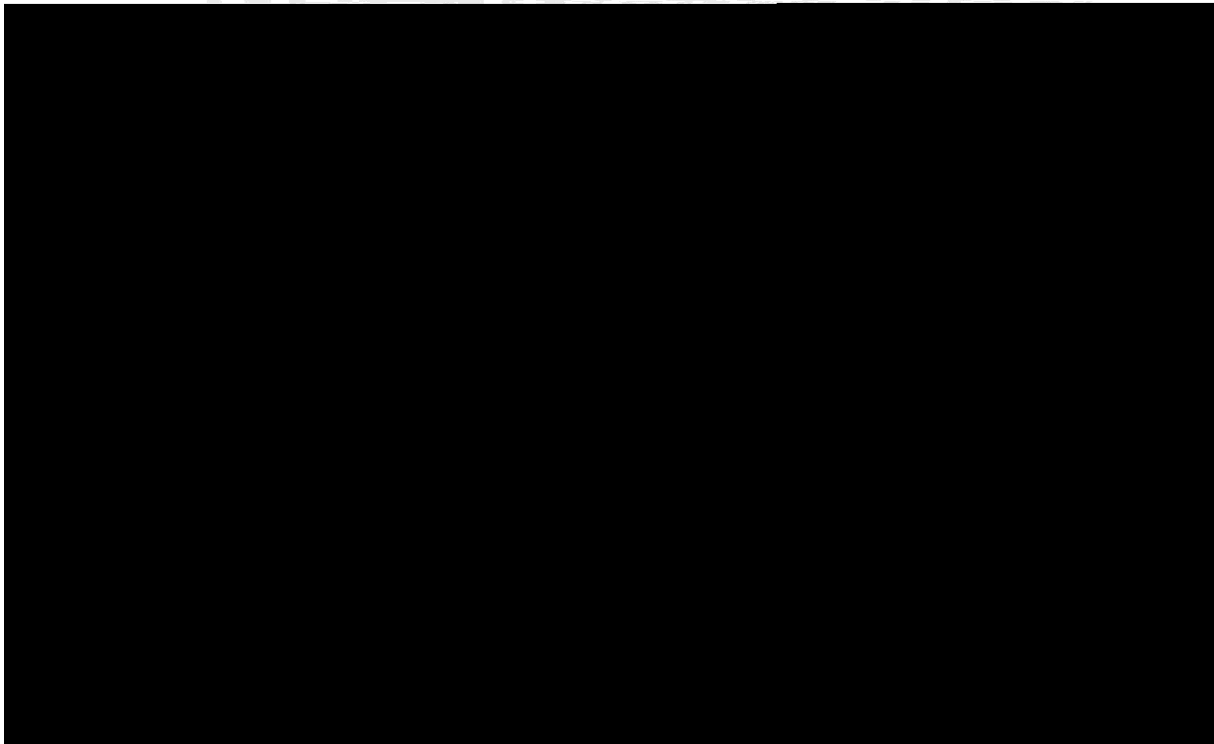




UNITED NATIONS

Judgment No. 2018-UNAT-859



Counsel for Mr. Samandarov: Brandon Gardner, OSLA

Counsel for Secretary-General: Nathalie Defrasne/Isavella Vasilogeorgi

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against

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11. By letter dated 13 June 2016 (sanction letter), the ASG, OHRM, conveyed to Mr. Samandarov the decision of the Under-Secretary-General for Management (USG, DM), to impose a disciplinary measure of written censure and loss of two steps in grade in accordance with Staff Rule 10.2(a)(i) and (ii) for threatening to break the complainant's mobile phone.

12.

Mr. Samandarov's step increments; and (c) pay Mr. Samandarov the loss of salary that he suffered as a result of the loss in steps, with interest on that amount at the current US Prime Rate.

Submissions

The Secretary-General's Appeal

15. The Secretary-General submits that the UNDT erred in finding that the decision to impose a written censure and a loss of two steps in grade on Mr. Samandarov was disproportionate and thus unlawful. In particular, the UNDT effectively substituted its own discretion for that of the Administration when assessing the proportionality of the imposed sanctions and when determining that, under the circumstances of the case, the lesser sanction of written censure was more appropriate. The imposition of a combination of two sanctions was not unusual, let alone "obviously absurd or flagrantly arbitrary" as required by the Appeals Tribunal jurisprudence for the UNDT to review the level of the sanction imposed. In addition, similar sanctions have been imposed in comparable cases. Moreover, he submits, the UNDT made its own assessment of Mr. Samandarov's conduct rather than examining how the Administration reached the contested decision and failed to defer to the Administration's discretion in determining the appropriate sanction. The Secretary-General was fully aware of Mr. Samandarov's challenging conditions of service, but in his discretion, considered that these conditions did not warrant a lesser sanction as the United Nations expects its staff members to abide by the Organization's regulations and core principles even in difficult circumstances. Accordingly, the UNDT exceeded its competence and erred in law when considering the nature of the misconduct and what it deemed to be mitigating circumstances.

16. In light of the foregoing, the Secretary-General requests the Appeals Tribunal to uphold the Administration's decision to impose disciplinary measures on Mr. Samandarov and to vacate the UNDT's rescission of the loss of two steps in grade, as well as all other remedies ordered by the UNDT. He requests, however, to leave undisturbed the UNDT's finding that the facts of the case were established and amounted to misconduct and that Mr. Samandarov's due process rights were fully respected.

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Considerations

21. Judicial review of a disciplinary case requires consideration of the evidence adduced and the procedures utilized during the course of the investigation by the Administration.² The Dispute Tribunal must establish whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct under the Staff Regulations and Rules, and whether the sanction is proportionate to the offence.³ The UNDT, in exercising judicial review, therefore may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on

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26. The UNDT correctly balanced the competing considerations and concluded reasonably that the cumulative imposition of a written censure and the loss of two steps in grade were disproportionate to the misconduct. The fact that the threat was directed against an object and not at the physical integrity of the complainant is a critical relevant consideration to which the UNDT attached appropriate weight. The fact that the threat did not materialize is equally consequential. By the same token, the UNDT did not misdirect itself in accepting as mitigating factors the fact that Mr. Samandarov had lost all of his belongings during the Taliban attack, was sensitive about anyone interfering with his belongings, suffered anxiety and stress from the attack, his work regarding the civilian casualties caused by the attack and by his living and working conditions in Kabul in the months following the evacuation. These are all relevant factors established by the evidence which a tribunal called upon to assess the proportionality of a sanction may be expected to take into account in the balancing of competing considerations. In addition, there was an element of provocation on the part of the complainant. She did interfere with Mr. Samandarov's possessions and threatened disrespectfully to take a photograph of him. She too could have conducted herself better.

27. In the circumstances of this case, the loss of two steps in grade was not proportionate and thus unlawful; a written censure was sufficient as the suitable and necessary means to achieve the object of discipline required on the facts. The UNDT did not lapse in respect of the considerations it sought to balance or in the assessment of their weight. It accordingly did not err on any question of law or fact permitting interference by this Tribunal in terms of Article 2(1) of the Appeals Tribunal Statute.

28. The appeal must therefore be dismissed.

Judgment

29. The appeal is dismissed and Judgment No. UNDT/2017/093 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Lussick

Entered in the Register on this 10th day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar