accepted to go to the Applicant's office because she thought they would be doing the test "at the same time", but then found herself in the awkward situation described above.

42. Ms. T. S. testified that the following day she mentioned what had happened to Ms. I. S. and Mr. P. P., because she was feeling uncomfortable with the situation. Ms. I. S. and Mr. P. P. confirmed this conversation.

43. The Tribunal is of the view that Ms. T. S.'s testimony is credible and found neither evidence of ulterior motives from her part nor any indication of bias. On the contrary, the evidence shows that it was the Applicant who was in a position to influence the witnesses since he was in a senior position, whereas Ms. T. S. was on a temporary appointment and left the office only few days later.

44. Moreover, the evidence also shows that this incident had consequences for Ms. T. S. as she received a written reprimand. As a consequence, the Tribunal agrees with the investigation report when it states that "[t]here were no valid reasons for Ms. [T. S.] to invent a story in which she would incriminate herself".

45. The Applicant argues that there is evidence that, on 20 June 2016, after the World Refugee Day celebrations, he returned to the office to do some housekeeping and supervise the cleaning activities. He also argues that a driver,

Mr. B. S., who was also in the office at that time, is a witness of the fact that he spent most of his time alone in his office and, as a consequence, he could not have done the test with Ms. T. S.

46. In this regard, the Tribunal notes that while the IGO investigator did not hear the testimony of Mr. B. S., the Tribunal heard his testimony at the hearing. The Tribunal found Mr. B. S.' testimony not credible and biased in favour of the Applicant for whom he has been working for the past ten years. In fact, Mr. B. S. showed that he had a "selective" memory since he could recall the precise time (to the minute) at which he saw the Applicant in his office at the time of the events but, when cross-examined, he couldn't recall other relevant, and more recent, details such as who assisted him to prepare his written statement for this Tribunal.

47. The Tribunal further notes that the documentary evidence shows that Ms. T. S. took her psychometric test from 6.47 p.m. to 7.42 p.m.. Also, the security records show that the Applicant and Mr. B. P. arrived in the office around 6 p.m. and left it after 8.30 p.m..

48. During the last day of the hearing, the Applicant presented evidence in the form of

the order (2014) 140874000892 T15 Td (p.m) ertion29.

a. No clear instructions were given to the candidates on what they were allowed or not allowed to do in relation to the tests;

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b. Taking pictures of the screen cannot be considered as misconduct since it

The right of a staff member to “appeal” an administrative decision imposing a disciplinary measure, in terms of Article 2(1)(b) of the UNDT Statute, is not restricted to a review of the investigative process. On the contrary, it almost always will require an appeal *de novo*, comprising a complete re-hearing and redetermination of the merits of a case, with or without additional evidence or information, especially where there are disputes of fact and where the investigative body *a quo* had neither the institutional means or expertise to conduct a full and fair trial of the issues.

77. The Tribunal has reviewed the investigation file on record and went even further since it allowed the Applicant to present all his witnesses, including Mr. B. S., a driver at UNHCR New Delhi Office who had not been heard before.

78. The onus is on the Applicant to provide proof of the lack of due process and how it negatively impacted the investigation and or disciplinary process. However, other than making the allegations, the Applicant has not provided substantial evidence that his due process rights were violated during the investigation and or the disciplinary process.

79. The Tribunal has

82. Full procedural guarantees only come into play in the context of a disciplinary process, not earlier. This is in conformity with the jurisprudence of the Appeals Tribunal that held in *Powell 2013-UNAT-295* that:

24. During the preliminary investigation stage, only limited due process rights apply. In the present case, the UNDT was correct in finding that there was no breach of Mr. Powell's due process rights at the preliminary investigation stage in that, by 21 December 2004, Mr. Powell had been appraised of the allegations against him and had been given the opportunity to respond. (footnote omitted)

83. This jurisprudence was also reiterated in *Akello 2013-UNAT-336*, in which the Appeals Tribunal held that:

36. While the statutory instruments governing the investigation and disciplinary process in the present case are different instruments to those which governed the *Applicant* case (footnote omitted), our jurisprudence remains that due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated. Furthermore, we have held in *Powell* that at the preliminary investigation stage, only limited due process rights apply. (footnote omitted)

84. In the case at hand, the evidence shows that, on 19 July 2016, the IGO received allegations made against the Applicant and Mr. A. B. that they had cheated during the EHP psychometric test administered in June 2016. The IGO opened an investigation and assigned the case to an investigator.

85. On 3 November 2016, the IGO disciplined and

86. From 6 September to 4 November

Ms. T. S. but also the documentary evidence and the testimonies of Ms. I. S., Mr. A. K., Mr. P. P. and Ms. A. J.

98. Having considered all the documents and evidence produced in this case, the Tribunal concludes that throughout the investigation and disciplinary process, there is no evidence of bias or of any procedural irregularity and that, as a consequence, the Applicant's due process rights were not violated.

Were the disciplinary measures applied proportionate to the offence?

99. The Secretary-General has the discretion to impose a sanction on a staff member for misconduct. However, this discretion is not unfettered, for there is a duty to act fairly and reasonably in sanctioning staff members and issuing sanctions that are proportional to the alleged offence. One of the grounds under which the Tribunal may interfere with the Administration's discretion in sanctioning staff members is lack of proportionality.

100. 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 (see *Aqel* 2010-UNAT-040).

101. 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.

102. 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.

103. 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.

104. The Tribunal considers that, bearing in mind the circumstances of the case, the cumulative application of two disciplinary sanctions was not excessive nor unreasonable.

105. In *Sanwidi* 2010-UNAT-084 (para. 39, in its relevant part), 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.

106. After a careful analysis of the content of the letter dated 10 July 2017, whereby the contested disciplinary measures were imposed on the Applicant, the Tribunal notes that the Organization took into consideration the “satisfactory service record” of the Applicant since 2010 as a mitigating factor.

107. Bearing in mind that the Applicant’s behaviour manifestly violates the highest standards of integrity expected of a staff member and jeopardizes the “good image” of the Organization as a credible institution, the sanctions imposed on him were actually quite lenient.

