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Facts

3. The Applicant joined the Organization in June 1999, as a Messenger (G-3) with the United Nations Office at Geneva ("UNOG"), where he worked until the contested decision was implemented on 7 May 2015. There is no record of any previous disciplinary incident.

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8. After talking with him at his workplace, SSS took the Applicant's official statement on the very same afternoon. He described the traffic altercation that occurred prior to his arrival at the United Nations premises gate, and stated that his recollection of the incident itself was blurred and that he believed that he had hustled the complainant without injuring him.

9. The complainant went to the Medical Service Section ("MSS"), UNOG, which certified that he had a swollen cheek and a small laceration in the internal face of the cheek. The following day, 6 November 2014, an external doctor certified that he had a bruise on his right cheek and a laceration of approximately one centimetre in the buccal mucosa.[1]

10. After the incident, the Applicant saw his doctor and was prescribed anti-depressants.

11. On 7 November 2014, the complainant reported the incident to the Swiss police.

12. By letter of the Director, Division of Administration, dated 7 November 2014, the Applicant was informed that an investigation of the incident had been launched and that he was placed, with immediate effect, on administrative leave with pay pending the investigation.

13. On 11 November 2014, SSS rendered its preliminary investigation report. It concluded that the Applicant had physically assaulted the complainant within the United Nations territory and that both had previously engaged in a verbal altercation on the road to the United Nations on their respective motorcycles, during which the complainant had insulted the Applicant. The conclusions of the preliminary investigation were based on: the initial report of the complainant, the Applicant's statement, the medical certificates provided by the complainant, the video footage, and the statement of one of the guards who witnessed the incident.

[1] The inner lining of the cheeks and lips.

14. On or about 13 November 2014, the Applicant provided the investigators with a medical certificate indicating that he had been under treatment for two months due to a particularly difficult family situation, which could justify a possible loss of self-control. It further stated that the Applicant had been advised, before the incident, to go on sick leave, which he had declined out of commitment to his work.

15. On 20 November 2014, the Chief, Human Resources Management Service, UNOG, requested the Applicant to undergo an examination by MSS to assess his ability to return to work without endangering third persons' security. He was examined on 21 November 2014, and MSS concluded that he represented no risk and that he could return to work.

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22.

This indicates that the Applicant was not capable of considering his actions. He was unable to control himself due to his mental state at the time;

c.

correctly applied. The stress the Applicant was under had been medically diagnosed. The Administration seemingly adopted the position that this stress was the substantial cause of the Applicant's misconduct when it addressed the question of whether the Applicant posed a threat by resuming work as a medical rather than a security issue. It is inconsistent not to take the medical factor into account in determining the relevant sanction;

i. No enquiries into the Applicant's mental state were made by investigators, who did not even approach MSS for information in this respect. The Organization failed to uphold the duty of care to its staff members, stemming from staff rule 1.2(c). Such duty must extend to considering a staff-member's mental health prior to terminating their employment where there is a clear indication that he or she may be suffering from a mental health condition that may have created the conditions purportedly requiring his separation. Moreover, as a matter of investigative

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n. According to the principle of progressive discipline, the ultimate sanction of separation should not be applied to address a first infraction. Having characterised the issue as medical, and in view of the relatively low level of the assault, the separation was far from the only sanction open to the Administration;

o. Contrary to that stated in the sanction letter, assault does not usually result in dismissal. The practice of the Secretary-General in disciplinary cases since 2010 reveals that 44% of the cases did not lead to separation, and those that did, included aggravating factors and never the level of mitigation existing in the Applicant's case. The Administration has misrepresented the practice in dealing with assault and, as a result, calculated his sanction from an inappropriate starting point, thus taking into account an incorrect consideration which vitiates the decision;

p. Beyond that, a radical change can be seen in the sanctions handed down in assault cases since 2002: prior to 1 July 2010 only 17% of the staff members found responsible of assault were separated; between 1 July 2010 and 30 June 2011, slightly less of half of them were separated; and from July 2011, 85% of the staff members charged with assault were separated. These figures demonstrate that a policy decision was taken to apply a more severe sanction to assault cases. However, according to sec. 1.2 of

q. The separation decision caused the Applicant to fall into depression. Aged 53, with 15 years of service with the Organization, and with this blot in his employment history, his chances of securing further employment are greatly diminished.

27. The Respondent's principal contentions are:

a. In determining the appropriate sanction, the Administration has discretion to weight aggravating and mitigating circumstances. In this case, it considered the nature and gravity of the misconduct and the applicable mitigating or aggravating factors. It was a proper exercise of its discretion to impose a sanction on the more severe end of the spectrum. The Tribunal may disturb a sanction imposed on the grounds of proportionality only if it is blatantly illegal, arbitrary, adopted beyond the limits stated in the respective norms, excessive, abusive, discriminatory or absurd in its severity;

b. The Applicant's misconduct is serious. It took place in the drive-in entrance of UNOG and resulted in physical injury. Abuse within the workplace is prohibited by staff rule 1.2(f), and sec. 2(d) of ST/AI/371 (Revised disciplinary measures and procedures) explicitly cites assault to other staff members as constituting misconduct. It runs contrary to the aims and principles of the Organization and constitutes an unlawful and intentional violation of a victim's right. Management has a duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offense and any form of abusive conduct;

c. A review of recent past practice in disciplinary matters shows that since July 2011, dismissal has most often been imposed in cases involving

were corroborated by other evidence. The Appeals Tribunal has held that, where facts are clear, there is no need for additional investigation;

h. There is no duty on the Administration to investigate the mental state of a staff member before the imposition of a disciplinary sanction. The letter provided by the Applicant's treating physician, on a date unknown to the Respondent, did not state that he was suffering from a mental condition, but only that he was experiencing "difficult family circumstances" which could explain a "change in mood" and a "possible loss of self-control; and

i. A sufficient nexus exists between the Applicant's conduct and the workplace for it to be considered as having occurred at the workplace.

Consideration

Framework of judicial review

28. It is trite law that the Secretary-General enjoys broad discretion as to the institution, conduct and outcome of disciplinary proceedings against its staff. This discretion is not to be lightly interfered with by the Tribunal, which should not substitute its own opinion for that of the Administration.

29. When reviewing an impugned disciplinary measure, the Tribunal's role is to ascertain whether the facts on which the sanction is based have be

proportionality of the sanction imposed and, in this connection, whether the decision is vitiated for failing to take into account relevant matters and taking into account irrelevant matters when making it (Sanwidi 2010-UNAT-084, Jaffa 2015-UNAT-545).

31. Indeed, under staff rule 10.3(b), due process in the disciplinary process requires that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

32. The determination of the adequate sanction for a given misconduct falls in principle within the Administration's remit. Only where the sanction imposed is found to be blatantly illegal, arbitrary, adopted beyond the limits set in the

mitigating circumstances result in the same sanction.[3] This would indeed suggest that the Administration takes the approach that termination with indemnity is the minimum sanction acceptable for an act of physical assault.

40. Notwithstanding this worrisome trend, the Tribunal opines that this is too thin a basis to find that the Administration applies an "automated response" or "forfeit approach" to assault matters. However, it wishes to underline that such line of action would be inconsistent with the duty to issue proportionate sanctions, because it would mean that the general nature and characterization of the misconduct would almost exclusively dictate the penalty, leaving little room to appreciate individual circumstances, including the actual, rather than comparative, severity of each case. It would notably constrain the consideration of aggravating and mitigating factors, with the risk of effectively preventing the Secretary-General from choosing measures that are truly commensurate to the nature and the gravity of the facts.

Mitigating factors

41. The Under-Secretary-General for Management's letter of 29 April 2015 explicitly cites three circumstances as mitigating factors:

a. The Applicant's long and satisfactory service;

b.

consideration of the matter before making a determination of its consequences for the Applicant.

46. Additionally, the investigation was incomplete on another point, namely the

49. This significantly affected the integrity of the investigation, as it was relevant in this case to establish if and to what extent the complainant had engaged in provocation, as it was alleged by the Applicant. Indeed, its pertinence is evidenced by the fact that the Under-Secretary-General for Management

record before the Tribunal, even then, OHRM sought no additional information in this regard.

52. It is noted that there was already on the Applicant's personnel file, a medical report of 24 November 2014 specifically referring to the Applicant requiring to undergo psychotherapy. There is no evidence that this report was brought to the attention of the decision-maker, although the Applicant may have quite reasonably assumed that it was. The Applicant was not advised of the precise material that was to be sent to the decision-maker, and in respect of which he should be able to comment when he was requested to do so as part of his due process rights, as set out in a memorandum to him of 11 December 2011. As a medical report of the Applicant indicating more precisely his need for psychotherapy was provided on or about 24 November 2014, it is reasonable for the Applicant to assume that it was to be taken into account. It transpires that it was not in fact included in the dossier provided to the decision-maker. It should have been, as it was directly relevant.

53. The dangers of relying upon preliminary reports when making decisions are disclosed in this case. If the 24 November 2014 medical report in respect of the Applicant had been included in the dossier sent to the decision–maker, it would have been sufficient to ensure that enquiries as to the mental health condition of the Applicant at the time of the assault were made and then taken into account when making a decision. The decision-maker was not put in a position to fully and properly consider this matter in this respect. Those involved failed in their duty to ensure the decision-maker had all relevant material upon which to base the decision.

54. Based on all the foregoing, the Tribunal finds that the Applicant was disciplined on the basis of a significantly incomplete preliminary investigation, which was deemed as a complete investigation. Moreover, its shortcomings were such that, whereas solid inculpatory evidence was gathered, it was less thorough regarding exculpatory evidence, notably on the mitigating circumstances in respect of provocation and mental illness of the Applicant at the time of the assault. Yet, the basic conclusions, that remained unchanged until the end of the

(Signed)
Judge Rowan Downing
Dated this 16th day of August 2016

Entered in the Register on this 16th day of August 2016

(Signed)