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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/048/T

Judgment No.: UNDT/2022/064

Date: 30 June 2022

Original: English

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**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Morten Michelsen, Officer-in-Charge

SALEH

v.

SECRET AO 21 Tm 0 G[(v.)] TJET Q





- (v) On 8 August 2018, the Applicant sent to [BM] the contact of [HAA, name redacted]. On a later unknown date, the Applicant sent to [BM] a screenshot of a conversation between himself and [HAA]. In this conversation, [HAA] indicated “for one day”. The Applicant replied, “One day?? How come? Why’s that? Why you didn’t tell me”. Following sending the screenshot of this conversation to [BM], the Applicant wrote in Arabic, “May we be able to repay you for your good deeds; one can really count on you”. On or about 2 September 2018, the Applicant shared with [BM] a screenshot of a conversation he had with [HAA] in which the Applicant asked whether [HAA] was “ok” working inside the warehouse and said that he may go to the field, and wrote, “This [unknown reference] get him working every day at the warehouse”. [HAA] is from the Applicant’s village.

... On 1 August 2018, the Applicant participated in a joint financial verification visit along with project control and programme colleagues of the INTERSOS office and warehouse in Zahle.

... On 31 August 2018, INTERSOS received UNHCR’s verification report containing negative findings on INTERSOS’ procurement processes. The verification report was signed by the Applicant and two other UNHCR staff members.

... On 15 January 2019, the Inspector General’s Office [“IGO”]



I write further to my letter dated 28 November 2019 inviting you to respond to allegations of misconduct. After carefully considering my recommendation with the Investigation Report and the evidence attached thereto, as well as your 30 January 2020 response to the allegations, the High Commissioner exercised his prerogative under Staff Regulation 10.1 (a) and decided to impose on you a disciplinary

individuals, the High Commissioner concluded that you used your office for the private gain of third parties and thus abused your office.

In light of the above, the High Commissioner concluded that you engaged in abuse of authority, misuse of office and conflict of interest, thus violating Staff Regulation 1.2 (b), (e), (g), (m), Staff Rule 1.2 (q), the Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (UNHCR/HCP/2014/4 of 29 August 2014) and Principles 2, 4 and 9 of the UNHCR Code of Conduct.

In determining the appropriate disciplinary measure to be imposed, the High Commissioner took into account mitigating and aggravating circumstances. In the present case, the High Commissioner considered as aggravating circumstances that you engaged in repeated conduct involving abuse of authority over a period of approximately one year. As mitigating circumstances, the High Commissioner considered that you have served UNHCR for over 5 years with a satisfactory record; your ePad shows that you are a very dedicated staff member; until now, you had an unblemished disciplinary record; and you appear to be remorseful.

The High Commissioner also applied the parity principle which requires equality and consistency in the treatment of employees and considered disciplinary measures imposed by the Secretary-General and the High Commissioner for similar cases.

## **Consideration**

*limited*

proof beyond a reasonable doubt—it “means that the truth of the facts asserted is highly probable”. See para. 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-



may for good reason interfere with the exercise of administrative discretion” (see *Sanwidi*, para. 38).

*Whether the facts on which the sanction is based have been established?*

12. In essence, the Applicant submits that the facts on which the disciplinary sanction was based were not lawfully established in the sanction letter. In short summary, he contends that the INTERSOS staff who had complained against him, namely BK, BM and AD, lacked credibility and had an ulterior motive for making an allegedly false complaint. Instead, the Applicant had, in good faith, proposed certain daily workers to INTERSOS to help managing the work in the Zahle warehouse, and he did not unduly pressure anyone to hire any particular daily workers.

13. In the following, the Tribunal will address the submissions made by the Respondent in his closing statement, albeit for reasons of structure, in a different order.

The evidentiary value of the witness testimonies before the Tribunal vis-à-vis the statements made to the investigation panel

14. The Respondent submits that the Tribunal should “consider the time elapsed between the imposition of the disciplinary measure and the hearing when assessing the evidence”. While “the investigation witnesses had to recall events that occurred three to four years earlier, the Applicant had ample time to adapt his explanations, rehearse his testimony and influence his witnesses”. In this respect, the Applicant’s closing submissions refer “almost exclusively to the testimonial evidence during the hearing”. In case of doubt, however, the Tribunal should “prefer the statements taken by INTERSOS in 2018 and the IGO in 2019, as they are closer in time to the events and therefore more reliable”. The Tribunal should also consider the “available documentary evidence, which speaks for itself”.

15. Regarding the evidentiary value of witness testimonies before the Tribunal vis-à-vis the statements made to an investigation panel, the Appeals Tribunal has held that

in general, an oral testimony given before the Dispute Tribunal under oath prevails over a statement given during an investigative interview not under oath (see the Appeals Tribunal's judgment in *Dibagate* 2014-UNAT-403, paras. 33 to 34). It is further noted that Counsel for the Respondent had full and ample opportunity to cross-examine the Applicant and all his witnesses to tes





22. The Respondent submits that “the Applicant lied about daily worker [ATS]. Indeed, he told the IGO during his interview that [ATS] was not a relative”. In an email to the IGO, he “insisted that all ‘drivers and the daily workers [he] shared their names with INTERSOS are not relatives’ and that he has ‘nothing to hide’”. However, once the Applicant “saw all the evidence gathered by the IGO, he finally admitted that [ATS] was his wife’s nephew (as proven by his message)”. The “numerous contradictions in the Applicant’s statement confirm that his testimony is not credible”.

23. Concerning the testimonies of MY and TK, which were both witnesses of the Applicant, he submits that they are “impartial former INTERSOS warehouse staff” and “independently corroborate [the Applicant’s] account”.

24. The Respondent contends that the “testimonies of [MY] and [TK] are not relevant or credible and should be given no weight”, because neither of them were “involved in the hiring of daily workers and rarely dealt with UNHCR”. On this last point, HR did “not even know [MY] and stated that he would only deal with [TK] when [BK] and [BM] were not available”. MY and TK “denied tha

Counsel for Applicant asked if he came to testify because he was upset, he replied “No, I am disturbed, I want to know why I was separated”. MY’s “testimony is clearly retaliatory and has no credibility”.

26. Regarding BK (INTERSOS Warehouse Manager), BM (INTERSOS Warehouse Assistant) and AD (former INTERSOS Transport Contractor), which were all witnesses of the Respondent, the Applicant challenges their motivation and credibility. The Applicant submits, *inter alia*, that BK, BM and AD “complained about [the Applicant] due to the 1 August 2018 verification visit and its implications for [AD’s] contract”, namely its termination. As evidence, the Applicant refers to MY’s testimony at the hearing according to which “he believed that there was a corrupt understanding” between BK and AD that led to AD “winning a

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33. Whereas the Applicant, MY and TK might therefore have discussed the topics of the present case before the hearing, the Tribunal, however, does not find that the Respondent has adequately substantiated that the Applicant coordinated, or otherwise inappropriately, influenced their testimonies. Counsel for the Respondent also had the opportunity to test their responses in cross-examination and did so. In addition, the fact that the Applicant keeps himself abreast with the current affairs in the Zahle warehouse and does not fish for facts in his information sources in order to make no difference in this context. The Applicant's interest therein is not surprising as he participated in setting up the warehouse, and since then, spent much time and energy there.

34. In line herewith, the alleged contradictions in the Applicant's testimony do not by themselves render them incredible. Indeed, the Applicant's statements regarding the importance of the origin of the daily workers and not recommending people he did not trust were rational. Notwithstanding the Applicant's own opinion, it was in UNHCR's best interest to hire reliable and local people, as according to the Applicant's testimony, the Lebanese Government had requested UNHCR to hire Lebanese workers rather than foreigners, even if, as testified by TK, foreign workers were often better fitted for the hard physical work. Similarly, the Applicant's explanations concerning the circumstances surrounding the assignment of tasks to HAA were compelling.

36. Specifically with regards to BM, the Tribunal finds that his testimony was candid and credible, and he had no difficulty in providing direct and precise answers to the questions posed by Counsel. In general, BK evidently did not appreciate the Applicant's management style and the manner by which he perceived that the Applicant intended to influence INTERSOS' hiring of daily workers.

37. As for BM, he also explained that he felt that the Applicant had been inappropriately meddling in his work by pushing him to hire certain daily workers. Parts of BM's remaining testimony came across, however, as incoherent and also inconsistent with BK's testimony. While this could, at least partially, have been caused by him not fully mastering the English language, as also submitted by the Respondent, the Tribunal notes that the Respondent could have avoided this by requesting Arabic-English interpretation, which was provided with regard to some of the other witnesses,







47. Firstly, it does not follow from the facts on record that any of the people referred to hereferred







BK and BM. Thus, it is noted that only BK and BM's situations are relevant in this context as the sanction letter only refer to the Applicant pressuring INTERSOS personnel and AD was a contractor. In addition, BK and BM were not colleagues of the Applicant (see para. 3, first sentence); the Respondent does not contend that the Applicant misused his influence, power or authority to negatively influence BK or BM's career or employment conditions (see para. 3, second sentence); and no blackmail claims have been made (see para. 3, third sentence).

58. The Tribunal notes that both BK and BM in their testimonies expressed that the work environment had become intolerable by the time when the alleged meeting between the Applicant, BM, BK and AD took place. Also, the Applicant had a loud voice, according to both BK and BM, and the tone of text communication with BM was demanding. At the same time, both BK and BM explicitly understood that the Applicant did not have any instruction authority over them and, as a UNHCR staff member, could not fire them.

59. In addition, it follows from the agreed facts that before INTERSOS took over the daily management of the Zahle warehouse in 2014, the Applicant helped to set up the UNHCR office and warehouse in Zahle and used to be in charge of hiring the daily workers. When the responsibility of managing the warehouse was transferred to INTERSOS, the previous practice of hiring daily workers simply continued and INTERSOS also inherited the pool of daily workers that the Applicant had previously established and used.

60. At no point in time has it been demonstrated that any UNHCR superiors gave the Applicant any guidance regarding the appropriateness of his established practices on hiring daily workers at the Zahle warehouse. The only direction that seems to have been provided is that hiring Lebanese workers should be preferred. Also, no complaints





*Rescission under art. 10.5(a) of the D*

68. The Applicant principally seeks the rescission of the contested decision and reinstatement in his former post. The Respondent makes no submissions on remedies other than the Applicant has failed to established “any of the four bases on which the disciplinary measure should be rescinded or for moral damages should be awarded”.

69. Considering its abovementioned findings on the unlawfulness of the contested decision, the Tribunal finds that the most appropriate remedy would be to rescind this decision (in comparison, see *Lucchini* 2021-UNAT-1121). As for reinstating the Applicant in his former post, the Tribunal notes that this is impossible as the evidence

- a. “[T]he nature and the level of the post formerly occupied by the staff

of departure for the Tribunal's cons ^ 9

