



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2021-UNAT-1181

**Ishfaq Hossain
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Dimitrios Raikos, Presiding
Judge Martha Halfeld
Judge Sabine Knierim

Case Nos.: 2020-1486

Date: 29 October 2021

Registrar: Weicheng Lin

Counsel for Appellant: Noam Wiener

Counsel for Respondent: George G. Irving

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. Mr. Ishfaq Hossain challenged the Administration's disciplinary sanction of separation from service with compensation in lieu of notice without termination indemnity for two charges of misconduct, namely the unauthorised transporting of ammunition and interfering with the investigation. The United Nations Dispute Tribunal (Dispute Tribunal or UNDT) issued Judgment No. UNDT/2020/164 (the impugned Judgment), dated 9 September 2020, which rescinded the sanction, set two years' net base salary as compensation in lieu of rescission and awarded USD 5,000 in moral damages compensation and interest. The Secretary-General appeals. Mr. Hossain in his answer to the appeal requests costs.
2. For the reasons set out below, we vacate the UNDT Judgment.

Facts and Procedure

3. Mr. Hossain joined the Organisation in 2005. Between 2015 and 2017 he served as a Field Security Coordination Officer (FSCO) on a fixed-term appointment at the P-4 level with the United Nations Assistance Mission for Iraq (UNAMI) in Kirkuk. As FSCO, Mr. Hossain oversaw *inter alia* security management, crisis readiness, and preparedness at the duty station. This included oversight for the maintenance of weapons and ammunition and managerial oversight to the Deputy FSCO, several Close Protection Officers (CPOs) and several Personal Protection Officers (PPOs). Following an investigation, Mr. Hossain was found to have committed misconduct on two grounds, namely transporting ammunition from UNAMI Kirkuk to Trans-Atlantic Viking Security (TAV) premises and asking the witness to give false evidence.
4. The background of the investigation and facts as determined to be established by the UNDT are set forth in part below:¹

19. On 24 November 2016, the Office of Internal Oversight Services ("OIOS") received a report that 24 firearms of differing types and caliber were missing from the UNAMI Baghdad armory. This incident was unrelated to both the Applicant and his Kirkuk duty station except that, it is alleged that after hearing about the loss of weapons and ammunition in UNAMI Baghdad, the Applicant told Mr. [GP], then Deputy FSCO, that there was ammunition stored at UNAMI Kirkuk which had been provided by the American military upon their departure from Iraq in 2011.

¹ Impugned Judgment, paras. 19-46.

20. Following the incident in Baghdad, security measures were undertaken to account for the weapons and ammunition stored in all UNAMI compounds, including in Kirkuk. In November 2016, Mr. [RF], then [Personnel Security Detail (PSD)] Team Lead, was appointed as Head Weapons Custodian of the Kirkuk armoury and Mr. [CS], CPO, was appointed as Deputy Weapons Custodian. They were thenceforth charged with responsibility for the weapons and ammunition in UNAMI custody at Kirkuk.

21. The duties of [Mr. RF] and Mr. [CS] included maintaining all records of weapons and ammunition. They created monthly joint inspection records, some of which the Applicant signed off on as FSCO.

The Weapons and Ammunition in Custody

22. There are three locations of weapons and ammunition custody that would have fallen within the new Weapons Custodians' responsibilities. These are all storage locations in relation to which the monthly joint inspection records of the Weapons Custodians would have been relevant. The first two locations are relevant only as a matter of comparison as to accountability for the said custody [...]. The third location is the subject of these proceedings as it is supposed to have contained the ammunition alleged to have been moved by the Applicant. The details of each ammunition and weapons custody location are explained in turn.

23. First, there is the armoury where weapons are secured. Records were kept of the weapons in this location.

24. Secondly, there is a location entitled ASF 1 - which is a cabinet in building 370 - where there was storage of ammunition procured through United Nations administrative processes. The OIOS investigation report dated 15 March 2019, at Annex 5 to the application, indicates at paragraph VI. A.20 that as of August 2017, there was around 11,663 rounds of ammunition housed in ASF 1. The ammunition in ASF 1 was issued only for official duties. Records were kept of this ammunition.

25. Thirdly, there is a location called ASF 2 which is a 20-foot container located outside building 370 and adjacent to the armoury. This location is said to have housed ammunition provided to the United Nations by the United States of America military. The OIOS report indicates that ASF 2 contained 150,000 to 200,000 rounds of ammunition valued at approximately USD 70,000.00. Thus, the alleged quantum of American sourced ammunition in ASF 2 was vastly greater than the United Nations procured ammunition in ASF 1.

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The Investigation

27. On 5 July 2017, OIOS received a report of possible misconduct implicating the Applicant and commenced an investigation. OIOS did not identify the source. However, the Applicant later became aware that report to OIOS came from a fellow staff member (the informant/complainant) at UNAMI Kirkuk. The OIOS investigation pursuant to this report concerned the alleged engagement by the Applicant in “ammunition, uniform and weapons deals with the owner/operator of a private security firm”.

28. Mr. [RF] resigned effective 1 August 2017. During the investigation, he did not respond to the OIOS invitation for an interview. On 6 August 2017, Mr. [CS] took over the duties of Head Weapons Custodian and Mr. [MP], CPO, was appointed as Deputy Weapons Custodian.

29. The Applicant was informed of the investigation by letter dated 14 September 2017 and placed on administrative leave with full pay (“ALWFP”) from that date. This was to prevent the Applicant from interfering with witnesses and hindering the OIOS investigation. On 15 March 2018, OIOS produced its investigation report. The report did not cite the initial subject matter of the investigation - weapons deals – as worthy of further proceedings. Instead, the subject matter was changed to focus on unauthorized transfer of ammunition and interference with the investigation.

30. Following a review of the report, on 23 March 2018, the then Assistant Secretary-General for Field Support referred the case against the Applicant to the then Office of Human Resources Management (“OHRM”), now the Office of Human Resources (“OHR”), for appropriate action.

31. After the referral, additional information was provided to the OHR for review. On 21 May 2018 (“the Allegations Memorandum”), formal allegations of misconduct were issued against the Applicant. These allegations did not include the original misconduct that was reported. Instead, the charges concerned movement of ammunition without authorization and interference with the investigation.

32. On 2 June 2018, the Applicant received the allegations of misconduct memorandum and its supporting documentation including a CD-ROM containing testimony of some of his subordinates in the CPD team accusing him of directing their actions. By memorandum dated 14 July 2018; the Applicant submitted his comments on the allegations of misconduct. He was interviewed. Thereafter, he submitted a clarification of his testimony.

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The factual matrix of the alleged movement of ammunition

34. In March or April 2017, UNAMI personnel went from Baghdad to Kirkuk and recorded an inventory of ammunition and weapons at the UNAMI Kirkuk ASF 1 armoury. The American-provided ammunition in ASF 2 was not shown to the personnel and, as a result, its presence was not recorded as part of the inventory.

35. On or around 8 or 9 May 2017, all PSD personnel were requested to come to the ASF 2 container and assist with the transfer of all the American-provided ammunition from ASF 2 to the premises of TAV. According to the Respondent, the request came from the Applicant. The PSD Team Lead, Mr. [RF], conveyed the Applicant's alleged request to other PSDs/CPOs, including Mr. [CS], Mr. [MP], Mr. [ST], Mr. [GE], Mr. [AB], Mr. [VN], and Mr. [RD].

36. Specifically, Mr. [RF] told Mr. [CS] that the Applicant had arranged for "the Americans to take the ammunition out of [UNAMI] compound", and that they "need to get it out of [the] compound because this [was] ammunition that ha[d] not been accounted for by the UN, [it] shouldn't be here." Mr. [RF] also told Mr. [MP] that the Applicant had "organized for the ammunition that doesn't belong to the UN to be taken back to the US people [sic]". Mr. [RF] told Mr. [VN] that the Applicant had "already done the arrangement [...] for the ammunition to be taken back to the Americans".

37. Around 6:30 p.m. or 7:00 p.m. on an unspecified date, the CPOs, namely, Mr. [RF], Mr. [CS], Mr. [MP], Mr. [ST], Mr. [GE], Mr. [AB], Mr. [VN], and Mr. [RD] came to the ASF 2 container, and moved boxes alleged to contain American-provided ammunition from the container to three United Nations vehicles. The Applicant, they say, came to the container as well and assisted them in loading the boxes into the vehicles. The boxes being transferred filled the backs of three United Nations vehicles. While the boxes were being loaded into the vehicles, the Applicant is alleged to have told Mr. [CS]: "Hey listen, we have to get the ... I've made arrangements with the Americans to take this ammunition there [sic]". When asked where the ammunition was to be taken, Mr. [RF] told Mr. [ST] that the location for handing over the American-provided ammunition "ha[d] been arranged by [the Applicant] with [his] friend who normally [came] with [him] to the bar".

38. Mr. [HL], Chief Executive Officer of TAV, is the Applicant's friend and he had visited the UNAMI Kirkuk compound as the Applicant's guest on multiple occasions.

39. The UNAMI Kirkuk compound was guarded by a detachment of Nepalese military personnel, the Nepalese Guard Unit ("NGU"). Sergeant (Sgt.) [AK] of the NGU stated that during the first and second week of May 2017, he was on night-guard duty at the compound's "Tango One" post, which is located inside the base and to the left of the main gate. One evening in early May 2017, around 7:30 – 8:00 p.m., four or five United Nations vehicles arrived at the main gate and prepared to leave the compound. Sgt. [AK] found this occurrence unusual as all vehicular movement in and out of the base

normally stops after 6:00 p.m. Sgt. [AK] telephoned his supervisor, Captain (“Capt.”) [AA], Operations Officer, NGU, to seek instruction as to whether the vehicles should be permitted to leave the base. Sgt. [AK] reported to Capt. [AA] that four United Nations vehicles were waiting to exit the compound, and that it was not a normal occurrence for United Nations vehicles to leave the compound after 6 p.m. Sgt. [AK] also informed Capt. [AA] that he saw the Applicant in one of the United Nations vehicles. Capt. [AA] directed Sgt. [AK] to check identifications, and let the vehicles exit the compound.

40. The United Nations vehicles transported the boxes to the premises of TAV, located approximately 500 meters from the main gate of the UNAMI Kirkuk base. At TAV, Mr. [HL] was waiting for the vehicles to arrive and he directed the PSD personnel to unload the boxes from the vehicles and to place them in a room. The PSD personnel unloaded the boxes and put them inside a room, as directed.

41. After unloading, the PSD personnel got back into the United Nations vehicles and waited for the Applicant to return. The Applicant remained with Mr. [HL] for approximately 10 minutes and then returned to the vehicles. Upon returning to the UNAMI Kirkuk compound, Mr. [RF] told Mr. [RD] that the ammunition was “not official”. Mr. [RF] told Mr. [ST] that the ammunition was not United Nations ammunition and that Mr. [RF] would get rid of it and “everything has been arranged by [the Applicant] [sic]”. It is alleged that the Applicant also told Mr. [RD] that the ammunition had to be transferred to TAV because of something that had happened in Baghdad.

The factual matrix of the alleged interference with the OIOS investigations

42. The persons the Applicant is alleged to have sought to influence, thereby interfering with the investigation, are Mr. [CS] and Mr. [GE] who were both PSD/CPO team officers lead by Mr. [RF] at the time of the alleged incident. The Applicant was their Second Reporting Officer.

43. It is alleged that in August 2017, prior to the date when the Applicant was sent on ALWFP, he told Mr. [CS] that there would be an investigation involving the ammunition, and that it was important that the PSD team “keep the same story that nothing ever happened [and] that there was never any American ammunition in the compound [sic]”. According to Mr. [CS], the Applicant told him:

[S]o guys, if we keep our same story, nothing is going to happen. I have talked with [HL] and [HL] is going to deny ever having received any ammunition from us, so if there is no ammunition in the compound, the American ammunition in the compound and there is nothing in the containers or whatever, there is nothing for them to investigate. Nobody... everybody is happy if we all stick to our story [sic].

44. On 5 September 2017, OIOS investigators undertook onsite inquiries in Kirkuk. Before that date, it is alleged that on multiple occasions, the Applicant had told Mr. [CS] not to disclose any details about the loading and transporting of the American-provided ammunition from ASF 2 to TAV premises. Five minutes after OIOS investigators departed Kirkuk on 5 September 2017, the Applicant is said to have urged Mr. [CS] to provide false information in the investigation and asked him what he had

discussed with the investigators. The Applicant's conduct made Mr. [CS] feel uncomfortable and harassed.

45. The Applicant is also said to have approached Mr. [GE] and told him that he was having "problems" and that it would be better to tell the OIOS investigators that there had been no American-provided ammunition at the UNAMI Kirkuk base.

46. On 20 October 2017, while on ALWFP, the Applicant telephoned Mr. [CS]. He allegedly told him that Mr. [HL] had been interviewed by OIOS and told OIOS investigators that he had not received any ammunition from the Applicant. The Applicant then told Mr. [CS] that, when the Applicant would be interviewed by OIOS investigators, he would "be relating the same information", and that, if asked by OIOS about the ammunition, Mr. [CS] should "say the same thing". Mr. [CS] discussed with the other CPOs the Applicant's attempt to interfere with the investigation, and he told them to tell the truth. For instance, Mr. [CS] told Mr. [ST] that the Applicant had asked Mr. [CS] to provide false information to the investigators that "nothing ha[d] been removed here [UNAMI compound]" and that "if something comes up nobody ha[s] to admit that we moved these boxes of ammunition [sic]".

Imposition of Disciplinary Sanction (the contested administrative decision)

5. On 15 March 2018, OIOS produced its investigation report. On 21 May 2018, the Administration issued formal allegations of misconduct alleging that Mr. Hossain had transferred ammunition to TAV without permission and that he had interfered with the investigation. On 14 July 2018, Mr. Hossain responded to the allegations.

6. On 14 September 2018, Mr. Hossain was informed that the Under-Secretary-General for Management had decided to impose upon him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity in accordance with Staff Rule 10.2(a)(viii).

7. On 14 December 2018, Mr. Hossain filed an application before the UNDT challenging the Administration's imposed sanction.

The Impugned Judgment

8. On 9 September 2020, the UNDT issued the impugned Judgment and held that the Administration had not presented clear and convincing evidence of either the removal of the ammunition or interference with the investigation. The UNDT rescinded the sanction and ordered Mr. Hossain's reinstatement to his position setting two years' net-base salary as compensation in lieu of reinstatement as well as USD 5,000 in moral damages with interest.

9. The UNDT made several evidentiary rulings on the admissibility of evidence. The UNDT rejected admission into evidence of the statement of Mr. TNW as Mr. Hossain had not put forward this witness during the investigation and he is not the author or recipient of the documents attached to his statement, rendering the evidence more prejudicial than probative.

10. In addition, the UNDT dismissed the Respondent's object to the statement of former FSCO VK. UNDT addressed Mr. Hossain's contention that the Administration failed to interview and consider relevant witnesses e.g., former FSCO VK, Mr. NK, Mr. HL and Mr. RF.² After discussion on whether an oral hearing was required to deduce testimony of these individuals, the parties agreed an oral hearing of these previously excluded witnesses was not required and the determination of the case was whether there was clear and convincing evidence on the record to justify the decision when it was made.³

11. On the merits, the UNDT held that there was not clear and convincing evidence that Mr. Hossain has transferred ammunition to TAV. It noted there was no clear and convincing evidence that the ammunition had even existed and thus was not a United Nations asset. The UNDT also held that there was no clear and convincing evidence that Mr. Hossain had interfered with the investigation.

Procedure Before the Appeals Tribunal

12. The Secretary-General appealed on 9 November 2020.

13. Mr. Hossain filed his answer on 6 January 2021.

Submissions

The Secretary-General's Appeal

14. The Appellant requests the Appeals Tribunal to vacate the impugned Judgment in its entirety, including the award of moral damages and to affirm the contested decision. The overwhelming evidence in this case, comprised of the testimony of the seven CPOs, the corroborating testimony of the soldiers of the Guard Unit and the testimony of the Deputy FSCO, established that Mr. Hossain, who was in charge of all security related matters

² Impugned Judgment, paras. 49-52.

³ *Ibid.*, para. 17.

at the Kirkuk Station, oversaw the unauthorized transfer of ammunition from the United Nations to the TAV, a military contractor. The evidence also established the Appellant's interference with the OIOS investigation.

15. The UNDT erroneously held that the allegations were not supported by evidence because the CPOs' testimony was tainted by ethnic bias and vindictiveness. Seven CPOs provided testimony as well as Mr. Hossain's deputy and two soldiers from the Guard Unit all hailing from different nations. The UNDT rejected the reliability of all of their testimony yet the UNDT's entire discount of their evidence is expressed in one sentence⁴ without analysing how all of these testimonies were tainted by bias such that it warranted rendering all of it unreliable. The UNDT did not set forth how the testimony of two out of seven CPOs discredited the others. For this reason alone, UNAT should vacate the UNDT's holding. The allegations that Mr. Hossain removed ammunition without authorisation and tried to cover it up from investigators is based on testimony of all seven CPOs.

16. The UNDT erroneously held that the CPOs allegations were not corroborated by the testimony of the soldiers of the Guard Unit. The seven CPOs testimony that the ammunition was transported to the TAV base by a four-vehicle convoy commanded by Mr. Hossain was corroborated by testimony of Sgt. AK and Cpt. AA from the Guard Unit. They testified that the CPOs and Mr. Hossain left the base in four or five vehicles claiming they were going to dinner and testified this was highly unusual and thus stuck in her mind. The UNDT, however, held it was not relevant testimony because the date of the occurrence is unknown and there is no record of it and the guards did not check what was in the vehicles.⁵ The occurrence of that many vehicles traveling outside the UN compound at night was so unusual Sgt. AK and Cpt. AA both testified they remembered the singularity of the event including Mr. Hossain's presence. Thus, contrary to the UNDT's holding, the CPOs and Mr. Hossain's trip to the TAV could not have been mistaken for another outing. The testimony of the seven CPOs corroborated the testimony of the Guard Unit soldiers and clearly and convincingly demonstrated that Mr. Hossain was the CPO's supervisor who ordered the CPOs to load the ammunition onto the vehicles, drove with the CPOs over to TAV compound and had the CPOs offload the ammunition there.

⁴ *Ibid.*, para. 58.

⁵ *Ibid.*, para. 81.

17. The UNDT erred in finding that Mr. Hossain was not in charge of the transfer of ammunition and thus did not engage in misconduct. It further erred in speculating that Mr. RF was the “mastermind” of the transfer. The UNDT held there was zero evidence that Mr. Hossain was the mastermind or in charge of the transfer but rather that there was ample evidence pointing to Mr. RF as the mastermind. The UNDT relied upon statements from the CPOs that the order to load and transfer ammunition was relayed to them by Mr. RF. It was completely natural for an order from Mr. Hossain to be conveyed by his deputy Mr. RF, but this did not prove that Mr. Hossain was not behind such an order.

18. The UNDT erred by dwelling on who was the mastermind. Mr. Hossain was not charged with masterminding the transfer. Mr. RF’s responsibility was not the subject of the investigation. By speculating on Mr. RF’s conduct, the UNDT exceeded its competence. The UNDT ignored the hierarchy between Mr. RF and Mr. Hossain: Mr. Hossain was Mr. RF’s supervisor, and the fact that, whatever Mr. RF’s involvement may have been, it did not absolve Mr. Hossain from his responsibility for his misconduct.

19. The UNDT erred when it found that there was insufficient evidence that Mr. Hossain was in charge of the unauthorised transfer of the ammunition.

20. The UNDT failed to properly consider that Mr. Hossain was either the first reporting or second reporting officer of all the CPOs involved and oversaw the security of the ammunition. The UNDT’s finding that it was insufficient evidence to establish that Mr. Hossain was in charge of the staff moving the ammunition is wrong on its face. The conclusion Mr. Hossain was not responsible for the transfer is manifestly erroneous.

21. The UNDT further erred in preferring Mr. HL’s testimony over the testimony of the CPOs, the Guard Unit, and Deputy FSCO. Mr. HL and Mr. Hossain have an interest in denying the events and thus the UNDT erred in finding their testimony reliable. Mr. GP’s testimony was found credible wherein he testified he was informed about the ammunition from Mr. Hossain, yet Mr. Hossain testified he did not have any knowledge about the ammunition or what was inside the container where the ammunition was kept. The UNDT does not explain how it relied upon two contradictory statements as reliable. Also Mr. Hossain had supervisory duties over these locations yet testified he had no knowledge as to what ammunition the CPOs were using and where it was being stored.

22. The UNDT erred in law and fact in finding the transfer of the ammunition was not unauthorized. The UNDT held that the ammunition was not registered when it entered the United Nations possession and thus no reason to believe the ammunition was owned by the United Nations. The UNDT speculated this ammunition was privately obtained by CPOs who then wanted to dispose of it since they had not properly accounted for it. The UNDT thus held that even if Mr. Hossain had transferred it to TAV without authority he could not be charged with a violation of Staff Rule 1.2(q) prohibiting unauthorized transfer of United Nations property or assets". This is an error as the ammunition was clearly property of the United Nations as testimony indicated it was often used for official training purposes housed in the possession of the United Nations for a long period of time.

23. Lastly, the UNDT erred in finding that Mr. Hossain did not interfere with the investigation in August and September 2017. The UNDT held that before Mr. Hossain had been informed that he was being placed on leave he had no knowledge that the ammunition even existed and had no knowledge of the investigation. Thus, he could not have interfered in the investigation. These conclusions are contradicted by the evidence. As noted above the evidence shows that Mr. Hossain was well aware of the ammunition as his very job was to know about such, and he told his deputy about the ammunition, and seven CPOs testified he knew. In addition, it was unreasonable to conclude that Mr. Hossain would not have known that OIOS was investigating the matter.

Mr. Hossain's Answer

24. Mr. Hossain requests that the Appeals Tribunal affirm the impugned Judgment and dismiss the Secretary-General's appeal in its entirety. He also seeks USD 5,000 in costs for the Appellant's abuse of process. In support Mr. Hossain argues that the appeal is an attempt to reargue the case. The appeals procedure is of a corrective nature and is thus not an opportunity for a party to reargue his or her case. UNAT defers to UNDT as trier of fact as it is best placed for fact finding and only overturns factual findings when the appellant meets their burden to show they are errors that resulted in a manifestly unreasonable decision.

25. The origins of the investigation arose from a far-fetched claim of a disgruntled staff member (Nurse SM) accusing Mr. Hossain of ammunition and weapons deals with a contractor. None of the original complaint was found credible but, in course of questioning CPOs, questions were raised about a reported transfer of ammunition. Nowhere in the UNSMS

Policy Manual is it written that the duties of the FSCO, as Mr. Hossain was, is responsible for the security and safe custody or maintenance of weapons and ammunition used by the CPOs. It is disingenuous for the Appellant to argue that Mr. Hossain had to know of the US ammunition due to his role as FSCO or that he controlled and directed the CPOs. The Standard Operating Procedures for Iraq Security Personnel which was annexed to the OIOS report clearly specified it is the Weapons Custodian who has charge of the armory. It was the direct responsibility of the PSD Team Leader (Mr. RF and Deputy Team Leader, Mr. CS as the designated weapons custodian to do so.) Mr. Hossain's duties were administrative. Operational supervision of the CPOs was carried out by the Team Leaders. Orders from the United Nations Department of Safety and Security (UNDSS) Headquarters, Baghdad were required for transporting ammunition. Mr. TNW, Chief Strategic Plans, Policy and Compliance Unit in UNDSS-I Baghdad confirmed in his statement that the "PPOs and CPOs would not take direct orders from the FSCO, Mr. Ishfaq Hossain, to remove any ammunition under their control using UN vehicles to relocate it outside the UN Kirkuk compound, such movement or ordinance requires the pre-approval of the CAS's Office in Baghdad of which none was issued". It is likewise untrue that Mr. Hossain, as FSCO, supervised the Nepalese Guard Unit. Mr. Hossain is civilian with no authority over the unit which is military personnel and has its own separate military command structure.

26. The investigation did not yield any documentation to support the existence of the ammunition nor any documentary or video record of its movement or physical proof it reached the warehouse of TAV. The Radio Room Kirkuk maintains continuous video recording. This scenario is based entirely on the statements of CPOs who were themselves targets of allegation of misconduct. The evidence supports Mr. Hossain's contention that he was unaware of the large amounts of United Nations ammunition on the premises since several audits and inspections of ammunition (including the special UNDSS Baghdad team visit in March or April 2017 after loss of weapons and ammunition occurred in Baghdad) reported no ammunition kept in the red container next to the armory at the Kirkuk Station. The CPOs revealed some US ammunition was kept in the red container only when the OIOS came to the site for investigation. What is clear is that the amount of ammunition was not accounted for and Mr. RF and Mr. CS were directly responsible for it as the Weapons Custodians. Mr. Hossain did not have keys to the armory and had no control over vehicles. There was no reason for Mr. Hossain to initiate the alleged transfer, thus jeopardizing his career a short time prior to him retiring. The reluctance of the then PSD Team Leader and primary

Weapons Custodian, Mr. RF, to cooperate with the investigation supports the conclusion that they were the officials who should be held responsible.

27. Mr. VK, who served as FSCO Kirkuk from 2012-2015 prior to Mr. Hossain, confirmed that he did not hand over any US ammunition to Mr. Hossain and provided testimony that he was not aware of any third-party ammunition kept in the United Nations premises. The Administration has produced no evidence of the ammunition's existence or that Mr. Hossain was aware of it other than *post facto* statements by those individuals motivated to deflect and blame their own potential misconduct charges. With regard to the Nepalese Guard Unit statement of Sgt AK, only a vague description is provided with no specific date mentioned. The movement was not recorded in the logbook and no video of the entrance was ever sought or produced to confirm his account. He admitted he never saw any ammunition, he merely noted the exit of several persons in the early evening for dinner (curfew was not until 10pm). There is no clear nor convincing evidence that Mr. Hossain directed the taking out of huge amounts of ammunition.

28. Mr. Hossain contends that the UNDT did not err in its finding that the Administration had not established facts that were clear and convincing. Almost all those who testified indicated that Mr. Filipowicz directed the transport of the ammunition and that it was he who told them that Mr. Hossain ultimately ordered it. Apart from this hearsay there is no direct evidence that the plan was devised or directed by Mr. Hossain. Everything points to Mr. RF. Furthermore, none of the CPOs and Team Leaders who had control over and access to the ammunition ever disclosed the existence of the US ammunition, nonetheless they all admitted it was kept and used for training purposes by the two trainers from Baghdad who had been accused of gross negligence for the disappearance of ammunition from Baghdad. It was not until the OIOS initiated an investigation that Team Leader, Mr. CS, came up with a fictitious story that Mr. Hossain was responsible for the plan to dispose of unaccounted for ammunition. Mr. HL of TAV denied the ammunition was ever taken there and offered investigators to search the property. They declined his invitation. Mr. HL had no vested interest or anything at stake in the investigation. The Guards also did not see any ammunition, rather they saw vehicles leaving the compound for dinner around 6 p.m., which was nothing exceptional as curfew was not until 10 p.m. There is no security footage of this departure and the CPOs did not require the approval or permission of Mr. Hossain to take the vehicles off the compound.

29. Mr. Hossain further contends that the CPOs' allegations were not corroborated by the soldiers of the Nepalese Guard Unit. He argues that the UNDT did not err in finding there was no clear and convincing evidence that Mr. Hossain was in charge of the transfer but there was ample evidence that Mr. RF was. He claims that the fact that no effort was made beyond an e-mail communication to contact Mr. RF after his abrupt departure and his failure to respond are legitimate factors to be considered, and UNDT did not speculate, but rather drew conclusions of fact from the testimonial and other evidence. Mr. Hossain reiterates that the UNDT did not err in finding no clear and convincing evidence that Mr. Hossain was in charge of the unauthorised transfer of ammunition and considers that the Respondent's continued misstatement of Mr. Hossain's duties and fabrication of a false narrative of what occurred is an abuse of process, noting that the testimonies of the CPOs, without exception, point to Mr. RF being the person who ordered them to move the ammunition and told them that Mr. Hossain had approved it. Mr. Hossain considers that it is not clear what the Appellant means to infer suggesting that the UNDT preferred some evidence over other evidence. Mr. Hossain contends that the UNDT did not err when it held that the transfer was not authorised and that Mr. Hossain did not interfere with the investigation.

30. Mr. Hossain concludes that the Appellant has provided no convincing argument to reject the conclusions of the UNDT and that the Appellant is willfully misrepresenting the record in an attempt to mislead the Appeals Tribunal. Mr. Hossain requests an additional USD 5,000 in compensation for costs in light of the Appellant's abuse of process.

Considerations

Merits of the appeal

31. The principal issue on appeal before us is whether the evidence before the UNDT adequately supports its factual and legal conclusions that Mr. Hossain has not committed the alleged disciplinary offences he was charged with, namely removing ammunition from UNAMI Kirkuk to TAV premises without authorisation and interfering with the investigation by asking the witnesses to the misconduct to give false evidence.

Standard of review in disciplinary cases

32. In disciplinary matters, we follow the settled and unambiguous case law of this Tribunal as to the role of the UNDT, the applicable evidentiary burden and the evidential standards, as laid out clearly in *Mizyed*:⁶

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is ‘to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence’. And, of course, ‘the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred’. ‘[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence’, which ‘means that the truth of the facts asserted is highly probable’.

Additional relevant jurisprudence provides further clarity:

Clear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards. The first (“clear”) is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard (“convincing”) requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be.⁷

33. In determining whether these evidential standards have been established in any case, the UNDT must consider and weigh not only the evidence put forward by witnesses produced for the Secretary-General, but also any countervailing evidence adduced for the staff member, and any relevant and probative documentary evidence which may either corroborate or cast doubt on the recollections of witnesses. Such an analysis has to be applied by the UNDT not only to each individual piece of disputed evidence, but it must then be applied likewise to the totality of the evidence in support of the allegation of misconduct. The judge can only then answer the fundamental question: “Is there clear and convincing evidence to enable the Tribunal to conclude that the allegation(s) of misconduct have been established?”⁸

⁶ *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.

⁷ *Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.

⁸ *Ibid.*, paras. 46-48.

34. The UNAT's task on appeal is to determine whether the UNDT did not apply the correct tests and whether the Tribunal could reasonably have reached the decisions it did about what happened.⁹

35. Furthermore, this Tribunal has held that in a system of administration of justice governed by law, the presumption of innocence has to be respected.¹⁰

36. It is in the context of these definitions and principles that the Appellant's appeal against the UNDT's conclusions must be assessed.

Clear and convincing evidence established that Mr. Hossain committed the offences

37. Applying the above-mentioned standards and criteria to the present case, we find that the facts on which the Administration based its decision to separate Mr. Hossain from service were established. The records show clear and convincing evidence establishing facts which amount to misconduct and these facts have not been successfully rebutted by Mr. Hossain. The UNDT, therefore, erred as the Secretary-General had established to the clear and convincing evidential standard before the UNDT that Mr. Hossain indeed removed ammunition without authorisation and interfered with the investigation.

38. At the outset, it is necessary to give some context to the events that led to Mr. Hossain's separation from service. In this regard, there are several incontrovertible facts that were before the UNDT that constituted the factual basis of the alleged disciplinary offences.

39. First, in 2011, when the United States military forces withdrew from Iraq, an amount of ammunition (the "ammunition") was transferred to the possession of the United Nations and was stored in a location called ASF 2, which is a 20-foot red container located outside building 370 and adjacent to the armory at the Kirkuk Station. The transfer of said ammunition was unofficial and it was kept without proper accountability in the abovementioned place.¹¹

⁹ *Ibid.*, para. 48.

¹⁰ *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 16; *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-718, para. 47; *Hallal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-207, para. 28.

¹¹ Impugned Judgment, paras. 24, 68 and 71-73.

40. The existence of this ammunition, which has been used by the CPOs repeatedly for training purposes when instructors came from Baghdad, is confirmed by the eye-witness testimony of the seven CPOs as well as by Mr. GP, Security former Deputy FSCO, who testified that Mr. Hossain told him about it in 2016, thereby belying the latter's assertion that he knew nothing about such ammunition. The statement of Mr. VK who served as FSCO Kirkuk from 2012-2015 prior to Mr. Hossain, in which he stated that he was not aware of any American ammunition in the UN Kirkuk Compound is not persuasive as the totality of the evidence indicates the existence of such ammunition and that it was known that it was kept in ASF 2 without official accountability. Obviously, the unregistered status of the ammunition was the explanation of Mr. VK's statement that he did not hand over such to Mr. Hossain.

41. There is dispute, however, as to the exact size of the ammunition, which, according to OIOS report, amounted to 150.000 to 200.000 rounds of ammunition valued at approximately USD 70.000, whilst the UNDT held, by drawing an inference from the lack of record keeping as opposed to the keeping of records for the smaller quantum in ASF 1, that there was no such large quantum.¹² In any event, by common experience standards, it must have been a significant amount of ammunition, enough to provide training for the CPOs over a number of years.

42. Second, on or about 8-9 May 2017, all PSD personnel were requested to come to the ASF 2 container and assist with the transfer of all the American-provided ammunition from ASF 2 to the premises of TAV. Allegedly, the request came from Mr. Hossain and it was the PSD Team Leader, Mr. RF, who conveyed his alleged request to other PSDs/CPOs, including Mr. CS, Mr. MP, Mr. ST, Mr. GE, Mr. AB, Mr. VN, and Mr. RD. Around 6:30 p.m. or 7:00 p.m., the abovementioned CPOs came to the ASF 2 container, loaded the ammunition from the container to three United Nations vehicles and, along with Mr. Hossain, drove to the TAV base, where they delivered it.

43. Third, per the UN Security Management System Security Policy Manual, Chapter II, Section B, Annex: Roles and Responsibilities of Actors within the United Nations Security Management System, Mr. Hossain, in his capacity as FSCO at the P-4 level at the Kirkuk station of UNAMI, was responsible for all aspects of security management, crisis readiness, and preparedness at the Kirkuk duty station. Moreover, he supervised the

¹² *Ibid.*, para. 72.

Deputy FSCO, the CPOs and PPOs, and the Guard Unit that was tasked with securing the compound,¹³ or he was at least administratively responsible for the coordination of the latter's activities, as he himself concedes.¹⁴ He was also responsible for the maintenance of United Nations weapons and ammunition at Kirkuk.¹⁵

The removal of ammunition without authorisation

44. The UNDT, in its judicial review, came to the conclusion, based on the evidence on record, that there was no clear and convincing evidence that ammunition was moved from ASF 2 out of the Kirkuk base by Mr. Hossain one evening in May 2017¹⁶ or that "he was the mastermind or in charge of this removal of ammunition from ASF 2 to the TAV".¹⁷ The Dispute Tribunal's conclusions were based on the findings set out below.

45. First, the UNDT occupied itself with the examination of the credibility to the sources of information to the Administration that Mr. Hossain engaged in the alleged misconduct, namely the persons who made the initial report in July 2017 and secondly, the seven CPOs' who were involved in the alleged movement. It held that Mr. Hossain's case that these persons were improperly motivated by ethnic bias and vindictiveness was supported by the testimony of CPOs Mr. CS and Mr. MP.¹⁸

46. Then, the UNDT Judge dealt with the circumstantial evidence the Administration relied on, in her view, namely the fact that Mr. Hossain was a close friend of Mr. HL of TAV. In this respect, the UNDT held that:

The inference was drawn that because of the friendship it must have been the Applicant who arranged the transfer of ammunition to TAV. The Applicant, by his own testimony during the investigation, however, gave a plausible explanation. He said that Mr. [RF], who knew of their friendship, asked him repeatedly for the contact information for Mr. [HL] so he could dispose of 'some extra items' for himself and other CPOs. The Applicant gave him the contact information without knowledge of the nature of the items, or that it may have been United Nations-owned ammunition.¹⁹

¹³ He was First Reporting Officer for the deputy FSCO and the Team leader of the CPOs and Second Reporting Officer to the CPOs. See, *inter alia*, S's testimony, line 101-102, 1046, B.'s testimony, line 74, E.'s testimony, line 78.

¹⁴ Mr. Hossain's Answer Brief, para. 10.

¹⁵ OIOS Investigation Report, lines 124-126, 141-142, 377-378 and 393.

¹⁶ Impugned Judgment, para. 82.

¹⁷ *Ibid.*, para. 62.

¹⁸ *Ibid.*, para. 37.

¹⁹ *Ibid.*, para. 58.

47. Further, the UNDT addressed the information given by Mr. CS that Mr. Hossain had come and joined in during the packing of the boxes into the vehicles and that Mr. Hossain told him he had made the arrangements, holding that the credibility of this evidence had to be properly considered in light of the improper motives alleged against Mr. CS.²⁰

48. Finally, in assessing the circumstances, the UNDT found that the evidence that Mr. Hossain was the mastermind or in charge for an unauthorised movement of ammunition was neither clear nor convincing, noting that:

On the other hand, there is ample evidence pointing to Mr. [RF]. as the mastermind behind the activities of transferring items from ASF 2 to TAV. He had just been appointed Custodian, making him responsible for the accountability and safe custody of ammunition. This evidence was also before the Respondent but appears not to have been considered.

(...) Yet Mr. [RF]. kept no record to account for the ammunition in ASF 2 which, based on the evidence from his team member [AB], he had collected from the United States military base in 2013. On the CPOs account, the amount of ammunition in ASF 2 was far more than that in ASF 1; yet it was unaccounted for. Mr. [RF]. did not reveal its existence to the inspectors visiting from Baghdad a few weeks before. By all accounts, he was the person who conveyed the request to his subordinates, the CPOs, to help transfer the boxes to the TAV.²¹

49. These findings are not supported by the evidence and are quite unreasonable.

50. As rightly asserted by the Secretary-General, the removal of ammunition by Mr. Hossain from the United Nations base in Kirkuk to TAV premises on or around 8 or 9 May 2017 is evidenced on the testimony by all seven CPOs who testified that Mr. Hossain, who was their supervisor, was present when they loaded the ammunition into the vehicles.²² Five CPOs testified that Mr. Ishfaq Hossain drove with them,²³ while one of the CPOs, who had missed dinner that evening, did not join the others after loading the ammunition. In addition, the six CPOs that went to the TAV base testified that the vehicles

²⁰ *Ibid.*, para. 59.

²¹ *Ibid.*, paras. 60-61.

²² S.' testimony, lines 853-873, 944; T.'s testimony, included with OIOS Investigation Report, line 184; B.'s testimony, included with OIOS Investigation Report, line 350; P.'s testimony, included with OIOS Investigation Report, lines 477-482; E.'s testimony, lines 144-170; D.'s testimony, included with OIOS Investigation Report, lines 248-252, 279-282; N.'s testimony, included with OIOS Investigation Report, lines 340-355.

²³ S.' testimony, lines 873-889, 1046-1057; B.'s testimony, line 390; P.'s testimony, line 482; D.'s testimony, lines 300-315; N.'s testimony, lines 356-365.

were then driven to the compound that housed the TAV²⁴ and that the ammunition was then offloaded and moved to the possession of the TAV.²⁵ Further, as the CPOs Mr. CS, Mr. MP and Mr. VN. testified, Mr. RF, the Team Leader, had told them that Mr. Hossain had made the arrangements for the ammunition to be taken out of the compound. The testimonies of all of the CPOs, who hail from different countries, were clear, detailed, plausible and consistent about these critical facts.

51. The CPOs' evidential statements that the ammunition was transported to the TAV base by a four-vehicle convoy (three vehicles loaded and one as escort) in the presence and command of Mr. Hossain are corroborated by the testimony of Sgt. AK and Cpt. AA from the Guard Unit who testified that around the date at which the removal of ammunition took place, Mr. Hossain and the CPOs left the base in four or five vehicles and claimed that they were heading out to dinner. Both Sgt. AK and Cpt. AA testified that Mr. Hossain was in one of the said vehicles²⁶, which led them to open the gate and give the green light for the convoy to exit the compound, and that this event was highly unusual, which is why it had stuck in their memory.²⁷ In this regard, Cpt. [AA] testified that "during my tour of duty that was the first that kind of movement when every [CPO] and FSCO was travelling, [CPO]s and FSCO were together for dinner".²⁸ Also, Mr. [CS]. testified characteristically that "... Ishfaq talked with the UNGU or whatever the case was and they opened up the gate".²⁹

52. In view of the corroborating evidence, we find that the UNDT erred in fact in holding that "The Respondent's case that the CPOs' evidence of movement of ammunition is corroborated by the Nepalese guards Sgt. AK and Capt. AA is without merit. Those guards could only speak to an unusual departure of four to five United Nations vehicles with CPOs and the Applicant on board one evening after dusk. Capt. AA was informed by Sgt. AK that they were all going to dinner which seemed unusual. The date of the occurrence is unknown, there is no record of it and the guards did not check what was in the vehicles".³⁰

²⁴ S.' testimony, lines 877-880; T.'s testimony, lines 265-272; B.'s testimony, lines 367-379; P.'s testimony, lines 482-496; D.'s testimony, lines 300-317; N.'s testimony, lines 370-380.

²⁵ S.' testimony, lines 1124-1134; T.'s testimony, lines 282-309; B.'s testimony, lines 390-399; P.'s testimony, lines 535-558; D.'s testimony, lines 315-334; N.'s testimony, lines 388-403.

²⁶ A.'s testimony, lines 122-130; K.'s testimony, lines 126-128.

²⁷ A.'s testimony, lines 127-169; K.'s testimony, lines 117-192.

²⁸ A.'s testimony, lines 114-146, 164-169.

²⁹ S.'s testimony, lines 873-874.

³⁰ Impugned Judgment, para. 81.

53. We hold that there was no reasonable ground whatsoever upon which the UNDT could discount Sgt. AK's and Cpt. AA's evidential statements because there was no (written) record of it and the exact date of the event was unknown. Contrary to the UNDT's holding, a proper reading of their testimonies in conjunction with the CPOs' testimonial statements and the documentary evidence as a whole, as well as the inherent probabilities of the situation and the surrounding circumstances, clearly demonstrates that Mr. Hossain participated by having a key role in the removal of said ammunition from the United Nations Compound to the TAV base. Hence, we agree with the assertion advanced by the Secretary-General that, under these circumstances, Mr. Hossain's trip to the TAV base could not have been mistaken for another outing. The size and timing of the event was unique and, therefore, imprinted itself in the memory of Sgt. AK. and Cpt. AA. Its evidentiary value as corroborating evidence stems from its singularity and is strengthened by the complete disinterest of the two witnesses, who had no reason to malign Mr. Hossain and had very little to do with the other witnesses.

54. Further, in view of the totality of the evidence provided by the other five CPOs, Mr. GP and the Nepalese Guards, Sgt. AK and Cpt. AA, we find that the UNDT's finding that the testimonies of Mr. CS and Mr. MP were not reliable because of the improper motives of bias and vindictiveness³¹ is erroneous and does not detract from the inferences drawn from the entirety of the evidentiary material which clearly and unambiguously shows Mr. Hossain's participation and leading role in the removal of the ammunition. We agree with the Secretary-General's contentions that Mr. Hossain's status, who was a seasoned senior military officer exercising authority over those CPOs involved in the removal of the ammunition, and notably his presence throughout the whole process, namely his participation in the unloading of the ammunition into the vehicles, his being onboard the vehicles carrying the ammunition out of the UN Compound, and finally his whole attitude during the process of removal of ammunition and the delivery of ammunition to TAV, was not a passive one but expressed his supervisory capacity and constituted undeniable proof of his being in charge of the removal venture. Indeed, the documentary evidence clearly speaks to the fact that it was exactly Mr. Hossain's status and presence in the whole venture that gave the exercise of authority necessary to convince the CPOs of the propriety of the orders relayed to them by their Team Leader, Mr. RF, who Mr. Hossain supervised, and persuaded the Nepalese Guards, Sgt. AK. and Cpt. AA, to open up the gates for the convoy to pass.

³¹ *Ibid.*, paras. 57 and 59.

55. Next, there was no clear factual basis presented in the impugned Judgment upon which the UNDT could legitimately conclude that the testimony of CPOs CS and MP was motivated by ethnic bias and vindictiveness. The UNDT's relevant reasoning falls too short in this regard and gives no room to the Appeals Tribunal to review the correctness of this finding. Be that as it may, Mr. CS's regrettable statement in his interview before OIOS that he had feared retaliation as a consequence of his testimony because some other members of UNAMI's management, like Mr. Hossain, were originally from the Indian sub-continent, which seems to have been the source of perception of ethnic bias and vindictiveness, does not in itself eliminate or diminish the credibility of his witness statement about the pertinent facts underlying the litigated disciplinary offences, namely that Mr. Hossain was the responsible officer who ordered the CPO Team to load the ammunition into vehicles, drive to the base of the TAV, and turn over possession of the ammunition.

56. As demonstrated in various parts of the impugned Judgment, the UNDT was too circumspect in the weight it ascribed to the CPOs' testimonial statements as it held them unreliable. In this context, the UNDT found fault with and disapproved of the Administration's reliance on the CPOs' testimonies in establishing the misconduct. That was so, per the UNDT reasoning, because "[a]ll the CPOs and Deputy Custodian [CS], who were involved in the transfer but had not reported it, then chose to support the report that had already been made against the Applicant by pinpointing him as being to blame for any wrongdoing, thereby exculpating their entire team headed by Mr. [RF]."³² Also, per the UNDT, the Administration should have properly considered issues of credibility on the record because of the possible motives for the CPOs, and Mr. CS. in particular, to give false information about Mr. Hossain, since they were potential suspects who always were concerned about their own failure to properly account for ammunition being detected.³³ Consequently, the UNDT adopted the following view:

On a thorough review of the evidence on record prior to the sanction decision, it is clear that the information, such as it was, based on which the Respondent decided on the Applicant's separation sanction, came from the CPOs. However, the credibility of these officers ought to have been scrutinised. There is no indication from the record that the Respondent duly weighed the unreliability of the information being provided during the investigation. The Applicant's final submission succinctly sets out several factors which point to the unreliability of the information provided to the OIOS by these staff members. Among the more glaring of these factors is that all

³² *Ibid.*, para. 69.

³³ *Ibid.*, para. 92.

of these CPOs kept the information they claim to have had about movement of the ammunition to themselves for several months. They did not volunteer any of the information, which in fact was more directly incriminating to the CPOs themselves, until the investigation started. Their Team Leader left the Organization just after the investigation started and has not to date given his account of what may have transpired to the investigators.³⁴

57. Considering the totality of the evidence on record, we believe the UNDT's approach in this regard was erroneous. While it is true that the CPOs did not report the removal of ammunition from the United Nations Compound to the TAV premises right away and supplied their witness statements during their interview by OIOS at a later stage, this alone does not eliminate the evidentiary value of their testimonies, nor does it render their statements unreliable. While prompt reporting may contribute to the evidentiary weight of a report, the absence of prompt reporting cannot serve to undermine the credibility of an allegation. Moreover, the CPOs, as eyewitnesses with direct knowledge of the facts, were the main source of evidence and their versions of the critical events have been found plausible, detailed and consistent, and coincided with that of the Nepalese Guards. Their cohesive statements that they were under the impression, -which was reinforced by the presence and participation of their Team Leader Mr. RF and Mr. Hossain, the Field Security Coordination Officer, that the removal was proper and legitimate, were cohesive, cogent and persuasive. In light of this and the fact that the CPOs came from different countries and ranked low in the relevant administrative hierarchy, as opposed to Mr. Hossain, who was their supervisor, it is objectively unlikely that the CPOs' testimonies about the participation and role of Mr. Hossain in the removal of ammunition were motivated by ethnic bias or their attempt to cover up their accountability for the removal of ammunition. By the same token, it is also strange that the CPOs would undertake the removal of ammunition on their own initiative without the direction or order coming from their superiors.

58. The only person, apart from Mr. Hossain, whose testimony before OIOS that TAV had received no ammunition from Mr. Hossain, confirms Mr. Hossain's pertinent assertion, is Mr. HL, Chief Executive Officer of TAV. However, in light of both of them having an interest in telling a story and their friendship, as well as the fact that Mr. HL's testimony comes to a stark contrast with the testimony of all the CPOs and the Nepalese Guards, this testimony is not at all persuasive.

³⁴ *Ibid.*, para. 99.

59. There is one more holding of the UNDT which we would like to comment upon. In the course of its reasoning, the UNDT also held that

In the circumstances, the Tribunal finds that the evidence that the Applicant was the mastermind for an unauthorized movement of ammunition was neither clear nor convincing. On the other hand, there is ample evidence pointing to Mr. [RF] as the mastermind behind the activities of transferring items from ASF 2 to TAV. He had just been appointed Custodian, making him responsible for the accountability and safe custody of ammunition. This evidence was also before the Respondent, but appears not to have been considered.³⁵

60. The Secretary-General asserts that the UNDT's fascination with the finding of a "mastermind" behind the transfer of the Ammunition to the TAV was wholly irrelevant to the case before it because the Appellee was not charged with "masterminding" the unauthorised transfer of the Ammunition to the TAV. Thus, the UNDT should never have occupied itself with the question whether it was Mr. Hossain or Mr. RF. who "masterminded" the unauthorised transfer of the Ammunition. The question before the UNDT was much simpler and did not require analysis of inchoate conspiracy questions, namely: was Mr. Hossain engaged in the unauthorised transfer of the Ammunition. Consequently, the UNDT's focus on Mr. RF's responsibility is a *non sequitur*. Mr. RF's responsibility was not the subject of either the investigation or of disciplinary measures. The UNDT should have, therefore, limited itself to determining whether the Appellant was within his authority to impose disciplinary measures on Mr. Hossain. Thus, by speculating on the misconduct of Mr. RF, the UNDT exceeded its competence.

61. We agree with the Secretary-General's arguments that it was not proper for the UNDT to occupy itself with this issue. The approach followed by the UNDT was erroneous. At this stage, having already set out in detail the evidentiary material and our conclusion drawn that Mr. Hossain participated and was in charge of the removal of ammunition from the United Nations Compound to the TAV premises, we find it unnecessary to address the concerns raised by the UNDT about who "masterminded" the removal of the ammunition. This was not the principal matter on application for judicial review before the UNDT, nor is it on appeal before us.

³⁵ Impugned Judgment, para. 60.

62. In any case, the UNDT's strong suggestion that Mr. RF. was the mastermind behind the activities of transferring items from ASF 2 to TAV is not supported by the available evidence on file.

63. At this point, however, it is important to record that Mr. RF. was not joined as a party in the proceedings before the UNDT and was not interviewed by the Administration (OIOS) or heard by the UNDT. Moreover, it is the responsibility of the Administration to establish the facts and of the responsible official to determine if the facts as established amounted to misconduct and falls within the Secretary-General's discretion to press charges against and impose on the implicated staff member the appropriate disciplinary sanction. As the Appeals Tribunal has held, it is not the role of the Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it, nor is it the role of the Tribunal to substitute its own decision for that of the Administration.³⁶ Moreover, the UNDT is not allowed to investigate facts on which the disciplinary sanction had not been based.³⁷ Therefore, the UNDT should not have entertained whether Mr. RF was the "mastermind" of the venture.

64. Despite its erroneous approach, however, close examination of the UNDT's reasoning indicates that it considered, though erroneously as already noted, there to be no rational connection between the evidence, the contested decision, and the reasons given for it, in the sense that, had Mr. RF. been the "mastermind," there would have been insufficient evidence to support the findings of Mr. Hossain's misconduct as the person in charge of the removal of ammunition. In any event, an appeal is not against the reasoning of the lower tribunal; it is against the order.

65. In conclusion, we find that the UNDT did not evaluate the evidence objectively. It came to unreasonable conclusions on the facts which were not supported by the evidence, and made speculations instead of findings based on the evidence. Consequently, the UNDT erred in fact and in law in its finding that the facts of misconduct were not established by clear and convincing evidence. A proper consideration of the whole of the evidence could only have led

³⁶ *Orabi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-884, para.21; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 27; *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 40; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

³⁷ *Narayan v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-918, para. 40.

to one conclusion, and that is that Mr. Hossain participated and was in charge of the removal of ammunition from the United Nations Compound to the TAV premises.

Whether the removal was authorised

66. In the course of its Judgment, the UNDT held that, “in all the circumstances, there was no evidence of ownership by the United Nations of the ammunition based on which the Respondent could have determined that the movement of it required United Nations authorization”.³⁸ Concomitantly, the UNDT held that:

There can be no gainsaying that, if as alleged by the Respondent there had been clear and convincing evidence that the Respondent was in possession of the alleged large amount of ammunition and the Applicant moved it to the private TAV premises without permission, an act of gross misconduct meriting separation from service would have been committed. However, in the absence of any proof whatsoever that the ammunition from the alleged source, in the alleged quantum and in the location it was alleged to have been, belonged to the Respondent, the inference remains open that movement of the contents of ASF 2 may have been merely a slipshod housekeeping exercise by incompetent CPOs.³⁹

67. The UNDT based its conclusion on the following findings.

68. First, it found that there was no clear or convincing evidence that the alleged ammunition was the property of the Organization. Per the UNDT’s reasoning, there was absolutely no record of it in any of the carefully compiled inventories of ammunition, weapons and other property present at UNAMI Kirkuk as being assets owned by/in the custody of the United Nations.⁴⁰

69. Then, the UNDT proceeded in holding that:

(...) the evidence before the Respondent when the sanction was imposed was that the ammunition was collected in 2013. The eye witness [sic] to the collection of the ammunition by then DFSCO [JCD] and then Team Leader [RF] in 2013 was CPO [AB]. There was nothing from his description of this occurrence to support the suggestion that the items were being collected on behalf of the United Nations. According to Mr. [AB], the then FSCO [VK] was not informed of the collection.

...

³⁸ Impugned Judgment, para. 70.

³⁹ *Ibid.*, para. 101.

⁴⁰ *Ibid.*, paras. 64 and 66.

Thus, even if ammunition was collected in 2013 and taken to the Kirkuk base, there is no evidence that it belonged to the United Nations. The Respondent's witness, CPO [RD], says he was told by his Team Leader [RF], that the ammunition in ASF 2 was "not official". It was not United Nations ammunition and he would get rid of it.⁴¹

70. It was also the UNDT's finding that "[t]here is no evidence from any of the PSD/CPOs that they were of the view that the ammunition belonged to UNAMI" and that "[t]he Applicant's evidence, corroborated by the statement of his predecessor [VK] is that when he took over from his predecessor, the April 2015 hand over email sent by Mr. [VK] made no mention of American ammunition in ASF 2 owned by the Organization (...)".⁴²

71. Finally, the UNDT added to its argumentative basis that

The informant/complainant [Nurse SM] got wind of the unusual movements and seized the opportunity to make a report of misconduct against the Applicant. All the CPOs and Deputy Custodian [CS], who were involved in the transfer but had not reported it, then chose to support the report that had already been made against the Applicant by pinpointing him as being to blame for any wrongdoing, thereby exculpating their entire team headed by Mr. [RF].⁴³

72. The Appeals Tribunal holds that the UNDT got it all wrong. Staff Rule 1.2(q) prohibits unauthorised transfer of "property or assets of the United Nations." The fact that the ammunition transferred, when the United States military forces withdrew from Iraq, to the possession of the United Nations and was stored in ASF 2 was unofficial and it was kept without proper registration and accountability, did not render it stray. It was still in the possession and under the control of the United Nations and therefore constituted a United Nations asset, an item belonging to its ownership in this sense. Hence, its removal from the possession of the United Nations and disposal, i.e. transfer to TAV, without proper authorisation constituted violation of the above cited provisions. Consequently, the UNDT erred in law and fact in holding otherwise.

⁴¹ *Ibid.*, paras. 65-66.

⁴² *Ibid.*, paras. 67-68.

⁴³ *Ibid.*, para. 69.

The interference with OIOS investigation

73. On the count of misconduct of interference with the investigation, allegedly committed when Mr. Hossain contacted CPOs Mr. CS and Mr. GE in August and early September 2017, the UNDT, in its judicial review, concluded that there was no clear and convincing evidence before the Administration at the time the sanction decision was made that Mr. Hossain, by speaking with the CPOs, sought to interfere with the investigation.

74. In the present case, the Dispute Tribunal's conclusions on the evidence were based on the following findings.

75. In the beginning, the UNDT noted that:

On the record before the Respondent at the time of the decision, it was clear that the Applicant denied the substance of the alleged contacts. The Applicant's version of events is that while on administrative leave he contacted several staff members, including CPOs, to inquire about their well-being after security concerns were heightened by Kirkuk being overrun by Iraqi forces. This is corroborated by Mr. [CS] who admits that when the Applicant called him in October 2017, he first spoke of security concerns. The Applicant admits to speaking with Mr. [CS] but denies there was any discussion about Mr. [HL] because he had never called Mr. [HL].⁴⁴

76. Then, the UNDT reverted to its wariness towards the credibility of the CPOs testimonies by noting that,

With the account of one person to be weighed against another, the Respondent had to properly consider issues of credibility on the record. There is no indication that the Respondent considered the two possible motives for the CPOs, and Mr. [CS] in particular, to give false information about the Applicant. Firstly, they were potential suspects who always were concerned about their own failure to properly account for ammunition being detected. The possibility that they may have sought by these reports of interference to further cement the case against the Applicant as a scapegoat for their own incompetence, thereby deflecting attention from their own Team and Team leaders, ought not to have been overlooked. Secondly, there was unrebutted evidence of Mr. [CS'] hostility towards the Applicant based on his ethnicity.⁴⁵

⁴⁴ *Ibid.*, para. 91.

⁴⁵ *Ibid.*, para.92.

77. Since we have already made clear this Tribunal's position on the issue of the CPOs' reliability and probative value of their testimonies, it is enough at this juncture to remind of and point to the UNDT's error in drawing an overall negative inference while assessing the credibility of said witnesses and the persuasiveness of their evidence.

78. The UNDT went on to find that:

(...) even if the Respondent considered that there was sufficient basis to accept the word of Messrs. [CS] and [GE] over that of the Applicant, there was insufficient evidence that in discussions with them he requested that they provide information to the investigation that was false. In light of the Tribunal's findings that there was no clear and convincing evidence at the time the Respondent's decision was made as to any misconduct related to ammunition movement, it is not possible to find that the content of what the Applicant was alleged to be telling the CPOs to say to the investigators was false information.

94. To tell the CPOs in August 2017 and early September 2017 to stick to the story that there was no American ammunition cannot *per se* have been accepted as clear and convincing evidence of his interference with an investigation. An alternate inference that could be drawn is that the Applicant was simply reassuring them that they should tell the truth.

95. The Applicant's alleged call to Mr. [CS] in October 2017 was to inform him that Mr. [HL] had been interviewed by OIOS and that Mr. [HL] then he received no ammunition from the Applicant. Mr. [CS] says the Applicant told him he would 'relate the same thing' and asked Mr. [CS] to do the same.⁴⁶

79. These are not reasonable findings on the evidence.

80. Mr. CS testified before OIOS that Mr. Hossain contacted him and that he became concerned because of that contact and any negative inference. He stated before the OIOS investigators that

... I was becoming very concerned. This is I would say harassment, he is continually calling me in trying to get to me lie to you if you have guys happen to talk about this ammunition, it's very unsettling, harassing. I am not physically scared of Ishfaq. It's... I am fine with that... But as my supervisor I do know that he can say certain things and prompt ask me to say certain things for investigations and so forth like that and I do know what harassment is and in his own way I believe this is his personality's way of harassing me of trying to try to fall on line with what he wants me to say or what him and maybe others want me to say, so I am concerned that this is not going end

⁴⁶ *Ibid.*, paras. 93-95.

well for myself, especially if everything. If I go back to work and Ishfaq is there. I don't think this will ever stop.⁴⁷

81. Mr. GE in his witness testimony stated that Mr. Hossain approached and told him that there had been a problem with the ammunition, there was going to be an investigation and that it would have been better for him (Mr. GE) to say that there had been no ammunition at the United Nations Compound in Kirkuk.⁴⁸

82. So, contrary to the UNDT's view, there was clear and convincing evidence that Mr. Hossain, having knowledge of the relevant OIOS investigation about the ammunition removal from United Nations Compound in Kirkuk to the TAV premises, interfered with it by pressuring CPOs CS and GE to testify otherwise. On the face of these witness statements, the version of events in which Mr. Hossain, while on administrative leave contacted several staff members, including CPOs, to inquire about their well-being because of security concerns, does not stand to reason.

The established facts qualify as misconduct

83. This Tribunal holds that the established facts amounted to serious misconduct on the part of Mr. Hossain.

Applicable provisions

84. Staff Regulation 1.2(b) provides:

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

85. Staff Regulation 1.2(q) provides: "Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets."

86. Under Staff Rule 10.1, a staff member commits misconduct when he or she fails to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the

⁴⁷ S.' testimony, lines 1467-1480.

⁴⁸ E.'s testimony, lines 448-461.

standards of conduct expected of an international civil servant, and such a failure may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

87. Staff Rule 1.2 (c) stipulates: “Staff members have the duty to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.”

88. Staff Rule 1.2(g) stipulates:

Staff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization, including activity in connection with the administration of justice system, nor shall staff members threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions. Staff members shall not threaten, retaliate or attempt to retaliate against such individuals or against staff members exercising their rights and duties under the present Rules.

89. Mr. Hossain's participation in the unauthorized removal of ammunition, being an asset of the Organization, from the United Nations Compound in Kirkuk to the TAV premises, a military contractor, and interference in the relevant OIOS investigation, amounts to misconduct in that he has violated his obligations under the above provisions.

90. Moreover, the critical facts of said disciplinary offences have been proven by clear and convincing evidence.

91. We therefore find that the UNDT erred in law and fact in finding that the decision to separate Mr. Hossain from the Organisation was unlawful.

The sanction of separation from service was proportionate to the offence

92. The jurisprudence of the Appeals Tribunal in *Nyawa*⁴⁹ provides:

The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is

⁴⁹ *Nyawa v. Secretary General of the United Nations*, Judgment No. 2020-UNAT-1024, paras. 89-90 (footnote omitted).

the Administration that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures such as a sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. That is why the Tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed without any change in the jurisprudence of this Tribunal. The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.

93. Further, as we stated in *Samandarov*⁵⁰,

(...) due deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.

(...) The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, 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. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

94. In the present case, given the seriousness and degree of Mr. Hossain's misconduct, the sanction of termination from service with compensation in lieu of notice without termination indemnity was not unreasonable, absurd, or disproportionate. The Appeals Tribunal finds that it was a reasonable exercise of the Secretary-General's discretion to determine that participating in an unauthorised removal of ammunition, being in the possession of the Organisation rendered Mr. Hossain unfit for further service with the Organisation, and is satisfied that termination was neither unfair nor disproportionate to the seriousness of the offence. In this context, Mr. Hossain violated the relationship of trust that had existed between

⁵⁰ *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, paras. 24-25.

him and the Organisation. His conduct was particularly grave in light of the position he occupied as a FSCO, charged with responsibility, *inter alia*, for all aspects of security management, crisis readiness, and preparedness at the Kirkuk duty station, the protection of personnel and property of the Organisation and the supervision of the CPOs. As such, the Appeals Tribunal finds that imposing the sanction of termination from service with compensation in lieu of notice without termination indemnity was a reasonable exercise of the Administration's broad discretion in the present disciplinary case; a discretion with which it will not lightly interfere. So, in this regard we agree with the UNDT's position that:

(...) if as alleged by the Respondent there had been clear and convincing evidence that the Respondent was in possession of the alleged large amount of ammunition and the Applicant moved it to the private TAV premises without permission, an act of gross misconduct meriting separation from service would have been committed.⁵¹

Request for compensation

95. The Appellant's claim for compensation is rejected. Since no illegality was found, there was no justification for the award of any compensation. As this Tribunal has stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".⁵²

96. On the premises, the appeal is allowed.

⁵¹ Impugned Judgment, para. 101.

Judgment

97. The appeal is hereby upheld and Judgment No. UNDT/2020/164 is hereby vacated.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)

Judge Raikos, Presiding
Athens, Greece

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 7th day of January 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar