



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1471

Fouzia Rizqy
(Appellant)

Secretary General of the United Nations
(Respondent)

JUDGMENT

Before: Judge Abdelmohsen Sheha, Presiding
Judge Nassib G. Ziadé
Judge Graeme Colgan

Case No.: 2023-1838

Date of Decision: 28 June 2024

Date of Publication: 13 August 2024

Registrar: Juliet E. Johnson

Counsel for Appellant: Self-represented

Counsel for Respondent: Sylvia Schaefer

JUDGE ABDELMOHSEN SHEHA, PRESIDING.

1. Ms. Fouzia Rizqy, former staff member of the United Nations Mission for the Referendum in Western Sahara (MINURSO), contested a disciplinary decision to separate her from service, with compensation in lieu of notice and with termination indemnity, for having submitted false information with respect to her claims for reimbursement for medical expenses (contested decision).
2. By Judgment No. UNDT/2023/056, the United Nations Dispute Tribunal (UNDT) dismissed the application on the merits (impugned Judgment).¹
3. Ms. Rizqy lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure²

5. Ms. Rizqy joined the Organization on 21 August 2006 as a Team Assistant at MINURSO Guard Force Unit in Laayoune, Western Sahara, at the G-3 level, a position she held until her separation from service.³
6. On 6 June 2018, she submitted to Cigna International Health Service (Cigna), the

8. In May 2019,

13. By the Sanction Letter dated 3 December 2021, the Assistant Secretary-General for Human Resources (ASG/HR), on behalf of the Under-Secretary-General for DMSPC (USG/DMSPC), informed Ms. Rizqy of the contested decision.¹³ The USG/DMSPC concluded that the allegations against her were established by clear and convincing evidence and her conduct violated Staff Regulations 1.2(b) and 1.2(q) and Section 10.1 of Administrative Instruction ST/AI/2015/3 (Medical insurance plan for locally recruited staff at designated duty stations away from Headquarters).¹⁴ With regard to the proportionality of the sanction, the Sanction Letter stated:

In determining the appropriate sanction, the USG/DMSPC considered the nature of your actions, the past practice of the Organization in matters of comparable misconduct, as well as whether any mitigating or aggravating factors apply to your case.

The USG/DMSPC considered that there are no aggravating factors applicable to your case.

The USG/DMSPC considered] TJETQ(S)19(P)8(C)28()-o(a)22(b)18(l6.16 IJ71 O O 1 115.22 494.23 Tm0 g0 G[(T)

23. Referring to the Compendium of Disciplinary Measures of the Ministry of the Interior General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2021¹ including disciplinary case No. 588, the UNDT noted that in cases of fraud, misrepresentation, and false certification of information, the Administration usually imposed disciplinary measures at the stricter end of the spectrum, e.g., separation or dismissal.²³ The Compendium shows that in most of the cases involving comparable misconduct, the sanction imposed was separation from service.

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or had decided not to consider the communication, the outcome would not have been different. The UNDT considered several additional factors in concluding that she was not credible.

33. The Secretary-General contends that Ms. Rizqy has merely repeated previous arguments in respect of the proportionality of the sanction and they should be dismissed on this ground alone. In any event, her arguments have no merit. Instead of admitting to her misconduct, she provided a series of misleading arguments regarding the authenticity of the invoices. The UNDT considered her reference to disciplinary case No. 588 in the Compendium of Disciplinary Measures. Neither the legal framework nor the Organizational Rules and Regulations apply to the present case. Moreover, the Compendium shows that staff members have been separated from service for even smaller amounts than in the present case.²⁷

Considerations

34. Ms. Rizqy contends that the UNDT failed to exercise jurisdiction vested in it, and erred in fact and in law when it (i) relied on privileged communication between Ms. Rizqy and her attorney at OSLA to conclude that the facts were established by clear and convincing evidence and when it (ii) found that the sanction of separation from service was proportionate to the misconduct and the circumstances of the case. Ms. Rizqy does not contest the other questions decided by the UNDT and, therefore, those questions do not fall within the scope of the present appeal.

35. Before addressing the merits of her case, we note, at the outset, that Ms. Rizqy's reliance on the ground of the UNDT's failure to exercise jurisdiction is misplaced. The legal issues before us are not related to the exercise of jurisdiction, or failure to do so. As we have held in *AAS*, "[e]xceeding the UNDT's jurisdiction is not simply the commission of an error, but more fundamentally, determining an issue or purporting to exercise powers that it is not entitled to exercise."²⁸ In submitting that the UNDT should not have relied on the privileged communication, Ms. Rizqy is in essence contending that the UNDT erred in procedure, such as to affect the decision on the case, in law, and in fact, resulting in an unreasonable decision. In the same vein, Ms. Rizqy's second argument shall be viewed as a contention that the UNDT erred in law and in fact in affirming the proportionality of the

²⁷ The Secretary-General refers to disciplinary case No. 582 in the Compendium.

²⁸ *AAS v. Secretary-General of the United Nations*

therein, this should be viewed as a normal exercise of judicial duties and powers conferred to that Tribunal.

exercise of that discretion is not unfettered, and the Tribunals have the authority to intervene when the sanction imposed is disproportionate or excessive.

42. As we noted in *Bamba*, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline.³⁶ We also found that, rather than focusing solely on the misconduct, the test of proportionality is circumstantial.³⁷ Thus, the Tribunal must be satisfied that the Administration properly considered all relevant factors when imposing the challenged disciplinary measure, including the seriousness of the offence, 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.³⁸

43. However, in applying the test of proportionality, this Tribunal relies on its previous Judgments in which we affirmed that mitigating factors may, in some cases, have less weight, and shall not necessarily disturb the proportionality of the disciplinary sanction. In this respect, we have noted that, "[a]ny form of dishonest conduct compromises the necessary proportionality."³⁹ We also found in *Saleh*:⁴⁰

44. In light of the foregoing, and considering the established dishonest behavior of Ms. Rizqy, we find that the UNDT did not err when it did not consider the amount of the false invoices as a significant mitigating factor in the circumstances.

45. As to Ms. Rizqy's second contention related to the principle of parity, we confirm that the test of proportionality not only relies on intrinsic aspects, related to the nature of the misconduct, its gravity, and all surrounding circumstances, but also entails another extrinsic aspect, that is the equality of treatment of staff members. This means that similar cases should, to the extent possible, be treated in a similar fashion, resulting in consistency in administrative practice.

46. However, the quest for perfect consistency should not override the principle of individualization in disciplinary cases, expressed by the UNDT in the impugned Judgment by the statement that

termination indemnity or summary dismissal, as is evident upon review of all the sanctions imposed for similar misconduct.

48. For these reasons, we do not find that the UNDT erred when it considered that the Administration had lawfully exercised its discretion in imposing the disciplinary sanction of separation from service with compensation in lieu of notice and with termination indemnity on Ms. Rizqy.

49. In light of the foregoing, the appeal must fail.

Judgment

50. A g" F]ne" Appeal is dismissed, and Judgment No. UNDT/2023/056 is hereby affirmed.

Oria97bnd Authoritative Version: English

Decision dated this 28th day of June 2024 in New York, United States.

(Signed)