

UNITED NATIONS APPEALS TRIBUNAL

GALLO

v.

THE SECRETARY-GENERAL OF THE UNITED NATIONS

Appeal of UNDT Judgment No. 2016/038

21 JUNE 2016

I. Background

1. On 22 April 2016, the United Nations Dispute Tribunal (“UNDT”) issued UNDT Judgment No. 2016/038 (“Judgment”) in the matter of Mr. Peter Gallo (“Appellee”) v. the Secretary-General of the United Nations (“Appellant”).¹

2. The Appellee is a former Investigator who served at the P-4 level in the Office of Internal Oversight Services (“OIOS”). By memorandum dated 17 January 2014, the Appellee’s first reporting officer requested the Director of ID/OIOS to initiate a formal investigation in accordance with section 5.11 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The request was based on the fact that on 14 January 2014, the Appellee had allegedly altered the ending of a quote appearing on a white board in the Investigation Division of OIOS (“ID/OIOS”), which originally read “If the facts don’t fit the theory, change the facts – Albert Einstein,” to “If the facts don’t fit the theory, change the photographs,” and attributed the quote to another OIOS investigator. The quote was apparently altered in reference to the issuance of UNDT Judgment UNDT/2013/176 (Nguyen-Kropp & Postica).²

3. By memorandum dated 31 January 2014, the Under-Secretary-General of OIOS (“USG/OIOS”) appointed a fact-finding panel (“FFP”) to investigate the report against the Appellee for prohibited conduct under ST/SGB/2008/5. By memorandum of the same date, the USG/OIOS informed the Appellee of the initiation of the fact-finding investigation and the establishment of the FFP under section 5 of ST/SGB/2008/5. On 31 March 2014, the FFP submitted its investigation report concluding that the Appellee’s actions and behavior constituted harassment under sec. 1.2 of ST/SGB/2008/5. By memorandum dated 9 April 2014, the USG/OIOS forwarded the FFP’s investigation report to the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) for her consideration of disciplinary action against the Appellee.³

4. By a note dated 29 October 2014, the Under-Secretary-General, Department of Management (“USG/DM”) advised the Secretary-General’s Chef de Cabinet that the matter

¹ UNDT Judgment No. 2016/038, dated 22 April 2016, attached as Annex 1 hereto. The present Appeal is submitted on behalf of the Secretary-General of the United Nations who is the Appellant. Although Mr. Gallo will be the “Respondent” to the Appeal, the term “Appellee” is used to refer to Mr. Gallo to avoid confusion since the term “Respondent” was used in the proceedings before the UNDT to refer to the Secretary-General.

² Judgment, paras. 1, 3-5.

³ Judgment, paras. 6, 8-9.

would be more suitably assessed and administered by an entity outside the United Nations Secretariat in order to avoid the appearance of any potential conflict of interest. Accordingly, the USG/DM recommended that the results of the investigation be transferred to UNICEF. Upon approval of the recommended transfer of the results of the investigation to UNICEF, on 6 November 2014, the USG/DM requested the Executive Director of UNICEF to assess the allegations and to carry out disciplinary proceedings, if warranted.⁴

5. By memorandum dated 1 December 2014, the USG/DM informed the Appellee that the FFP had found that the evidence supported the allegations that he had engaged in conduct amounting to harassment, as defined by section 1.2 of ST/SGB/2008/5. The USG/DM further informed the Appellee that the Secretary-General had decided to delegate to UNICEF the authority to assess and make a final recommendation on the resolution of the matter.⁵

6. On 5 January 2015, the Appellee submitted his comments to the FFP's investigation report. Thereafter, by letter dated 11 February 2015, the then Director of the Department of Human Resources of UNICEF ("DHR/UNICEF") informed the USG/DM that he had decided not to pursue the matter with reference to section 5 of ST/AI/371 (Revised disciplinary measures and procedures) and recommended that a written reprimand be issued against the Appellee.⁶

7. On 16 March 2015, the Appellee's fixed-term appointment expired, and he separated from the service of the Organization. By a letter dated 1 April 2015, the Deputy Secretary-General informed the Appellee that the Secretary-General had accepted the recommendation of the Director of DHR/UNICEF and that "the current letter [would] serve as a written reprimand, issued pursuant to Staff Rule 10.2(b), which shall be placed in [the Appellee's] Official Status File."⁷

8. On 2 July 2015, the Appellee filed his application with the UNDT contesting the decision to place the letter of reprimand in his Official Status File ("OSF"). He sought rescission of the decision to find him "guilty" of misconduct and the decision to issue the reprimand and sought financial compensation based on the non-renewal of his appointment and resultant separation from service.⁸

⁴ Judgment, paras. 10-11.

⁵ Judgment, para. 12.

⁶ Judgment, paras. 13-14.

⁷ Judgment, paras. 15-16; Letter from Deputy Secretary-General to Appellee dated 1 April 2015, Annex 2 hereto.

⁸ See Judgment, paras. 1, 17.

9. The UNDT issued its Judgment on 22 April 2016. The UNDT found the application, which the Appellee had filed directly with the UNDT, receivable *ratione materiae*. The UNDT's finding was premised on the grounds that the written reprimand had been issued pursuant to Staff Rule 10.2(b)(i) as a non-disciplinary measure following the completion of disciplinary proceedings under ST/AI/371, Amend. 1. Consequently, the UNDT ruled that, pursuant to Staff Rules 10.2(c) and 11.2(b) as well as section 10 of ST/AI/371, Amend. 1, the Appellee was not subject to the requirement to seek management evaluation as a pre-condition to filing the application in this matter with the UNDT.⁹

10. On the merits, the UNDT held that the written reprimand had been issued unlawfully.¹⁰ The UNDT held that both disciplinary and non-disciplinary measures had the effect of sanctioning or imposing an administrative measure on staff members, and that the Secretary-General could exercise his authority to impose such measures only while there is an ongoing contractual relationship between the Organization and the staff member.¹¹ In this case the Appellee had separated at the expiration of his fixed-term appointment on 16 March 2015, and the written reprimand was issued on 1 April 2015. The UNDT concluded that “a disciplinary or non-disciplinary measure cannot be imposed on a former staff member, since the Secretary-General’s authority to sanction no longer exists from the date of separation from the Organization[.]”¹² Even though it recognized that the investigation in this case had taken place before the expiration of the Appellee’s appointment, the UNDT held that the “mandatory requirement for a non-disciplinary measure to be imposed only on a current staff member [had not been] observed[.]” rendering the decision to issue the written reprimand and place it in the Appellee’s OSF unlawful.¹³

11. Based on the above, the UNDT rescinded the decision to issue the written reprimand and ordered the 1 April 2015 letter removed from the Appellee’s OSF. The UNDT rejected the Appellee’s remaining requests.¹⁴

12. The Judgment was issued on 22 April 2016. Accordingly, the deadline for filing the present Appeal with the United Nations Appeals Tribunal (“UNAT”) is 21 June 2016.

⁹ See Judgment, paras. 51-66; see also Judgment, paras. 36-44 for the legal framework considered by the UNDT.

¹⁰ Judgment, paras. 67-75, 79.

¹¹ Judgment, paras. 69-71.

¹² Judgment, para. 72.

¹³ Judgment, paras. 73-75.

¹⁴ Judgment, paras. 79, 81; see also paras. 78, 80.

II. Respondent's Legal Arguments

13. This Appeal presents the issue as to whether the Secretary-General has the discretionary authority to issue a non-disciplinary, administrative measure in the form of a written reprimand under Staff Rule 10.2(b)(i), and to place such reprimand in the staff member's Official Status File after the staff member's separation from service.

14. The decision to issue the reprimand was a proper exercise of discretion of the Secretary-General's discretion, and the UNDT erred in law when it held that the reprimand, issued after the Appellee's separation, had been unlawful. As explained in greater detail below, the UNDT erred in holding that a written reprimand has the scope of **either** sanctioning **or** imposing an administrative measure on a staff member, thereby equating the reprimand to a disciplinary sanction. The UNDT also erred when it held that a written reprimand, by definition a non-disciplinary administrative measure, can be issued and placed in a staff member's file only while the staff member is still actively in the service of the Organization.

A. A written reprimand is an administrative measure, not a sanction

15. The UNDT held that "**both** disciplinary and non-disciplinary measures of oral and written reprimand have the scope of **either** sanctioning **or** imposing an administrative measure on a staff member[.]"¹⁵ In essence, the UNDT held that a written reprimand, issued pursuant to Staff Rule 10.2(b)(i), would have the effect of a sanction, i.e., a disciplinary measure. This UNDT holding constitutes an error of law.

16. Both the Staff Rules and UNAT jurisprudence are clear that a written reprimand is not a disciplinary measure and does not amount to a sanction. Staff Rule 10.2(a) provides that "[d]isciplinary measures may take one or more of the following forms **only**" (emphasis added) and enumerates various sanctions which do not include among them a written reprimand.¹⁶ Moreover, Staff Rule 10.2(b)(i) specifically provides that "[m]easures other than those listed under staff rule 10.2 (a) **shall not be considered to be disciplinary measures** within the meaning of the present rule. These include, but are not limited to, the following **administrative measures**: ... [w]ritten or oral reprimand" (emphases added). The UNAT has also explained

¹⁵ Judgment, para. 69 (emphases added).

¹⁶ Specifically, under Staff Rule 10.2(a), only the following are considered disciplinary measures: written censure; loss of one or more steps in grade; deferment of eligibility for salary increment for a specified period; suspension without pay for a specified period; fine; deferment of eligibility for consideration for promotion for a specified period; demotion with deferment of eligibility for consideration for promotion for a specified period; separation from service, with notice or compensation in lieu of notice, with or without termination; and dismissal.

that “[a] reprimand is not an adverse entry in the same way as an entry relating to sanction post-disciplinary proceedings would be.”¹⁷

17. Contrary to the UNDT’s holding in this case, a written reprimand (even one issued after the completion of a disciplinary process) does not amount to a sanction. A written reprimand is by statutory definition a non-disciplinary administrative measure, and its character and effect do not depend on the context in which it is issued. Staff Rule 10.2(b)(i) does not distinguish between a written reprimand issued by management in the regular course of a staff member’s service, and one issued after the completion of a disciplinary process. In other words, a reprimand cannot on the one hand be considered to be an administrative measure when issued in the absence of disciplinary proceedings, and on the other as a sanction when issued after the completion of disciplinary proceedings.

18. The UNDT’s holding that a written reprimand has the effect of a sanction, therefore, is contrary to clear statutory language and UNAT jurisprudence. Consequently, the UNDT erred in law when it held that the written reprimand issued pursuant to Staff Rule 10.2(b)(i) operated as a sanction.

B. The Secretary-General’s authority to issue reprimands is not limited to the duration of a staff member’s appointment

19. The UNDT further erred in holding that the Appellant’s authority to issue the written reprimand required that the staff member then be in the active service of the Organization.¹⁸

20. The Secretary-General possesses broad discretion in administering the operations of the United Nations. Pursuant to Articles 97 and 101 of the Charter of the United Nations, the Secretary-General, as the chief administrative officer of the Organization, in managing the performance of UN staff pursuant to the Staff Regulations enacted by the General Assembly, must ensure that “[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.” Staff Regulation 1.3 provides that “[s]taff members are accountable to the Secretary-General for the proper discharge of their functions. Staff members are required to uphold the highest standards of efficiency, competence and integrity in the discharge of their functions.”

¹⁷ UNAT Judgment No. 2012-UNAT-192 (Akyeampong), para. 30.

¹⁸ See Judgment, para. 70.

21. The UNAT has long recognized the Secretary-General's broad discretion in administrative matters.¹⁹ Consistent with this principle, the UNDT has recognized that the Administration "clearly has all necessary powers to conduct such investigations and enquiries as might be thought necessary or desirable to administer the Organization, and the mere fact that a staff member has separated cannot hinder, let alone prevent, any such action even if that staff member's conduct is in question."²⁰ The UNDT has further recognized the importance of the Administration's ability to maintain accurate and complete records of a staff member's performance and activities as part of his file with the Organization:

The Administration must be able to deal with its files in any reasonable way thought to be necessary or desirable. They comprise the records of its affairs. Placing notes of relevant matters on files is a vital part of the management of any undertaking and it is necessary, in most cases, that the records be comprehensive at the risk of including irrelevant or inconsequential matter, since it is not always possible to know what will be required in the future.²¹

22. In light of the foregoing, the Secretary-General holds both the responsibility, and the discretionary authority, not only to ensure that the conduct and performance of staff members during their service with the organization satisfy "the highest standards of efficiency, competence and integrity" set forth in the Staff Regulations, but also to ensure that any matters concerning a staff member's performance of his duties are fully and adequately reflected in the records maintained by the Organization. The Secretary-General has the authority to administer the records of a staff member for conduct related to the staff member's performance and activities while still in service, even after the staff member separates from the service of the Organization. To conclude otherwise would mean that any actions that a staff member performs in their last days of service could not be recorded in the Organization's files because that staff member would have separated by the time such actions could be properly recorded. Moreover, this would mean that the Secretary-General's broad discretion and authority in administrative matters could be obviated by a staff member's simply resigning or otherwise being separated for other reasons from the service of the Organization. Such separation can ensue from the expiration of an appointment, but can also be the consequence of other reasons, such as resignation, abandonment of post, disability, etc.

¹⁹ See UNAT Judgment No. 2010-UNAT-084, (Sanwidi), para. 40; see also UNAT Judgment No. 2016-UNAT-616 (Tiwathia), para. 25; UNAT Judgment No. 2015-UNAT-577 (Staedtler), para. 35.

²⁰ Judgment UNDT/2010/069/Corr.2 (Applicant), para. 14.

²¹ Judgment UNDT/2010/069/Corr.2 (Applicant), para. 11.

23. Finally, the Appellant notes that there is no requirement in the Staff Regulations or Rules that conditions the Secretary-General's discretionary authority to issue a written reprimand as a non-disciplinary measure pursuant to Staff Rule 10.2(b)(i) on the existence of an ongoing appointment. Likewise, there is no UNAT precedent requiring a subsisting employment relationship for purposes of administrative, non-disciplinary measures. Indeed, the requirement that a reprimand can only be issued to and placed in the OSF of a staff member in active service would render nugatory those standards of conduct in the Staff Regulations and Rules and related administrative issuances that are said to survive active service. These include the ongoing confidentiality obligations pursuant to Staff Regulation 1.2(i), the post-employment restrictions set forth in ST/SGB/2006/15, etc. Such a requirement would, thus, prevent the Secretary-General from dealing with the consequences of such after-service conduct.

24. Based on the foregoing, the UNDT erred in law when it held that the decision to issue a written reprimand was unlawful because it required the existence of an on-going appointment. The Secretary-General acted within his authority when, based on the Appellee's conduct as a staff member, he decided to issue a non-disciplinary, administrative measure in the form of a written reprimand and place it in the Appellee's OSF.

III. Conclusion

25. Based on all of the foregoing, the UNDT erred in law when it rescinded as unlawful the decision to issue the written reprimand against the Appellee and when it ordered the removal of the letter of reprimand from the Appellee's Official Status File. The Appellant requests that the UNAT vacate the Judgment with respect both to the UNDT's holding that the written reprimand had been issued unlawfully and to the order to remove the reprimand from the Appellee's Official Status File.



Respectfully submitted,

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