

Case No.: UNDT/NBI/2023/056

Judgment No.: UNDT/2024/079

Date: 11 October 2024

Introduction

1. On 18 July 2023, the Applicant filed an application with the United Nations

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. (*Sanwidi* 2010-UNAT-084, para. 40).

15. However, UNAT also held that “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” or otherwise “substitute its own decision for that of the Secretary-General”. In this regard, “the Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision” (*Sanwidi, op.cit.*).

16. In this case, the Applicant argues that the sanction imposed is disproportionate to the offense in question. As part of that claim, he also argues that the facts upon which the sanction was based were not all established to the required standard.

Whether the facts on which the disciplinary measure was based were established by the preponderance of evidence

17. Pursuant to section 9.1 of ST/AI/2017/1, the standard of proof in disciplinary cases depends on the disciplinary measure imposed. Specifically, this document provides that the applicable standard of proof is:

(a) Clear and convincing evidence, for imposing separation or dismissal of the subject staff members. This standard of proof is lower than the criminal standard of “beyond a reasonable doubt”; and

(b) Preponderance of the evidence (more likely than not that the facts and circumstances underlying the misconduct exist or have occurred), for imposing any other disciplinary measure.

18. Since the sanction in this case was “written censure and deferment for two years of eligibility for salary increment”, and not separation or dismissal, the facts must be established by the preponderance of the evidence.

19. The Applicant concedes some of the factual findings upon which the discipline was imposed, specifically, that he incorporated and registered a company,

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Tale rapporto tuttavia non si è mai concretizzato in realtà in un rapporto commerciale in senso tecnico. Ne deriva che non esistono fatturazioni, contratti e quant'altro tra le nostre società.

In occasione della presentazione dell'evento cui Lei fa riferimento abbiamo semplicemente condiviso un interesse professionale a presentare il prodotto MC-TECH, tuttavia in contesti totalmente slegati tra le parti interessate.

A completamento di quanto sopra terrei a precisare che, proprio in ragione della citata amicizia, abbiamo sempre preferito evitare ogni coinvolgimento che andasse al di là della semplice reciproca cortesia.

Pertanto commercialmente MD SYSTEMS non ha mai avuto alcun rapporto con SAROAL. Rimango a Sua disposizione per qualsiasi ulteriore chiarimento.

Rimanendo a disposizione per qualsiasi chiarimento porgiamo cordiali saluti.

b. OIOS translated this as follows:

Good morning Mr. Vittone,

I confirm that we have known Mr. Moroldo for several years, with whom we have a friendly relationship.

However, this relationship was never actually materialized into a commercial relationship in the technical sense. As follows, that there are no invoices, contracts and anything else between our companies.

During the presentation of the event you refer to, we simply shared a professional interest in introducing/presenting the MC-TECH product, however the participation to the event was for different reasons (we had different reason to attend to this event).

To complete the above, I would like to point out that, precisely because of the friendship, we have always preferred to avoid any involvement that went beyond simple mutual courtesy.

Therefore, MD SYSTEMS has never had any commercial relationship with SAROAL.

I remain at your disposal for any further clarification.

Remaining available for any clarification, we send our best regards.

c. The Applicant's translation of this is:

Good morning Dr. Vittone,

I confirm that we have known Mr. Moroldo for several years, with whom there is a feeling of friendship. However, this relationship never actually materialized into a commercial relationship in the technical sense.

On the occasion of the presentation of the event you are referring to, we simply shared a professional interest in presenting the MCTECH product; however, in totally unrelated contexts between the parties.

To complete the above, I would like to point out that, precisely because of the aforementioned friendship, we have always preferred to avoid any involvement that went beyond simple mutual courtesy.

Therefore, commercially MD SYSTEMS has never had any relationship with SAROAL.

I remain at your disposal for any further clarification.

Remaining available for any clarification, we send our best regards.

26. The Tribunal finds that both translations are correct in this instance and that the variations are stylistic. The substance of the text is the same, regardless of which translation

44. The Respondent cites other cases they claim to be similar in which the sanction included more than just a written censure. However, these too are distinguishable as they involve financial gain to the staff member, financial loss to the Organisation or holding a senior position elsewhere. This leaves only two cases in which the sanction exceeded a written censure versus four in which written censure was deemed sufficient. Unfortunately, the Compendium does not explain why those two cases were treated more harshly.

45. In the circumstances before it, the Tribunal finds that the additional sanction of deferment for two years of eligibility for salary increment to be arbitrary, excessive and obviously absurd. *See, Jaffa* 2015-UNAT-545, para. 22; *Sanwidi* 2010-UNAT-084, paras 39-42; *Portillo Moya*, UNAT-2015-523, para. 21; and *Sall*, 2018-UNAT-889, para. 41.

46. Of course, the imposition of a sanction is not just a mechanical exercise, since the sanction should not be “more excessive than is necessary for obtaining the desired result.” *See Sanwidi* 2010-UNAT-084, para. 39, as confirmed in *Applicant* 2013-UNAT-280, para.120; *Abu Jarbou* 2013-UNAT-292, para. 41; *Akello* 2013-UNAT-336, para. 41; *Samandarov* 2018-UNAT-859, para. 23 and *Turkey* 2019-UNAT-955, para. 38.

47. In *Kennedy* 2024-UNAT-1453,² the Appeals Tribunal provided the following guidance:

Under our jurisprudence, the proportionality inquiry of Staff Rule 10.3(b) seeks to ensure that a disciplinary measure is reasonable and not more excessive than necessary to obtain the desired result. This analysis respects the need for decision-makers to balance legitimate concerns and respond to individual facts, while also meeting the obligation to treat staff members fairly and rationally. We thus look, among other factors, to the seriousness of the offence, the

examining whether similar violations have resulted in similar disciplinary measures.

48. For example, when the staff member profited financially from the misconduct, imposing a financial sanction beyond mere written censure would be appropriate. The same is true where the Organization suffers a financial loss as a result of the misconduct. Neither circumstance exists in this case to justify the financial penalty, denying him a salary increase for two years, given that his performance ratings seem to be exceptional.

49. Indeed, a written censure would have been a suitably “meaningful consequence” (*Kennedy op.cit.*) and sufficient to impress upon the Applicant the error of his actions. The record indicates that he acknowledged that he should have sought authorisation before registering *Saroal*, and the company never really operated. The registration is akin to registering an internet domain name in case one wants to use it in the future. Similarly, his activities regarding the Udine fair seem to have been a “spur of the moment” error unlikely to be repeated.

50. The Tribunal therefore finds that the sanction in this case was disproportionate to the misconduct by adding to the written censure an additional, unnecessary, arbitrary and excessive penalty of a two-year deferment of an increment to his salary.

Conclusion

51. The Application is GRANTED in part.

52. The Tribunal rescinds the decision to defer the Applicant’s eligibility for salary increment by two years.

53. In all other respects, the Respondent’s decision is affirmed and the Applicant’s prayers refused.

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(Signed)

Judge Sean Wallace

Dated this 11th day of October 2024

Entered in the Register on this 11th day of October 2024

(Signed)

Wanda L. Carter, Registrar, Nairobi