



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/048

Judgment No.: UNDT/2021/020

Date: 8 March 2021

Original: English

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Introduction

1. The Applicant is

18. It is unethical and inappropriate to raise a case that was closed 10 years ago with the Director/DHR's memo having been removed from his file. This slanderous insinuation should not be receivable by the UNDT.

19. It is disingenuous of the Respondent to suggest that he can afford to pay the disciplinary measure in instalments of USD3,300 because his gross salary amounts to over USD15,000. His net take home pay is currently not more than USD9,500 as a single parent on one salary supporting a son at university and paying a mortgage for the family home as well as having to rent accommodation at his duty station. A deduction from his income of this amount would be devastating for them.

20. This type of unethical comparison, gross salary versus instalment recoveries by the Respondent shows a pathological degree of disrespect not only to him but to recoveries

The Respondent

24. The Respondent submits that the facts are undisputed. The Applicant has not contested that he failed to declare thousands of personal calls and reimburse UNHCR. The Applicant has not questioned that he committed misconduct and has not raised any questions of due process.

25. The Applicant has only asserted that the disciplinary measure is unreasonably harsh. Accordingly, the sole point in issue is whether the disciplinary measure was proportionate to the gravity of the Applicant's misconduct.

26. The Applicant's misconduct is serious. All staff members have a duty under

28. The Applicant's view, expressed repeatedly during his interview with the investigators, that the Division of Information Services Technology ("DIST") should have alerted him to the fact that he was certifying personal calls as official further illustrates the Applicant's reckless attitude with respect to both the use of UNHCR resources and the discharge of his obligations. It was manifestly unreasonable for the Applicant to expect UNHCR to identify for him his calls to relatives, friends, hotels, restaurants, shops and various other service providers. If the Applicant had no time to identify his personal calls, he should not have made those calls from his official UNHCR-issued phone in the first place.

29. The Applicant's misconduct is thus serious on account of its nature and scale as well as the high standards expected from the Applicant. In addition, consistent with the jurisprudence of the United Nations Appeals Tribunal ("UNAT"), the High Commissioner considered as an aggravating circumstance the prolonged period of time during which the Applicant was reckless and failed to exercise reasonable care in the use of his official UNHCR-issued phone.

30. The High Commissioner also considered as an aggravating factor the contempt for the investigation displayed by the Applicant during his interview. A review of the verbatim transcript shows that he did not take the investigators or the investigation seriously. The Applicant laughed when he asked to confirm that he had understood the explanation about the investigation process and commented that he had heard it all before. The Applicant laughed and responded, "Is this serious?", when he was asked to swear to tell the truth.

31. The Applicant's scornful attitude during his interview is not consistent with his obligation to cooperate with duly authorized investigations in accordance with staff rule 1.2(c). It is also illustrative of the Applicant's lack of remorse. The Applicant's explanation that he was questioning the wisdom of spending resources on an exercise as long and expensive as an investigation rings hollow in

32. As mitigating factors, the High Commissioner took into account the Applicant's admission of the facts and his offer to reimburse UNHCR. The Applicant's personal circumstances and stress in connection with the situation of his son were also considered as a mitigating circumstance – even if the information relayed by the Applicant did not concern the entire relevant period and in spite of the fact that the Applicant's stress did not affect his performance during 2016.

33. The Applicant also asserts that the disciplinary measure is not warranted in light of his long record of exemplary service to the Organization. The Respondent notes that the Applicant was the subject of an investigation into allegations of misconduct in 2009. Although the then Director/DHR considered that the Applicant had committed misconduct, he decided not to institute disciplinary proceedings on

35. The Applicant's submission that it is impossible for him to pay the fine at once disregards the fact that, on 12 April 2019, four weeks before he filed his application, UNHCR offered that he pay it in five instalments, one instalment equal to USD3,356 and four instalments equal to USD 3,200. Considering the Applicant's monthly gross earnings were then USD15,374.44, the Applicant's claim that the fine will cause him an irreparable harm is not substantiated.

36. After the sanction was imposed, and after he repaid the financial loss to UNHCR, the Applicant has asked that his personal circumstances after the misconduct, particularly his financial situation, be taken into account with respect to the choice and execution of the disciplinary measure. The Respondent submits that there is no basis in the regulatory framework or the jurisprudence for that consideration and that, even if there were, the Applicant's financial hardship has not been established.

37. There is no precedent in the case law supporting the consideration of a staff member's financial situation as a relevant or mitigating circumstance in levying a disciplinary sanction. The UNAT has upheld(s)9()1rnings h cumstnaThe4 v0 G{b)20(e)e4Pbe g a

UNDT applications. The Applicant has had ample time to prepare for the possibility of the fine, and his take-home pay is now approximately USD1,000 higher than at the time of his application.

43. The Applicant's reiteration that he paid back the financial loss owing to his misconduct as soon as the matter was brought to his attention is factually wrong. During the investigation, the Applicant offered to reimburse UNHCR. He was fully aware of the amount owed as he received the draft findings of the investigation on 24

limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance⁸.

47. **When** faced with an application to review the Secretary-General's exercise of discretion in matters of sanctioning staff members for proven acts of misconduct, the test of proportionality requires a 9(m)18(i)1 a089(t)6(t)-41(y)40()-36inister td wr(r)-6(e)4(t)-21(a)3w

result¹². Once imposed, the appropriateness of the level of sanction can only be reviewed in case of obvious absurdity or flagrant arbitrariness.¹³ The Tribunal may interfere with the sanction if it finds that it is too excessive in the circumstances of the case.¹⁴

52. Some of the relevant factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the misconduct, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency in dealing with comparable cases¹⁵.

53. The Respondent has outlined the factors that he considered when determining the appropriate sanction to impose. He has shown that he considered both aggravating and mitigating factors and he has shown that he tried to be as consistent with past practice in similar cases of misconduct as possible. In particular, the Respondent considered as an aggravating circumstance the prolonged period of time during which the Applicant was reckless, failed to exercise reasonable care in the use of his official UNHCR-issued phone by certifying private calls as official and making the Respondent pay for them. He considered this as serious misconduct on account of its nature and scale as well as the high standards expected from the Applicant. The Respondent also considered the contempt for the investigation displayed by the Applicant during his interview as a failure to fully cooperate with investigations. In mitigation, the Respondent considered the Applicant's admission of the facts and his offer to reimburse UNHCR. The Applicant's personal circumstances and stress in connection with the situation of his son were also considered as a mitigating circumstance.

¹² *Sanwidi* 2010-UNAT-084, para. 39; ~~Applicant~~

