UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2021-UNAT-1184

Timothy Kennedy

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge John Raymond Murphy
Case No.:	2021-1515
Date:	29 October 2021
Registrar:	Weicheng Lin

Counsel for Appellant:	George G. Irving
Counsel for Respondent:	Angélique Trouche

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. The Appellant, a Security Officer at the Department of Safety and Security (DSS), contested the Administration's decisions that found misconduct in his mishandling of printed e-mail communications that had become public, and in his failure to report the incident, and that imposed resulting disciplinary sanctions against him. The Appellant does not dispute mishandling the communications and failing to report their loss but says the communications were not confidential and there was no misconduct; in the alternative, he submits that the disciplinary sanctions were not proportionate. In Judgment No. UNDT/2020/209 (the Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) disagreed and dismissed his application.

2. For the reasons set out below, we uphold the UNDT's finding relating to misconduct but rescind the UNDT's finding on the proportionality of the disciplinary sanctions.

Facts and Procedure

3. The Appellant is a staff member of DSS at the Headquarters in New York and has been serving the Organization since September 1993, including as Vice-President of the Headquarters Staff Union (Staff Union).

The Misconduct Allegation

4. The underlying facts of the allegations are not in dispute. The misconduct allegations stem from an e-mail exchange resulting from a security incident.

5. On 16 March 2017, a United Nations staff member, acting in his role as a Security Analyst (the Analyst) sent an e-mail to five United Nations senior officials of DSS, copying six other United Nations staff members (E-mail 1). The e-mail had the subject line "*Confidential: Incident at [*REDACTED*]: Update in STI". In the body of this e-mail, under the headline "UN STRICTLY CONFIDENTIAL", the Analyst referenced a recent and serious security incident at an international entity, which had resulted in staff injuries. The Analyst outlined the actions of the entity to the incident. As sources, he made generic reference to some security officials not working with the United Nations and "open source media reporting" and Twitter.

6. E-mail 1 went on to describe the past deployment of an analyst to develop an assessment of vulnerabilities of a high-level official of a different international entity and the entity's premises as well as details of previous similar incidents. In various places of the e-mail, the Analyst indicated "INTERNAL UN STI", "MEMBER STATE STI" or "SBU" before setting out his analysis (at the hearing, the Analyst explained that "SBU" is an abbreviation for "sensitive but unclassified" and that this is a term not used by the United Nations). The Analyst indicated "UNCLASSIFIED" at the very end of the body of the text before writing his e-mail signature.

7. The second e-mail exchange begins with an e-mail of 16 March 2017 from the Analyst to the USG/DSS (E-mail 2). The subject line reads "*Confidential: Potential implications of [DSS]". The body of the e-mail begins with the title: "UN STRICTLY CONFIDENTIAL". The Analyst brings the issue of the recent security incident to the USG/DSS's attention and sets out his belief of potential wrong doings by senior managers of the department in question. He indicates that he would also seek specific guidance and direction from the ethics office, OHRM, the Staff Union and the Office of Internal Oversight Services (OIOS). The Analyst then mentions an incident in 2016, assessments that were made, and "operational concerns" for the premises and a named high-level official for that location (the Designated Official). In addition, details regarding death threats are referenced. The Analyst then alleges that an official DSS assessment was "buried" due to personal political implications for individuals involved. The Analyst then requests an independent investigation into the matter.

8. On 17 March 2017, the Analyst forwarded E-mail 2 and the USG/DSS's response to a group of seven United Nations officials, including the Appellant, for their "information and apprisal [sic]".

9. By e-mail of 20 March 2020, the Appellant forwarded the Analyst's 17 March 2017 e-mail to the USG/DSS, indicating his title as "Vice President UN Staff Union". The subject line again indicated "Confidential". The Appellant mentions allegations of a "cover-up" regarding another incident. The Appellant indicates in his e-mail that he is also requesting an independent investigation and also states that "[i]n light of the injury to the staff member, it (the entirety of the issue) must be shared with the Administration in the very near future".

10. The USG/DSS responded the following day, 21 March 2020, also copying some other United Nations officials, requesting the Appellant to provide further information about the other specific similar security incident, noting that this was "a serious allegation". Later that day, the

Appellant replied to the USG/DSS in a lengthy e-mail in which, among other matters, he referred to another previous similar serious security incident at a United Nations entity. The entire e-mail exchange continued the same subject line that began "Confidential".

11. On 17 May 2017, the Appellant printed the entire e-mail trail with the intention of delivering it to the Staff Union office so that the new leadership of the Staff Union, who had been recently elected, would be informed of the issues and have a hard copy file. According to the Appellant, he placed the envelope of the printed e-mails on the bench in front of his security service locker in the locker room. He departed and later, realizing he did not have the envelope, returned to the locker room at the end of the shift but the envelope had been removed. He went on leave on 22 May 2017 and returned to work 30 May 2017. After he returned from leave, the Appellant was informed that the communications, including his e-mail to the USG/DSS and E-mail 2, had been posted on a website called Inner City Press on 18 May 2017.

12. On 19 May 2017, an OIOS investigation was launched. The investigation report of 29 June 2018 (investigation report) stated that they reviewed and analyzed documentation including the Appellant's official e-mail back up files, webmail logs and hard disk drive of the United Nations issued computer used by the Appellant. They interviewed staff members and the Appellant. The investigation report outlined their findings that the Appellant was on duty when he printed the e-mail correspondence from a desktop computer on 17 May 2017 and that on 18 May 2017, Inner City Press published the same correspondence with the Appellant's webmail account identification and an indication it was printed on 17 May 2017.

13. In the investigation report, the Appellant's interview of 7 March 2018 is summarized. In the interview, the Appellant stated the documents were lost "due to his negligence, and it was irresponsible to leave confidential documents on the bench". The Appellant did not report the loss to anybody "because [he] was embarrassed" and it was a "mistake". In the transcript of the interview, the Appellant stated that losing the envelope with the e-mails was "careless….Because it's confidential information." When asked whether he felt a responsibility to keep this kind of confidential document in a secure place, the Appellant agreed that "it was irresponsible". He then stated that he did not mention the documents were missing because "you know, I was embarrassed, you know, that I had a confidential document and I left it on the bench, and it went missing" and that he should have made a report about the missing documents.

14. On 1 August 2018, the Appellant received formal allegations of misconduct that he provided confidential United Nations information, in the form of e-mail correspondence about security-related issues, to the Inner City Press or, in the alternative, negligently lost this printed correspondence and did not report this loss to anyone. In his written response to the allegations of misconduct, the Appellant stated that he did not provide the "confidential UN document" to the Inner City Press; this statement indicates that he was aware the e-mail documents were "confidential". He also stated that he was "careless" due to distractions from family issues at the time. He apologized for the mistake and understood the possible consequences of the disciplinary proceedings but asked for consideration of his long service, performance history and contribution to the Organization and his personal circumstances.

The Contested Decision

15. By letter dated 1 October 2018, the Appellant was informed of the contested disciplinary sanction (sanction letter or contested decision). The Under-Secretary-General for Management (USG/DM) concluded that "[a]fter a thorough review of the entire dossier, including [the Appellant's] comments dated 29 August 2018", it had been established by "clear and convincing evidence" that after printing confidential United Nations information on 17 May 2017, in the form of e-mail correspondence about security-related issues, the Appellant lost this printed correspondence and did not report this loss to anyone; and that the same printed correspondence containing confidential information was published the next day by Inner City Press, a private online blog. The USG/DM concluded this amounted to "gross negligence". In determining the appropriate sanction, the USG/DM considered the Appellant's long service to the Organization as a mitigating factor and the fact that the Appellant was employed as a Security Officer as an aggravating factor. She imposed sanctions: a written censure, loss of four steps in grade and deferment for two years of eligibility for consideration for promotion.

The UNDT Judgment

16. Before the UNDT, the Appellant agreed that the only issues in dispute were whether the information in the printed copies of the e-mail correspondence were "confidential" and whether the disciplinary sanctions were proportionate.

17. In the Judgment, the UNDT observed that the only factual finding that the Appellant was challenging was the USG/DM's determination that the information encompassed in the printed copies of the e-mail exchanges was confidential. The UNDT confirmed the Appellant's submission that he has "openly acknowledged that he copied the e[-]mail correspondence in question and that he inadvertently misplaced it".[1] He copied the e-mails "pursuant to a protected Staff Union activity as a Vice President of the Union Leadership" which was not "improper".[2] The UNDT noted that the USG/DM never found the Appellant to have intentionally leaked information but instead found that he had acted with gross negligence in losing the documents and in failing to report the incident (facts which were not disputed).

18. The UNDT noted that the Analyst, who had expertise in confidentiality labelling, noted the content of the e-mails as "confidential" and "UN STRICTLY CONFIDENTIAL" and this "represented his professional assessment that information contained therein was sensitive and, in some instances, also confidential and should therefore not be made public".[3] The UNDT reviewed the content of the e-mails, including the description of a recent and very recent security incident, vulnerability analysis and domestic issues of some countries, and concluded that these confidentiality designations were appropriate in the circumstances.

19. The UNDT was unconvinced by the Appellant's submission and the Analyst's testimony at the hearing that aside from the circumstances related to the USG/DSS, no other information in E-mails 1 and 2 was of a confidential nature. Rather, the UNDT noted that the Analyst testified that the leak of information was very sensitive and put the high-level Designated Official and the Analyst himself in jeopardy. In addition, the UNDT noted that in the e-mail exchange that followed E-mail 2 between the Appellant and the USG/DSS, additional sensitive information was disclosed regarding the security and safety of the United Nations and its internal dealings.

20. The UNDT found that it was not clear from E-mail 1 that the information in the e-mails came from the public domain as stated by the Analyst. Also, the Analyst's professional assessments were for a limited circle of United Nations addressees as demonstrated by his secrecy designations. The UNDT also found that the Appellant had not demonstrated how the

[1] Impugned Judgment, para. 27.
[2] *Ibid.*
[3] *Ibid.*, para. 37.

confidential nature of the e-mails, dated March 2017, had lapsed after only two months at the time of their printing on 17 May 2017.

21. The UNDT then found the USG/DM properly exercised her discretion in finding that these established facts amounted to misconduct. Although there are no specific statutory directions given on the specific situation of a staff member's loss of confidential information and his/her failure to report the incident, the UNDT relied on the applicable legislative framework, including Staff Rule 10.1(a), Staff Regulations 1.2(b), (i) and (q) and Secretary-General's Bulletin ST/SGB/2004/15 (Use of information and communication technology resources and data). The UNDT found that the Appellant as Vice President of the Staff Union which is a leadership position in which one can expect to be entrusted with and have access to a lot of privileged and confidential information, should have understood the significance and particular sensitivity of the e-mails; in addition, he should have known that if he lost the printed e-mails, this could have serious ramifications, including for his career.

22. The UNDT held the USG/DM did not exceed the scope of her authority by concluding that the Appellant had acted with gross negligence (although not because of his role as a Security Officer) and that the established facts amounted to misconduct.

23. As for reviewing the proportionality of the sanctions imposed, the UNDT noted "the very particular situation of the present case [which] distinguishes it from all … other cases"[4] and found that the sanctions imposed on him fell within the scope of the Administration's discretion. It further found that the Appellant's career as a Security Officer did not appear to have suffered much harm from the sanctions, as he was reassigned to a sensitive post at the Secretary-General's residence.

24. At the same time, the UNDT found that the fact that the Appellant was a Security Officer should not have influenced the disciplinary decision while his responsibilities as Vice President of the Staff Union could have been taken into account due to his distinct access to privileged and confidential information. The UNDT noted that the Appellant's long and untarnished work record did not exempt him from disciplinary sanctions for misconduct, but it had been a mitigating factor. The UNDT held the Appellant had not met the onus of proof to substantiate

[4] *Ibid.*, para. 56.

that the contested decision was possibly been tainted by ulterior motives. The UNDT concluded that the disciplinary sanctions imposed were proportionate to the offense.

Submissions

The Appellant's Appeal

25. The Appellant says that the UNDT paid insufficient attention to the question of whether the alleged actions amounted to misconduct and whether the penalty imposed was proportionate to the alleged misconduct. The Appellant did not dispute that the original e-mails were labeled "confidential", but questioned the implications drawn by the Secretary-General. The Analyst testified that none of the communications or issues were confidential and that he had added the label of "confidential" because it contained criticism of the USG/DSS. The original correspondence was also shared with a number of people, as was the Appellant's e-mail. The Appellant submits the use of the term "confidential" was used by the Secretary-General to impose a harsher sanction on the Appellant, although it was never clarified what confidential information was at issue or what obligations attached to it. Furthermore, at the time the e-mail documents were misplaced, the information in question was two months old and had already been reported in the press.

26. The Appellant submits that the UNDT's assumption that the information was sensitive and should not be made public is unsupported and contradicts the evidence given by the Analyst in both his oral and written witness statements to the effect that most of the information referred to in the exchanges was from public sources and not the United Nations and by the time it was published it was "old news". The UNDT's efforts to dismiss this information is based on a mistake of law in placing the burden on the Appellant to disprove the assertion that confidential United Nations documents with highly sensitive and dangerous content had been published as a result of the Appellant's actions.

27. The Appellant also submits that the UNDT's finding confirming the Secretary-General's conclusion that the Appellant's actions amounted to misconduct constitutes an error of law. A finding of gross negligence (which has never been defined by the Secretary-General and been inappropriately described as "willful recklessness") is not warranted. The UNDT's conclusion that some of the Appellant's actions could be described as willfully reckless is unsupported by the facts. The single inadvertent fact of misplacing an envelope and the inability of the Secretary-General to point to any serious consequence do not support such a conclusion.

28. By reaching its conclusion, the Appellant says the UNDT incorrectly imputed a higher standard of behaviour by a Union representative which appears speculative, as does the conclusion as to what might have occurred had the loss of the envelope been reported since the publication occurred immediately thereafter. On the other hand, the UNDT rejected the Secretary-General's argument that the sanction was justified by the fact that the Appellant was a security officer but failed to draw any conclusion from this finding even though it was used to justify a harsher sanction.

29. As for the sanction letter, the Appellant submits that it does not specify which rules or guidelines the Appellant violated in copying the materials with the intention of sharing them with his Staff Union colleagues during the transitional period. As in the sanction letter, the UNDT failed to identify why a single oversight with unforeseen consequences amounted to gross negligence warranting a finding of misconduct.

30. The sanction letter fails to mention the fact that the Appellant was acting in the course of carrying out his official Staff Union responsibilities. The Judgment avoids this issue and the serious repercussions the action had on staff/management relations. The Staff Union has felt strongly enough about this issue to sponsor the appeal. The decision imposing such a severe sanction undermines the independence of the Staff Union by implicitly intimidating staff representatives and threatening them with disciplinary action for criticizing senior managers.

31. Even assuming that the Appellant's inadvertence is actionable, the Appellant submits that the penalty imposed is wholly disproportionate to the alleged wrongdoing. It is also unduly harsh in terms of the financial penalty imposed in the sum of thousands of dollars plus adverse effects on the Appellant's pension. The Appellant says that "[l]eaks to the press occur frequently, sometimes by accident and sometimes by design. The Respondent has not been able to cite a single example of action that has been taken against staff for such occurrences." In addition, the UNDT failed to note that the Appellant is currently carrying out responsibilities at a higher level while not receiving equal pay for equal work. He has since been excluded from applying to the S-4 level and there is no indication in what respect his long record of distinguished service was taken into account and no similar case to compare it to.

32. Moreover, the Appellant says that the UNDT erred in procedure in citing the Appellant's witness statement, while not allowing him to testify and respond to the assertion that he was not harmed by the sanction. The UNDT dismissed the Appellant's claims of bias and undue influence

owing to the pressure placed on the Secretary-General by the USG/DSS who eventually left, while precluding the Appellant from raising the substantive issues mentioned in the leaked reports or allowing his witness to testify about his mistreatment by the USG/DSS arising out of the same issues.

33. The Appellant says he suffered a long period of emotional distress and has been forced to undergo treatment for the consequences of how the case was handled and the effect on his reputation.

34. The Appellant requests reversal of the UNDT Judgment; rescission of the contested decision, including removal of censure, reinstatement of lost steps in grade, and compensation for loss of opportunity for promotion. He also requests compensation in the amount of one-year net base salary for damage to reputation and moral damages.

The Secretary-General's Answer

35. The Secretary-General or Respondent submits that the UNDT correctly found that the contested decision was within the Administration's discretion and lawful. The UNDT assessed in detail the evidence and the applicable legal framework, including UNAT's case law, and properly rejected the application. The Appellant does not establish any error by the UNDT warranting a reversal of the Judgment but rather reiterates arguments he presented before the UNDT. In particular, he does not demonstrate that the UNDT erred in finding that the facts on which the sanction was based had been established; that the established facts constituted misconduct and that the sanction was proportionate to the offence.

36. As to whether the facts on which the sanction was based had been established, the Secretary-General says the Appellant has only challenged one factual element: the confidentiality of the information contained in the e-mails. The UNDT noted the designation of the content of the e-mails as "confidential" and "UN STRICTLY CONFIDENTIAL" and found the confidentiality designation was appropriate based on the content of the e-mails. It relied on the Analyst's testimony that the leak of information was very sensitive and put the high-level Designated Official and the Analyst in jeopardy.

37. In upholding the finding of misconduct, the UNDT relied on Staff Rule 10.1(a) and Staff Regulations 1.2(b) and (q) and ST/SGB/2004/15 which stress integrity and the exercise of care with respect to using United Nations property.

38. The Secretary-General argues the Appellant does not explain how focusing on the facts immediately relevant to the case constituted an error by the UNDT, nor does he state which other facts the UNDT should have taken into account and how those would have led the UNDT to a different judgment. The Appellant had agreed on the facts that were before the UNDT, except for the fact that the e-mails were confidential.

39. Also, the Secretary-General argues that the Appellant does not identify how the UNDT erred in fact by finding that the e-mails contained information designated as "confidential" and that the review of their content confirmed this designation as "only appropriate". The Appellant himself had admitted several times that the e-mails exchanged in 2017 were confidential. The Analyst acknowledged before the UNDT that information contained in the e-mails had not been made public at the time the Appellant lost the printouts of the e-mails and that the e-mails contained information, which was not from open sources, but from regional security officers of Member States. The UNDT was therefore correct to find that the e-mails "were evidently not intended for other than a limited circle of addressees at the United Nations".

40. In addition, the Secretary-General says the Appellant's contention that the UNDT mistakenly placed on him the burden to disprove that the information was confidential is unsupported. Ample evidence of the confidentiality of the e-mails was provided by the Secretary-General, and the Appellant was unable to demonstrate the contrary. The confidentiality of the e-mails was discussed in detail before the UNDT and was the focus of a full hearing. The Appellant simply disagrees with the outcome of the case before the UNDT and fails to demonstrate that the UNDT's finding of fact was not supported by the evidence or that it was unreasonable.

41. The Secretary-General submits the Appellant does not demonstrate that the established facts do not amount to misconduct. While the Appellant argues that the UNDT erred in finding that his action amounted to misconduct and that he was being punished for the "single inadvertent act of misplacing an envelope" which is not gross negligence, the reality is that the envelope contained confidential information, that he was aware of it and that he did not exercise caution in handling the e-mails; rather than forwarding the e-mails to their intended recipients or to share their content orally, he printed hard copies; and rather than delivering the hard copies to their intended recipients, he negligently left the envelope unattended on a bench. Also, the Appellant failed to report this incident both at the time of the loss as well as later when he learned of the publication of the e-mails on the internet which failure has an element of willfulness and recklessness. These cumulative aspects of his conduct made his negligence significant.

42. As for the sanctions, the Secretary-General submits that the Appellant fails to demonstrate that the sanction was disproportionate to the offense. The sanction imposed on him was not blatantly illegal, arbitrary or discriminatory nor otherwise abusive or excessive and is in line with past practice and not stricter. To determine the sanction, the Administration took into account mitigating and aggravating factors. The Appellant's long service to the Organization was found to be a mitigating factor. While the Administration had found his functions as a Security Officer an aggravating factor, the UNDT disagreed. However, a Security Officer should have known better about reporting the loss of the e-mails, and the Appellant admitted several times before OIOS that he should have reported this loss. The UNDT considered that the Appellant's Staff Union responsibilities could have been taken into account because of "his distinct access to confidential and privileged information". The UNDT seemingly replaced one aggravating factor with another, with no impact on the sanction.

43. The Secretary-General says that while the Appellant contends that the sanction is an implicit attack on the independence of Staff Union representatives and was retaliatory, his past responsibilities within the Staff Union are not directly relevant to this case. First, at the time the Appellant lost the e-mails, he was not a Staff Union representative; but, even if he had been, this would not change his obligation to abide by the highest standards of integrity, as any other staff with the handling of confidential information. Further, the e-mails were not a discussion of Staff Union matters between Staff Union representatives; they were exchanged confidentially marked security-sensitive information between security officials, some of whom also had responsibilities in the Staff Union. The e-mails were not shared among Staff Union representatives at large who were not security officials.

44. The Secretary-General submits that there was also no element of retaliation against the Appellant. The Appellant does not identify any irregularity or element of ulterior motives and the UNDT correctly rejected this claim.

45. While the Appellant contends that the UNDT erred in procedure by not allowing him to testify about the harm caused by the sanction, the Secretary-General argues that he does not identify when this right to be heard was refused. In fact, the UNDT allowed both parties to present their argument for 30 minutes at the hearing and the Appellant made use of this opportunity through his Counsel. Further, as the UNDT did not find the Sanction Decision unlawful, there was also no reason to discuss potential harm and compensation. The UNDT was correct to find that the sanctions imposed on the Appellant fell within the discretion of the Administration. In the

context of reviewing the proportionality of a disciplinary sanction, UNAT has held that it must be deferential not only to the Secretary-General, but also to the UNDT which is charged with finding facts.

46. The Secretary-General requests the Appeals Tribunal uphold the Judgment. The Appellant fails to show that the UNDT erred in fact or law in the Judgment. As the Appellant fails to demonstrate that the contested decision was unlawful, his claims for remedies must be dismissed. Alternatively, should the Appeals Tribunal consider the Sanction Decision unlawful, the Secretary-General argues that the Appellant does not produce any evidence of harm to his reputation and loss of career opportunities. In fact, as noted by the UNDT, his career has not suffered harm, because the Appellant has been reassigned to the Secretary-General's residence, a post of great sensitivity. The Appellant also fails to substantiate his claim for moral damages. The mere note of a psychotherapist is not sufficient evidence to prove harm.

Considerations

Standard of Review in Disciplinary Cases

47. Judicial review of disciplinary cases requires consideration of the evidence adduced and the procedures utilized during the course of the investigation by the Administration.

48. The Appeals Tribunal in *Samandarov*[5] held that when reviewing disciplinary cases, the Dispute Tribunal must establish: i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, and iii) whether the sanction is proportionate to the offence. The "Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred".[6] "[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".[7] Clear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards: clear requires that the evidence of misconduct must be unequivocal and manifest and convincing requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation

[5] *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859.
[6] *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 15, quoting *inter alia Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.
[7] *Ibid.*

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 of evidential inferences that can be properly drawn from other direct evidence.[8]

49. The Appeals Tribunal has also generally held that the Administration has a broad discretion in disciplinary matters which will not be lightly interfered with on judicial review.[9] However, this discretion is not unfettered and can be judicially reviewed to determine whether the exercise of the discretion is lawful, rational, procedurally correct and proportionate. This includes considering whether relevant matters have been ignored and irrelevant matters considered, whether the decision is absurd or perverse, or affected by bias, etc. It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it or to substitute its own decision for that the Administration.[10]

50. In the present case, we find that the UNDT did not err in fact or in law on the question of whether the established facts qualify as misconduct but did err on the proportionality of the disciplinary sanctions.

Whether the established facts qualify as misconduct under the Staff Regulations and Rules

51. There is no real dispute on the underlying facts, therefore, the question is whether these facts constitute misconduct under the relevant regulatory framework.

52. The relevant regulatory framework on misconduct is set out in the Staff Regulations and Rules. The starting point is Staff Rule 10.1(a) that states that "[f]ailure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct".

[8] *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.
[9] *Ladu, op.cit.*
[10] *Sanwidi v. Secretary-General of the United Nations,* Judgment No. 2010-UNAT-084, para. 40.

53. Staff Regulations 1.2 (b), (i) and (q) set out the standard of conduct of staff members:

> (b) 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;
>
> ...
>
> (i) Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service;
>
> ...
>
> (q) 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[.]

54. As for the use of information by staff members, Section 5.1 of ST/SGB/2004/15 provides:

> Users of ICT resources and ICT data shall not engage in any of the following actions:
>
> (a) Knowingly, or through gross negligence, creating false or misleading ICT data;
>
> (b) Knowingly, or through gross negligence, making ICT resources or ICT data available to persons who have not been authorized to access them;
>
> (c) Knowingly, or through gross negligence, using ICT resources or ICT in a manner contrary to the rights and obligations of staff members[.]

55. The Appellant says that his actions do not amount to misconduct and his inadvertent act of misplacing an envelope is not "gross negligence". In addition, the information in the misplaced communications was not "confidential".

56. We find the UNDT did not err in determining that the Appellant's actions amounted to misconduct, regardless of whether those actions amount to gross negligence as required by ST/SGB/2004/15. ST/SGB/2004/15 speaks of "gross negligence" in the use of information and communication technology. The contested decision makes a finding of "gross negligence". In its Judgment, the UNDT said that it was "inappropriate" for the USG/DM[11] to state the

[11] The UNDT erroneously refers to the USG/DSS instead of the USG/DM.

Appellant's actions amounted to "gross negligence"[12] but subsequently describes the Appellant's offence as acting "in a grossly negligent manner, losing the printed version of the two confidential e[-]mails".[13] This contradiction is not fatal to the Judgment which remains manifestly reasonable because regardless of whether the Appellant's actions are considered "gross negligence" pursuant to ST/SGB/2004/15, they still constitute a violation of the standard of conduct expected in Staff Regulations 1.2 (b), (i) and (q), and therefore, misconduct pursuant to the Staff Regulations and Rules.

57. As for the question of confidentiality, the definition of "confidential" from Black's Law Dictionary is "entrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret". "Confidentiality" is defined as "something that has the quality of being confidential, secret or privileged". The e-mails in question were clearly labelled as "confidential" in the subject lines but also in the body of some of the e-mails. The Appellant understood the information or printed e-mails were "confidential" when questioned as part of the investigation. He stated multiple times in the investigation interview that he knew the information was "confidential" and it was a "mistake" to not have secured it properly.[14]

58. The Appellant says the Analyst testified that none of the communications or issues were confidential and that he had added the label of "confidential" because his e-mail contained criticism of the USG/DSS. However, the UNDT placed less weight on this part of the Analyst's testimony given other evidence before it, which it is entitled to do as the trier of fact. For example, in the Analyst's written statement to the UNDT, the Analyst stated that Inner City Press reproduced Staff Union exchanges which he indicated were confidential "for those who might take the matter up". Also, during cross-examination at the hearing, the Analyst stated the leak of information was a "very sensitive issue that put the specific high level UN official at the location of similar security incidents, as well as himself, in jeopardy".[15] This supports the finding that the e-mails and its contents were intended to be held in confidence due to the sensitive nature of the information they contained.

[12] Impugned Judgment, para. 50.
[13] *Ibid.*, para. 56.
[14] See para. 13 above.
[15] Impugned Judgment, para. 38.

59. A review of the content of the e-mail exchange also supports the UNDT's determination of the confidentiality of the exchange as being reasonable. The e-mails describe not only the most recent security incident, but other previous incidents, and the steps taken following them. The e-mails reference death threats and the Official who is targeted. They also make allegations of "cover ups" and the role of the USG/DSS in these allegations, as well as other officials. Both the Appellant and the Analyst described the information as "confidential" and/or sensitive in their testimony to the investigators and/or the UNDT. The UNDT acknowledged that there are no specific statutory directions given on the specific situation of a staff member's loss of confidential information and his/her failure to report. However, Staff Regulations 1.2(b) speaks to staff members upholding the highest standards of "efficiency, competency and integrity". The Appellant agreed in the investigation interview that he was "careless" and "irresponsible" in his handling of the printed copies of the e-mails, and therefore, acted contrary to these high standards. Staff Regulation 1.2(q) provides that staff members shall exercise reasonable care when utilizing the property and assets of the Organization. The Appellant did not exercise reasonable care in the handling of the e-mails as he has admitted to being "careless" and "irresponsible".

60. Therefore, the facts clearly and convincingly support the finding of misconduct and we uphold the UNDT's Judgment on this issue.

Whether the sanction is proportionate to the offence

61. Although the established facts support the finding of misconduct, we find the Dispute Tribunal erred in determining that the sanctions were proportionate to the misconduct and rescind this portion of the Judgment.

62. The decision to impose a disciplinary measure is within the discretionary authority of the Secretary-General or officials with delegated authority. Staff Rule 10.1(c) provides that "[t]he decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority". Staff Rule 10.2 lists the forms of disciplinary measures that may be taken which include the specific measures imposed against the Appellant.

63. However, as with all exercises of discretion, it should not be "absurd, arbitrary or tainted by extraneous reasons or bias, which would otherwise be grounds for judicial review, if proven".[16] We agree with the UNDT that there is no evidence the exercise of discretion was tainted by extraneous reasons or bias. However, as for the absurdity or arbitrariness of the exercise of discretion, we are unable to ascertain whether the Secretary-General considered all relevant factors when exercising the discretion on sanctions given the sparse and incomplete rationale provided in the sanction letter.

64. As stated in S*amandarov*:[17]

> Our jurisprudence has expressed the standard for interference variously as requiring the sanction to be "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" or to be obviously absurd or flagrantly arbitrary. 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.

65. In order to determine whether disciplinary sanctions are proportionate or "excessive in relation to the objective of staff discipline"18, there should be sufficient reasons for the specific sanctions imposed including what factors were considered or not considered in the sanction analysis. It is axiomatic that in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, that some form of reasons should be required. For example, it would be unfair for a person subject to a disciplinary decision which is critical to their future and career not to be told why the result was reached. However, this need for transparency needs to be balanced with the possible consequences of administrative delay and costs on the system in question. Therefore, what are adequate reasons will depend on the circumstances of the case and the reasons must be read together with the record and outcome to determine whether the result is a lawful exercise of discretion. In the present case, the USG/DM in the sanction letter states she considered the "nature of your actions, the past practice of the Organization in matters of comparable misconduct, as well as whether any

[16] *Mousa v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-431, para. 30.
[17] *Samandarov, op. cit.*, para. 25 (internal footnote omitted).
[18] *Ibid.*

mitigating or aggravating factors apply to your case". However, she does not set out the "past practice of the Organization" nor the specific nature of the actions that she considered. She then sets out a mitigating factor of "long service to the Organization" and the fact the Appellant was employed as a Security Officer as an aggravating factor. She imposes on the Appellant a written censure as one of the measures available and enumerated in Staff Rule 10.2. The written censure can be reasonably ascertained as a minimum for any disciplinary infraction or misconduct. However, the rationale for the other measures imposed on the Appellant such as loss of four steps in grade and deferment for two years of eligibility for consideration of promotion are more difficult to ascertain from the sanction letter and the record. Why was a reduction in four steps in grade selected as opposed to a reduction of one step, two steps, etc? Why was a deferment of eligibility for consideration of promotion selected and why two years? There was an aggravating factor and a mitigating factor. How did these factors weigh in the measures imposed? We are unable to ascertain the answers to these questions from the reasons provided in the sanction letter and the record.

66. The UNDT held at paragraph 58 of the Judgment that the fact the Appellant was a Security Officer should not have influenced the disciplinary decision unlike the Appellant's role as Vice President of the Staff Union. In fact, there are other relevant facts that the USG/DM does not outline in the sanction letter, such as the lack of intent, the lack of previous misconduct, the performance history of the Appellant, and the circumstances surrounding his lapse in judgment. Whether these relevant facts were actually considered is not clear from the record or the sanction letter other than a general introductory statement in the letter.

67. The failure to ascertain reasons from the sanction letter and the record makes it difficult to review whether there is a "rational connection or suitable relationship" to the evidence of misconduct and the purpose of the discipline; therefore, the resulting decision on disciplinary sanctions becomes arbitrary. The obligation of the Administration to provide adequate reasons for the exercise of discretion in imposing disciplinary sanctions is important in light of established jurisprudence that a tribunal cannot substitute its own decision for that the Secretary-General. The reasons for the exercise of the discretion when read together with the outcome serves the purpose of showing whether the exercise of the discretion is lawful and rational. Without the "why" in the reasons, the test of rational connection or relationship to the misconduct and the purpose of discipline cannot be met.

68. As stated by the Appeals Tribunal in *Rajan*, a decision on the appropriate sanction for misconduct involves a "value-judgment and the consideration of a range of factors. The most important factors to be taken into account in assessing the proportionality of a sanction include 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." [19]

69. What factors are relevant considerations will necessarily depend on the circumstances and nature of the misconduct. Some considerations can include:

a) the staff member's intent or whether the action was accidental, careless, reckless or deliberate. Factors relevant to this are whether the staff member made full, timely disclosure to a direct or indirect supervisor, the staff member's self-awareness of the conduct, whether the staff member followed operational procedures in connection with the misconduct, whether the staff member engaged in the misconduct despite prior warning, whether the misconduct was fraudulent, manipulative or deceptive, whether the staff member acted alone or with others resulting in differing degrees of knowledge, participation and responsibility, whether the staff member organized and planned the conduct or whether it was the result of a rash action or temporary lapse of judgment, and whether the staff member concealed or attempted to conceal the misconduct or otherwise deceive or mislead the employer from discovering the misconduct;

b) the nature of the misconduct or whether the misconduct was minor or technical, or substantive or severe. Factors relevant to this are whether the conduct involves a minor misstep or honest mistake or is the result of a lack of expertise or experience, whether the conduct involves a single act or numerous acts and/or a pattern of misconduct, whether the misconduct is over an extended period of time, whether the conduct involves multiple violations, either related or unrelated to each other, whether the conduct involves the staff member directing another individual in the misconduct, whether the conduct involves fraudulent, deceptive or manipulative acts or statements, and whether the conduct is contrary to express or implied duties and obligations of the staff member;

[19] *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 48.

c) the harm or damage to the Organization, employer, colleagues and other staff members, and clients and the public, which can range from none to significant. Factors relevant to this are whether there was actual harm that can be tangible or intangible, the number of persons harmed, whether the harm affected the Organization's operations and productivity, whether the harm includes loss of finances, loss of trust or integrity in the Organization;

d) the disciplinary history or future of the staff member, namely whether the staff member has a history of disciplinary violations or other misconducts and sanctions. Factors relevant to this are whether the misconduct in question is the first violation or part of a history or pattern of violations and the nature of the prior violations, whether there are mitigating factors present in the staff member's employment history, and whether the staff member has committed to taking steps to ensure there will be no repetition or continuation of the misconduct.

70. In conclusion, we find the sanction letter and record provided inadequate reasons for judicial review leading to the finding that no rational connection or relationship between the evidence and the objective of the disciplinary action has been established. As a result, we are unable to assess the proportionality and lawfulness of the imposition of the disciplinary sanctions.

71. Pursuant to Article 9 of the UNAT Statute, the Appeals Tribunal may only order one or both of the following: rescission of the contested administrative decision or specific performance with compensation in lieu if the contested decision concerns "appointment, promotion or termination"; or compensation for harm. We uphold the UNDT's Judgment on the finding of misconduct but vacate the UNDT's finding that the disciplinary sanctions were proportionate. Therefore, we rescind the contested administrative decision imposing the disciplinary sanctions. There is no compensation in lieu as the administrative decision does not concern "appointment, promotion or termination" as required in Article 9.

72. In rescinding the disciplinary sanctions, we note that it is open to the Administration to reconsider disciplinary sanctions and make a new administrative decision on sanctions with more adequate reasons.

73. As for the Appellant's request for removal of censure and reinstatement of lost steps in grade, the rescission of the decision selecting the disciplinary sanctions removes the sanctions. We deny the Appellant's request for compensation for loss of opportunity and compensation in the amount of one-year net base salary for damage to reputation and moral damages. We find that the established facts amounted to misconduct subject to some discipline which may be reconsidered by the Administration. There is no basis for compensation for loss of opportunity or reputation as there is insufficient evidence to substantiate such loss or moral damages.

Judgment

74. The Appellant's appeal is partially allowed and the contested administrative decision selecting the disciplinary sanctions is vacated. It is open to the Administration to issue a new administrative decision on disciplinary sanctions with adequate reasons.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding Vancouver, Canada	Judge Colgan Auckland, New Zealand	Judge Murphy Cape Town, South Africa

Entered in the Register on this 12th day of January 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar