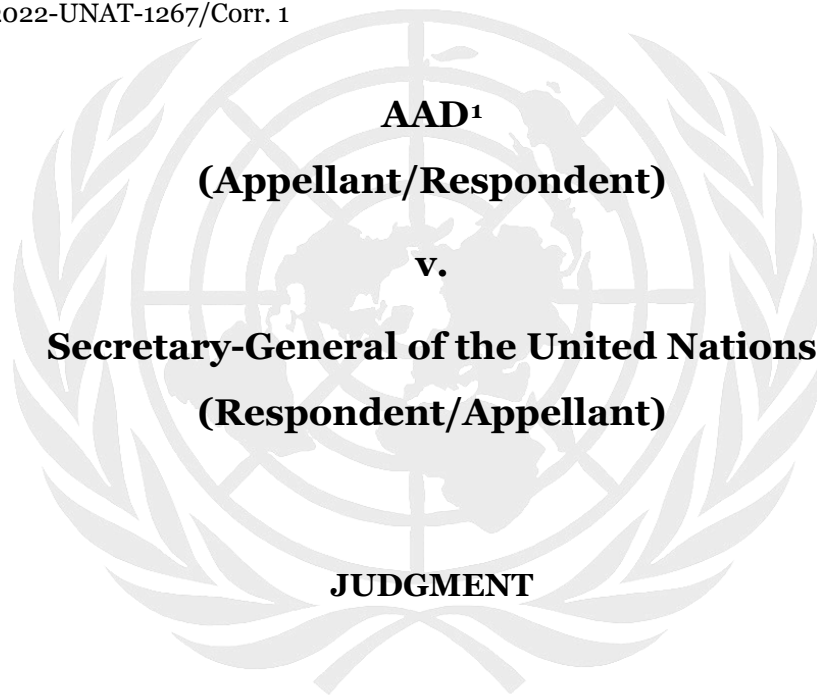




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2022-UNAT-1267/Corr. 1



**AAD<sup>1</sup>**

**(Appellant/Respondent)**

**v.**

**Secretary-General of the United Nations**

**(Respondent/Appellant)**

**JUDGMENT**

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Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge Martha Halfeld
Case No.:	2021-1595
Date of Decision:	1 July 2022
Date of Publication:	19 August 2022
Registrar:	Weicheng Lin

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Counsel for Applicant: Omar Yousef Shehabi, OSLA

Counsel for Secretary-General: Angélique Trouche

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<sup>1</sup> This unique three-letter substitute for the party's name is used to anonymize the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. AAD, a staff member of the Department for General Assembly and Conference Management (DGACM), contested the Administration's finding of misconduct in a range of unauthorized, outside activities such as the provision of assistance to the benefit of third parties. These activities were potentially inconsistent with her obligations as an international civil servant. The Administration imposed disciplinary sanctions of loss of two steps in grade, plus a written censure (the sanction decision).

2. In Judgment No. UNDT/2021/066 (Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) granted AAD's application in part. The Dispute Tribunal held that the Secretary-General committed errors in the allegation and sanction letters phase and this, together with the minor degree of gravity of the offences, supported the Dispute Tribunal's determination that the sanction of loss of two steps in grade was disproportionate. The loss of two steps was overturned, but the written censure was confirmed. The Secretary-General appeals and requests the original sanction decision be reinstated. AAD cross appeals and says there was no misconduct and asks for damages.

3. The appeal concerns the standard of conduct of international civil servants engaging in "outside" activities and when those activities can become a basis for misconduct. The underlying facts of the conduct complained of and the outside activities are essentially not in dispute. The specific issues in this appeal are whether the Dispute Tribunal erred on a question of law, fact, or jurisdiction when it held that: (i) the facts in support of the allegations against AAD were established by clear and convincing evidence that she engaged in inappropriate outside activities contrary to the applicable Staff Regulations and Rules; (ii) these facts amounted to misconduct; (iii) the disciplinary sanction of loss of two steps in grade was disproportionate and should be rescinded; (iv) the written censure was proportionate; and (v) due process was respected in the course of the disciplinary proceedings and therefore there is no basis for damages, including for moral harm.

4. For the reasons set out below, we find the Dispute Tribunal erred in its determination that the disciplinary sanction imposed by the Administration was disproportionate and in its inappropriate substitution of its sanction decision for that of the Administration. We, therefore, vacate the Judgment. The Secretary-General's appeal is allowed and AAD's cross-appeal is dismissed.

**Facts and Procedure**

5. AAD began service with the Organization in 2002. Between August 2012 and February 2014, she was with DGACM at the P-4 level. Since 2014, she has been in the Document Management Section, DGACM, under a continuing appointment at a P-5 level. Since 2002-2003, AAD, by her own account, developed a long-standing relationship with Mr. X. In the context of this case, between 2013 and 2015, Mr. X., a former Ambassador of a Member State to the United Nations was acting as the president of non-governmental organization or NGO named “South-South News”.

6. By way of background (which is relevant in providing context but not outlined in the impugned Judgment), on 5 October 2015, the Federal Bureau of Investigation (FBI) of the United States filed complaints in the Southern District of New York against a former Ambassador of a United Nations Member State (Mr. G.), Mr. X., Mr. D.N. (the founder of South-South News and chairman of S.K.I. Group ), and others. The FBI complaint identified that NGOs, namely South-South News, Global Sustainability Foundation and International Organization for South-South Cooperation (IOSSC), facilitated bribes from Chinese businesspeople to Mr. G. Mr. G. pled not guilty but died while awaiting trial. According to the complaint, Mr. X. facilitated bribes through these NGOs in the United States purportedly established to promote the United Nations’ mission and/or development goals. Mr. X. pled guilty to the charges of corruption.

7. US authorities also alleged that in exchange for illegal payments, Mr. G. performed official acts on behalf of the United Nations for the benefit of Mr. D.N. and other businessmen which involved UN Document No. A/66/748 supporting the establishment of a conference centre that Mr. D.N. sought to build and which document was drafted by Mr. X.

8. Through review of information provided by the Internal Audit Division (IAD) auditors of the Office of Internal Oversight Services (OIOS), the Investigations Division of OIOS (OIOS/ID)’s conducted investigations of the above case, and through collaboration with the FBI, OIOS/ID uncovered information of alleged misconduct by a number of staff members directly related to the corruption events involving Mr. G. and Mr. X. This included a review of e-mails between AAD in this appeal and Mr. X. leading to an investigation of those communications.

9. On 15 June 2016, OIOS served AAD with a pre-interview notice which identified her as a subject of the following allegation of misconduct: “possible involvement in the publication of a new version of document A/66/748 with significant modifications made without the knowledge of the [Executive Office of the Secretary-General]”. OIOS interviewed AAD on 17 June 2016, 8 July 2016, and 27 April 2017.

10. On 29 December 2017, OIOS issued an investigation report based on the collected evidence (investigation report). It concluded that AAD had violated the Staff Regulations and Rules that set out the standards of conduct of international civil servants including conflicts of interest (see Staff Regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(o), 1.2 (q) and 1.2(q), and Staff Rule 1.2(s)) and the standards for the use of information and communication technology resources and data (see ST/SGB/2004/15 (Use of information and communication technology resources and data)).

11. The investigation report found that AAD i) provided assistance to third parties outside the scope of her duties, ii) engaged in the improper alteration of a General Assembly document (A/66/748) to include reference of South-South News and the S.K.I. Group, iii) provided an unauthorized official United Nations reference for third parties, iv) was actively involved in the activities of at least three NGOs, v) is a trustee of Arise India Foundation without approval, vi) sought employment for her niece with third parties she assisted, vii) arranged an internship for her daughter with third parties she assisted, and viii) maintained social relations with third parties she assisted. The third parties primarily included Mr. X.

12. On 21 November 2018, the Administration provided a memorandum setting out allegations of misconduct against AAD (the allegation memorandum). The memorandum set out the following formal allegations of misconduct:

- a. Between 2013 and 2015, AAD engaged in outside activities while being a staff member of the United Nations without prior approval of the Secretary-General, including one or more of the following: i) editing and reviewing documents, including document A/66/748 for Mr. X.; ii) assisting Mr. X. in finding employees; and iii) undertaking speaking engagement for Mr. X.;
- b. AAD improperly utilized UN information and communications (ICT) resources including her UN e-mail account in engaging in the outside activities; and

- c. On or before 16 June 2015, AAD used letterhead consisting of her name and position as Chief, Documents Control Unit, DGACM, and signed a reference letter recommending Mr. X. and Mr. D.N. to an apartment landlord in which she falsely stated that she had interacted with Mr. D.N.

13. Importantly, the allegation memorandum's introduction stated: "Please be advised that findings in the OIOS investigation report which are not specifically discussed below (e.g., your alleged engagement in the re-issuance of document A/66/748) are not being pursued further as part of formal allegations of misconduct against you".

14. By letter dated 14 June 2019, AAD was informed that the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) had decided to impose on her the sanction decision.

15. On 12 September 2019, AAD filed an application with the Dispute Tribunal contesting the sanction decision.

*The UNDT Judgment*

16. In the Judgment, the Dispute Tribunal found the Administration committed errors in the allegation and sanction letters. In particular, it found that the allegation memorandum was ambiguous on whether AAD's involvement in the editing and reviewing of document A/66/748 was part of the allegation and concluded it was contrary to due process to rely on this ambiguous allegation. The Dispute Tribunal also held that only 5 of the 12 alleged activities had been factually established: AAD's activities regarding the "short concept note", the draft letter on "Global Business Incubator", the e-mail invitation to a DGACM staff member, the paragraph for the document regarding "Global South-South Development Expo Center", and the recommendation letter. As a result, the Dispute Tribunal rescinded the loss of steps but confirmed the written censure. The Dispute Tribunal rejected AAD's request for moral damages as there was no evidence of a direct causal link between the excessive disciplinary sanction and the medical issues experienced.

## **Submissions**

### **Secretary-General's Appeal**

17. The Secretary-General disagrees with the Dispute Tribunal that the Administration had committed errors regarding the allegation memorandum because it wrongfully took issue with the introduction in the memorandum with respect to OIOS findings. The Dispute Tribunal could not decide that part of the allegations had been “effectively withdrawn” just because it considered that the allegation memorandum should have possibly included additional details.

18. The Secretary-General also submits that the Dispute Tribunal erred in finding that the sanction decision did not respect the due process rights of AAD. AAD did not argue that the sanction decision was unclear to her. The sanction decision clearly explained that between 2013 and 2015, while AAD was a staff member of the United Nations, she engaged in unauthorized outside activities, without the prior approval of the Secretary-General, by editing and reviewing documents, including document A/66/748, for Mr. X., and assisting Mr. X. in finding employees. The sanction decision further made clear to AAD that in doing so, she had improperly utilized official UN ICT resources, including her UN e-mail account.

19. Further, the Secretary-General says the Dispute Tribunal wrongfully held only 5 of the 12 alleged activities had been established. The Dispute Tribunal excluded without explanation two events, which it had nevertheless mentioned at the beginning of the Judgment when discussing the content of the allegation memorandum: AAD's drafting talking points and sending them through her UN e-mail address to Mr. X. on 15 February 2013, and revising a letter addressed to Mr. X. at his request on 12 October 2013. These actions were not part of her official functions, were not authorized, and undeniably constituted misconduct. Also, the Dispute Tribunal erred in concluding that two other instances did not amount to misconduct. The first instance was AAD supporting Mr. X. in finding an assistant. This is part of her behaviour to utilize her UN e-mail account and her official position and knowledge gained as a staff member to benefit an outside party, Mr. X. The second instance was a generic reference to Mr. X.'s requests for AAD's assistance. Nonetheless, they formed part of consistent unauthorized support AAD gave to Mr. X.

20. Finally, the Secretary-General says the Dispute Tribunal erred in finding the sanctions were disproportionate to the misconduct. The imposition of sanctions is within the Administration's discretion. The Dispute Tribunal erroneously discarded part of the inculpatory facts as previously noted. Two mitigating factors had been considered which were the time taken to resolve the matter and the lack of financial gain by AAD. The sanctions were in line with past disciplinary practice for outside activities. The Dispute Tribunal failed to categorize how the sanction was blatantly disproportionate which is the legal standard to disturb the Administration's imposed sanction. It further erred in finding that perceived errors in the allegation memorandum and sanctions decision should impact the proportionality of the disciplinary measures.

**AAD's Answer**

21. AAD requests the Appeal Tribunal to dismiss the Secretary-General's appeal and submits that the Dispute Tribunal correctly determined that the allegation memorandum was unclear and violated her rights to due process and procedural fairness.

22. She says the Dispute Tribunal was correct that her alleged assistance with the General Assembly document played a central role in the corruption case against Mr. X., Mr. D.N., and Mr. G. Her alleged assistance with this document was the sole allegation contained in her pre-interview subject notice and was by far the allegation OIOS most thoroughly scrutinized in its investigation report. Yet, the introduction of the allegation memorandum clearly indicates that assistance with this document was not amongst the allegations of misconduct formally laid against her. Therefore, AAD believed that the Administration had dropped any charge related to assistance with the General Assembly document and the Dispute Tribunal held this was an objectively reasonable understanding of the allegation memorandum.

23. As for the other allegations, AAD submits that the Dispute Tribunal correctly determined that alleging a "pattern" of rendering professional help to non-UN persons/entities cannot, consistent with due process, convert lawful interaction with non-UN persons/entities or the mere receipt of an e-mail from such a person or entity, into prohibited conduct. Therefore, the Dispute Tribunal correctly held that her receipt of an e-mail from Mr. X. requesting assistance in editing a document could not constitute misconduct if she never in fact edited it and she did not solicit these requests for assistance.

24. However, AAD says the Dispute Tribunal took an overly broad view of the requirement for prior approval for outside activity (as per Section 4.2 of ST/AI/2000/13) as much of her assistance to the NGO were activities seemingly “of benefit to the Organization or the achievement of its goal”. Therefore, AAD says the Dispute Tribunal erred in finding misconduct, in its failure to rescind the sanctions entirely, and in its failure to award compensation for harm.

### **AAD’s Cross-Appeal**

25. In her cross-appeal, AAD submits that the Dispute Tribunal erred in law in misinterpreting Section 4 of ST/AI/2000/13 (Outside activities) and in assuming that her assistance to an NGO required prior approval, the absence of which constituted prohibited conduct. Also, the Dispute Tribunal erred in law by failing to recognize, in assessing whether the established facts constitute misconduct, that some of her assistance was in no way related to the United Nations, but rather were social and charitable activities pursuant to Section 5.1 of ST/AI/2000/13.

26. AAD also argues that the UNDT erred in law in finding her limited personal use of her UN e-mail for engagement with an NGO violated ST/SGB/2004/15. Section 4.1 allows staff members “limited personal use” of UN ICT resources, provided that use is “consistent with the highest standard of conduct for international civil servants” and “would not reasonably be expected to compromise the interests or the reputation of the Organization”. As explained above, involvement with an NGO generally constitutes an ‘other outside activity’ pursuant to Section 5 of ST/AI/2000/13, for which prior approval is not required.

27. AAD also requests compensation for harm under Article 10.5(b) of the Dispute Tribunal’s Statute for emotional distress and harm to *dignitas* resulting from the excessive delay in the investigative and disciplinary proceedings. She says the Dispute Tribunal failed to exercise the jurisdiction or competence vested in it by failing to determine whether her medical issues resulted from delay in the investigative and disciplinary processes. The USG/DMSPC issued the sanction decision 1094 days – three full years – after OIOS notified AAD that she was being investigated for possible prohibited conduct. Nearly two and a half years – 889 days – elapsed from the notice of investigation to the formal allegations of misconduct. The Dispute Tribunal never properly addressed the question of delay, instead mistakenly asserting in paragraph 52 of the Judgment that she attributed harm



to the “excessive disciplinary sanction,” and dismissing her compensation claim on the basis that the alleged harm occurred before the sanction was imposed. While the UNDT lacks the authority under its Statute to award compensation exclusively for procedural breach or delay (see *Nchimbi*<sup>2</sup>), compensable harm may flow from delay or procedural errors in the investigative and disciplinary processes rather than the disciplinary sanction itself.

28. Thus, this Tribunal in *Nchimbi* vacated the award of compensation for an “unlawful procedural delay” not because delays are lawful and/or non-compensable, but because the award violated Section 10.5(b) of the Statute insofar as a staff member had not alleged or demonstrated harm resulting from the delay.

29. Finally, AAD alleges that the Dispute Tribunal failed to exercise jurisdiction or competence vested in it by failing to recognize her claim for harm to *dignitas* that arises from conduct which would reasonably (i.e., objectively) be expected to have “detrimental effects on [her] state of mind, *dignitas*, and personhood” (see *Civic*<sup>3</sup>). Claims for harm to *dignitas* are established by “a direct link between facts and harm, by means of evidentiary presumption, corroborated by the context in which the situation occurred and the expected impact the acts would have on an average person” (see *Al Hallaj*<sup>4</sup>). She says that she has endured five years of trauma as a result of this matter, and specifically the protracted investigation and disciplinary process; she is entitled to compensation for harm to *dignitas* in addition to compensation for physical harm resulting from the inordinate delay.

### **Secretary-General’s Answer to Cross-Appeal**

30. In responding to the cross-appeal, the Secretary-General argues AAD has failed to demonstrate that the Dispute Tribunal erred in finding that she committed misconduct when it concluded that her assistance to South-South News amounted to unauthorized outside activities. It is undisputed that AAD never requested prior approval of the Secretary-General before assisting South-South News.

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<sup>2</sup> *Nchimbi v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-815.

<sup>3</sup> *Melanne Civic v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1069, para. 79.

<sup>4</sup> *Al Hallaj v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-810, para. 52.

31. The Secretary-General also says AAD raises a new argument on appeal that should not be receivable, namely her reliance on ST/AI/2000/13 to assert that her activities were not subject to prior approval because they would be covered by Sections 4.1 and 5.1 of this Administrative Instructions. Notwithstanding this, AAD's argument is inconsistent with the Staff Regulations and Rules. She is suggesting that ST/AI/2000/13 radically limits the application of the Staff Regulations and Rules in that no prior approval is required, according to her, when a staff member assists an NGO. The Staff Regulations and Rules are very clear that staff members are not allowed to engage in outside activities, whether with an NGO or otherwise, without the Secretary-General's prior approval. The fact that South-South News was incorporated as an NGO does not make AAD's assistance to South-South News consistent with the Staff Regulations and Rules.

32. Section 5.1 of ST/AI/2000/13 provides that "social or charitable activities", which have "no relation to the staff member's official functions or to the Organization [...] may be engaged in at the staff member's discretion". It is very clear that AAD's assistance to South-South News had direct relevance to the United Nations. Staff Rule 1.2(t) clarifies instances when prior approval is required. It also makes it clear that the listed activities may be performed without prior approval only if they are part of a staff member's official duties. It is clear that the activities carried out by AAD were not part of her official duties. In case of doubt, the Ethics Office is available to staff members to seek assistance, but AAD did not seek any such clarification.<sup>5</sup>

33. The Secretary-General contends the Dispute Tribunal correctly found that AAD's use of her official UN e-mail address amounted to misconduct. It is undisputed that she used her UN e-mail address to conduct part of her unauthorized outside activity. In particular, the Talking Points, the Concept Note and the Draft Letter were communicated to Mr. X. from her UN e-mail address. Contrary to AAD's contention, the fact that it benefited an NGO, South-South News, does not mean that her acts did not amount to misconduct.

34. Further, the Secretary-General submits that AAD does not show that the Dispute Tribunal failed to exercise its jurisdiction when determining compensation. Under the Appeals Tribunal's consistent case law, for a delay to be compensated, "the staff member's due process rights must have been violated by the delay and the staff member must have been

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<sup>5</sup> Section 6.1 of ST/AI/2000/13.

harmed or prejudiced by the violation of his or her due process rights”.<sup>6</sup> There is no legal provision setting out a timeline, neither can the time the investigation and disciplinary process took be considered unlawful, particularly considering the complexity of the file. AAD fails to identify any illegality or demonstrate how the purported delay violated her due process rights. She does not show what was the direct prejudice she allegedly suffered. In addition, as rightly noted by the Dispute Tribunal, the medical report dated 15 November 2018, filed by AAD as part of the application, refers to “an event in the workplace on November 2<sup>nd</sup> [2018]”. This document is, therefore, irrelevant to prove any prejudice as a result of the investigative process, which ended beforehand with the issuance of the OIOS investigation report on 29 December 2017. Other medical notes filed by AAD offer limited information as to her medical conditions and do not speak of a possible cause for it. Consequently, AAD fails to demonstrate any prejudice as a result of a purported delay on the side of the Administration. Her claim for compensation for alleged harm to her *dignitas* is also unsupported. In both *Civic* and *Al Hallaj*, the Appeals Tribunal reviewed and relied on evidence of harm to the *dignitas* of the staff member to award compensation on this ground.

### **Considerations**

#### *Preliminary Issue: Request for Oral Hearing*

35. We decline AAD’s request for an oral hearing before the Appeals Tribunal as she provides no persuasive reasons in support for her request. Further, as will be discussed below, the underlying facts of AAD’s conduct are essentially not disputed.

36. Under Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules), the Appeals Tribunal may grant an oral hearing if it would “assist in the expeditious and fair disposal of the case”.

37. However, the Appeals Tribunal has consistently held that an appeal before the Appeals Tribunal is not a rehearing of the matter but an opportunity for parties to appeal on narrow bases, such as errors of law, fact and jurisdiction of the Dispute Tribunal, not to re-decide the matter itself. Given there is no dispute as to the underlying facts, we find that an oral hearing would not assist in expeditiously and fairly resolving the issues in this appeal.

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<sup>6</sup> *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-292, para. 46.

*Standard of Review in Disciplinary Cases*

38. In an application concerning 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.<sup>7</sup>

39. However, the Appeals Tribunal has also held that the Administration has a broad discretion in disciplinary matters which will not be lightly interfered with on judicial review.<sup>8</sup> 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. Assuming compliance with these legal standards, 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 lawfully open to it or to substitute its own decision for that of the Administration.<sup>9</sup>

40. In the present case, we find that the Dispute Tribunal erred in determining whether the established facts qualify as misconduct and whether the disciplinary sanctions were proportionate. In the Judgment, the Dispute Tribunal also erred by substituting its determination of the appropriate disciplinary sanction for that of the Administration and, as such, the Judgment must be vacated. AAD says her actions do not amount to misconduct and seeks a rescission of the Administration's finding on this. We disagree and find AAD's actions amounted to misconduct that attracts discipline. Given the finding of misconduct, there can be no compensation award as requested. We set out our reasons for these findings below.

*Whether there is clear and convincing evidence to establish the facts in the allegations and whether these facts amount to misconduct under the Staff Regulations and Rules*

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<sup>7</sup> *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, para. 21.

<sup>8</sup> *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 40.

<sup>9</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

41. The “Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”.<sup>10</sup> “[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”.<sup>11</sup>

42. There is no real dispute on the underlying facts. The Dispute Tribunal stated that AAD admitted most of the Administration’s findings of facts in her pleadings as well as at the Dispute Tribunal’s hearing. Therefore, the primary question is whether these facts constitute misconduct under the relevant regulatory framework.

43. The Dispute Tribunal set out the “[AAD]’s inculpatory acts to which she has also admitted”. AAD says that while she acknowledged assistance to an NGO, she did not admit that such assistance was “inculpatory”. However, AAD has admitted to the complained of conduct and assistance and the Dispute Tribunal stated as a fact that these acts and admissions incriminated or inculpated her in the context of the investigation and ultimate determination of misconduct. Given AAD’s own statements and admissions form the basis of the allegations, there is clear and convincing evidence establishing the facts of the allegations and the issue is whether the activities constitute misconduct under the regulatory framework.

44. The Secretary-General says the Dispute Tribunal wrongfully held only 5 of the 12 alleged activities constituted misconduct. In the Judgment, the Dispute Tribunal held that USG/DMSPC in the sanction letter “withdrew allegations concerning ‘a speaking engagement’ for the AA”.

45. AAD says that none of the actions listed amount to misconduct. She largely relies on ST/AI/2000/13 to assert that her activities were not subject to prior approval because they would be covered by Sections 4.1 and 5.1. However, this is a new argument, which was not presented before the Dispute Tribunal, and therefore, cannot be receivable as part of her cross-appeal.

46. Nevertheless, ST/AI/2000/13 does not assist her as it clearly provides that staff members require prior approval for certain outside activities and allows for private non-remunerated activities for social or charitable purposes without prior approval which have

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<sup>10</sup> *Ladu Judgment, op.cit.*, para. 15, quoting *inter alia Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.

<sup>11</sup> *Ibid.*

“no relation” to the staff member’s functions or the Organization as long as that activity is “compatible” with their status of international civil servants. The activities engaged in by AAD were clearly related to the Organization’s initiatives and activities, and as a result, she should have sought prior approval before engaging in those outside activities. There is no supporting evidence that AAD had prior approval for any of the alleged activities. Finally, the activities engaged in by the staff member must still be compatible with the standards and regulatory framework set out below that is applicable to an international civil servant.

i) *The Regulatory Framework*

47. The Organization has set high standards for international civil servants in the Staff Regulations and Rules to ensure the integrity and credibility of the Organization.

48. Staff Regulation 1.2 provides:

(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; ...

(e) By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view.  
....

(f) .... They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations ...

(g) Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party ...

(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; ...

(m) A conflict of interest occurs when, by act or omission, a staff member’s personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member’s status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head office ...

(o) Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without approval of the Secretary-General; ...

(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; ...

49. The use of UN ICT resources by staff members is also addressed in Section 5.1 of ST/SGB/2004/15 that 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[.]

50. ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) sets out that “unsatisfactory conduct” is any conduct where a staff member fails to comply with their obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issues or “to observe the standards of conduct expected of an international civil servant”, and includes conduct of “sufficient gravity that rises to the level of misconduct”.

51. Section 3.5 provides that “Misconduct for which disciplinary measures may be imposed includes, but is not limited to”:

(a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it; ...

(e) Misuse of United Nations property, including equipment or files, and electronic files;

(f) Misuse of office, including breach of confidentiality and abuse of United Nations privileges and immunities...

(h) Acts or behaviour that would discredit the United Nations.

52. Section 3.4 provides that Staff Rule 10.1(a) provides that “failure by a staff member to comply with [the staff member’s] 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 of misconduct”.

*ii) The Established Facts*

53. In the Judgment, the Dispute Tribunal held that the established facts supported the following allegations:

- i) AAD forwarded a “short concept note” to Mr. X. via her United Nations e-mail of 12 March 2013 regarding an issue regarding a United Nations initiative, and therefore, it appears as if she acted in her official capacity as a staff member and not as a private person. This assistance to Mr. X. was not given as part of her regular work and therefore would have needed prior approval from the Secretary-General which she did not have;
- ii) AAD forwarded a draft letter on “Global Business Incubator” to Mr. X. that indicated it was from the EE to the Secretary-General and on official letter template of the General Assembly. When forwarding it, AAD used her official United Nations address. This was not part of her work as a staff member and therefore was an outside activity and required prior approval of the Secretary-General which she did not have;
- iii) AAD’s use of her United Nations e-mail to revise Mr. X.’s invitation of a DGACM official to a “high level meeting”. The content of the e-mail clearly involved a matter related to the United Nations and addressed to a staff member in DGACM where AAD worked. Provision of this assistance was without prior approval of the Secretary-General;
- iv) AAD’s assistance regarding the “Global South-South Development Expo Center” which concerned the United Nations initiative. The Dispute Tribunal found her contribution to be “relatively harmless” and through her private e-mail address, she overstepped her duties by not obtaining prior approval of the Secretary-General;



v) AAD's recommendation letter for Mr. X. to a property management company using her name, full title, the name of department and division and location of the United Nations Headquarters of New York that the Dispute Tribunal held gave the "overall impression" that this was a recommendation given on behalf of the Administration in her professional capacity as a staff member.

54. As indicated, AAD does not dispute the facts underlying the allegations but says they do not amount to misconduct as she was assisting an NGO in good faith. However, for each of the above actions, AAD did not have prior approval of the Secretary-General in her involvement in United Nations initiatives such as the short concept note, the Global Business Incubator, the Global South-South Development Expo Center, or the invitation of a DGACM official to a high-level meeting. These were outside of her formal job duties. She used her UN e-mail to effect these communications.

55. The fact that AAD believed that her assistance to the NGO were activities seemingly "of benefit to the Organization or the achievement of its goal" or done in "good faith" is not a defense here. As an international civil servant, AAD is required to act according to the standards of conduct set out in the Staff Regulations and Rules and administrative issuances, which she did not do.

56. We also note that AAD had to amend her answers after the investigation interview to either clarify or contradict answers given in her interview. In the written clarification after the interview, she relies on Mr. X.'s "association" with the "top echelons of the Secretariat". For example, she stated in her interview that she wrote a recommendation letter for Mr. D.N. to a property management company wherein she stated she knew Mr. D.N. even though she did not know him. She stated she did so because Mr. X. requested her to do so and she had "trust and faith" in him. By not adhering to the high standards of an international civil servant and the regulations, AAD acted contrary to the Staff Rules and Regulations and to the relevant standards of conduct at the request of Mr. X., a person who did not work for the United Nations but who she thought had some stature and power. This is problematic as it shows conduct and the use of United Nations resources in order to provide benefit to those she considered "powerful" and well-connected. This type of staff member conduct seriously undermines the integrity and credibility of the Organization and should be discouraged within the Organization.

57. The Secretary-General says the Dispute Tribunal excluded, without any explanation, two events, which it had nevertheless mentioned at the beginning of the Judgment when exposing the content of the allegation memorandum: AAD's drafting talking points and sending them through her UN e-mail address to Mr. X. on 15 February 2013, and revising a letter addressed to Mr. X. at his request on 12 October 2013. We agree the Dispute Tribunal erred by not determining whether these allegations were factually established and amounted to misconduct. The allegation memorandum included these actions as part of the unapproved assistance AAD provided to Mr. X.

58. The Dispute Tribunal then held the established facts did not support the following allegations:

- i) AAD's recommendation of a former United Nations staff member to work for Mr. X and provision of that person's private email address to Mr. X., after Mr. X. requested her assistance. Using her United Nations e-mail address, AAD reached out to the relevant person. The Dispute Tribunal held this did not entail "any inculpatory action by itself" under the Staff Regulations and Rules or ST/SGB/2004/15, although it agreed that using her United Nations e-mail address to communicate was not "fully in line with ST/SGB/2004/15". However, the UNDT said that the content was "harmless", and it would lead to an absurd or perverse result if this alone amounted to misconduct.
- ii) AAD's receipt of various requests for assistance from Mr. X. on her United Nations e-mail address that the Dispute Tribunal held did not "by itself" amount to misconduct unless these requests "directly or indirectly, can be found to have been solicited by [AAD]". Therefore, this alone did not amount to misconduct.

59. The Secretary-General says that the Dispute Tribunal erred in concluding that these two instances did not amount to misconduct but form part of AAD's behaviour to utilize her UN e-mail account and her official position and knowledge gained as a staff member to support and benefit Mr. X. We agree.

60. The Dispute Tribunal found that AAD used her UN e-mail address to reach out to a former staff member to work for Mr. X. and that this was contrary to ST/SGB/2004/15. Regardless of the content, it was a misuse of UN resources. If this was the only transgression,

it may be considered “harmless” but nevertheless it occurred and was misconduct under the regulatory framework. However, this incident was consistent with many other uses of her UN e-mail address to provide unapproved assistance to Mr. X., and therefore, should not be considered “harmless” misconduct. It was part of a pattern of misuse of the e-mail facility. As for the “various requests” for assistance from Mr. X. that AAD did not respond to, this again is a relevant consideration in determining misconduct and sanctions. Alone, it may not amount to misconduct, but with consideration of other incidents, it is relevant and probative. Also, it is not significant that AAD did not “solicit” the request for assistance. A proper and compliant response would have been to ask Mr. X to cease such e-mail communications to her. The fact remains that she received the requests and did not discourage them, but in many instances acceded to the requests.

61. The Dispute Tribunal held the allegation memorandum did not specifically allege a “pattern” of misconduct. This is a misinterpretation of the allegation memorandum because it did outline in para. 13 that “between 2013 and 2015” AAD engaged in “outside activities” that included “editing and reviewing documents” for Mr. X. and “assisting” Mr. X. in “finding employees”. The allegations therefore include involvement in multiple, repetitive incidents and behaviour.

62. The Appeals Tribunal has previously held that “judicial review of decisions of whether or not misconduct has been established dictates that due deference be given to the Secretary-General to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Administration in the exercise of its rule-making discretion. The Administration is best placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements”.<sup>12</sup> In the present case, the Dispute Tribunal erred in excluding certain allegations by inappropriately usurping the Secretary-General’s judicious exercise of discretion.

63. Finally, the Secretary-General says the Dispute Tribunal wrongfully took issue with the introduction in the memorandum that OIOS findings were not developed further in the rest of the document, such as the re-issuance of document A/66/748, and that they were not pursued as part of the formal allegations.

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<sup>12</sup> *Nadasan v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-918, para. 41.

64. The allegation memorandum expressly states that “findings in the OIOS investigation report which are not specifically discussed below (e.g., your alleged engagement in the re-issuance of document A/66/748) are not being pursued further as part of formal allegations of misconduct”. The Dispute Tribunal held that allegations relating to A/66/748 should not be considered due to the ambiguity and confusion in the allegation memorandum which resulted in a violation of AAD’s right to respond to allegations.

65. The Secretary-General argues, however, the allegation memorandum clearly distinguished the re-issuance of document A/66/748 from its revision by AAD through her unauthorized outside activities, an allegation which was maintained in the allegation memorandum. Therefore, the Dispute Tribunal could not decide that part of the allegations had been “effectively withdrawn” just because it considered that the allegation memorandum should have possibly included additional details. AAD argues that the Secretary-General conflates the formal requirements for allegation memoranda (as defined in Section 8.3 of ST/A/2017/1) with the requirements for due process and procedural fairness.

*Was due process respected in the course of the disciplinary proceedings?*

66. With regard to due process, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.<sup>13</sup>

67. The Dispute Tribunal correctly held it was a very basic principle of due process in a disciplinary case that each of the relevant facts and allegations of misconduct be presented to the employee or staff member in such a manner that they can easily understand them, and they be afforded an adequate opportunity to respond to those allegations.

68. We agree with the Dispute Tribunal that the allegations pertaining to A/66/748 were too ambiguous and confusing based on the statement in the introduction of the allegation memorandum that AAD’s alleged engagement in the re-issuance of document A/66/748 was not being pursued further. Although the statement in the introduction references the “re-issuance” of the document as not being pursued, the allegation memorandum could have specifically stated and made clear that AAD’s involvement in “revising” that document was being pursued. By not doing so, the allegation memorandum could be interpreted as being equivocal

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<sup>13</sup> *Ibid.*, para. 43.

and therefore, unclear. This confusion makes the staff member's response to the allegations difficult and therefore, was a significant procedural irregularity and violation of due process.

69. However, this irregularity does not support the rescission of the finding of misconduct or the overturning of the disciplinary sanctions. The misconduct that has been factually established is serious enough on its own to support the initial sanctions as discussed below. It is "clear" or unequivocal and manifest that the alleged misconduct occurred, except as it pertains to A/66/748. But it is also "convincing" in that the evidence (beyond the allegations relating to A/66/748) is "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".<sup>14</sup> In other words, the evidence that does establish the misconduct (excluding actions relating to A/66/748) meets the high standard appropriate to the gravity of the allegations and severity of the consequences for such misconduct. Moreover, AAD had the opportunity to defend herself appropriately, having been sufficiently appraised of the allegations against her.

*Whether the disciplinary sanctions of loss of two steps in grade and written censure was disproportionate*

70. It is well established principle that the Secretary-General has wide discretion in applying disciplinary sanctions for misconduct but the disciplinary measure must be proportionate to the misconduct as proven by appropriate evidentiary methods. "[D]ue deference must be shown to the Secretary-General's decision on sanction because Article 101(3) of the United Nations Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard".<sup>15</sup>

71. Therefore, "[t]he 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".<sup>16</sup>

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<sup>14</sup> *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.

<sup>15</sup> *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-890, paras. 15-16.

<sup>16</sup> *Samandarov* Judgment, *op.cit.*, para. 25.

72. In *Rajan*<sup>17</sup>, the Appeals Tribunal held that “[t]he most important factors to be taken into account in assessing proportionality of a sanction include the seriousness of the office, then 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”.

73. In the present case, we find the Dispute Tribunal inappropriately interfered in the exercise of the Secretary-General’s discretion on disciplinary sanctions. The Dispute Tribunal considered that in imposing the sanctions of loss of two steps and written censure, the Organization properly took into account relevant and mitigating factors. However, it rejected AAD’s arguments regarding an “honest mistake”, her interactions with Mr. X. “related to interactions with Member States, and her positive performance in recent years”. But the Dispute Tribunal wrongfully noted it found only “5 out of the 12” impugned activities were a breach of AAD’s duties and that some of AAD’s input was of a “trivial nature”. The Dispute Tribunal then noted the Administration failed to “convincingly” explain how the interests of the Organization or anyone were harmed by AAD’s conduct and that AAD’s conduct belonged to the “lightest end of the scale of disciplinary offences”. Therefore, the Dispute Tribunal found the sanction was disproportionate.

74. The Dispute Tribunal’s reasoning is flawed as it failed to consider the “essential enquiry” in determining the proportionality of a disciplinary sanction which is whether the sanction was “excessive in relation to the objective of staff discipline” and whether it was “arbitrary and irrational”. Contrary to the Administration’s views, the Dispute Tribunal differed in its opinion that the misconduct was “trivial” or at the “lightest end of the scale”. However, it did not consider the relevant context of the misconduct, namely the role of Mr. X. in corruption events involving Mr. G. and which was part of a wider pattern of using United Nations staff members and resources for personal interests. This pattern is mirrored in AAD’s misconduct, namely AAD rendering UN professional help and UN resources to non-UN persons and entities for their personal or professional benefit. It could be reasonably argued that this is far from “trivial”. However, the Dispute Tribunal inappropriately substituted its own opinion rather than considering whether the Secretary-General’s discretion was arbitrary or irrational, and in particular whether the Secretary-General took into account

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<sup>17</sup> *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 48.

irrelevant considerations or failed to consider relevant considerations in exercising his discretion.

75. In assessing the disciplinary sanctions in the present case, the Secretary-General considered past practice of the Organization in matters of comparable misconduct involving unauthorized outside activities. He considered relevant mitigating factors of the staff member, namely the long period of time to resolve the matter and the fact AAD did not benefit financially from her misconduct. This was appropriate. It was also appropriate to dismiss AAD's claim that the events could be attributed to an "honest mistake of judgment" or "misplaced trust" in Mr. X., or that the conduct related to approved interactions with Member States at the DGACM. Mr. X. clearly did not represent a Member State. The Secretary-General considered AAD's positive performance in recent years but found this was not a sufficiently mitigating circumstance as it is in his discretion to do.

76. It is notable that the Secretary-General mentions the allegation of "editing and reviewing documents, including document A/66/748" for Mr. X. As found above, we accept the allegation memorandum could be interpreted as not including allegations regarding A/66/748; however, it is one instance among others of AAD editing and review documents for Mr. X. and not the only instance. For example, in the allegation memorandum, the Secretary-General outlined instances of AAD drafting "talking points", the "short concept note", and the letter for the "Global Business Incubator". Therefore, if there was a procedural irregularity in outlining the allegations surrounding document A/66/748, it was not fatal to the imposition of the loss of steps because it was one instance of many others of "editing and reviewing documents" for Mr. X. The Secretary-General could have imposed harsher sanctions, but he exercised his discretion judiciously in imposing the sanctions of loss of two steps in grade, plus a written censure.

77. We cannot find that the initial disciplinary sanction that were imposed was unlawful or "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity".<sup>18</sup>

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<sup>18</sup> *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, para. 21.

78. In conclusion, we find the Secretary-General's imposition of the initial disciplinary sanctions was a reasonable exercise of his discretion in imposing sanctions for misconduct, and the Dispute Tribunal erred in inappropriately interfering with this.

*Is AAD entitled to compensation?*

79. AAD requests compensation for harm and emotional distress and harm to *dignitas* resulting from the excessive delay in the investigative and disciplinary proceedings. She says the Dispute Tribunal erred in rejecting this claim.

80. We also reject AAD's request for compensation and find the Dispute Tribunal did not err. Only in extenuating circumstances will a staff member found to have committed misconduct be granted compensation for moral harm as a result of the disciplinary proceedings against them. These are not extenuating circumstances. AAD relies on the length of time of the investigation and disciplinary process which she says was unduly long as the USG issued the sanction decision three full years after OIOS notified AAD she was being investigated for possible prohibited conduct. While that is a long period, it is explained and justified by the complexities of the allegations, AAD's responses to them, and the need to investigate and decide these issues thoroughly and sensitively.

81. In order to award compensation for harm, there must be evidence to support the existence of harm, an illegality, and a nexus between the two.<sup>19</sup> There is no illegality present here. Under the Appeals Tribunal's consistent case law, for a delay to be compensated, "the staff member's due process rights must have been violated by the delay and the staff member must have been harmed or prejudiced by the violation of his or her due process rights".<sup>20</sup> There is no legal provision setting out a timeline, neither can the time the investigation and disciplinary process took be considered unlawful, particularly considering the complexity of the allegations and AAD's responses to them. AAD fails to identify any illegality or demonstrate how the purported delay violated her due process rights. She does not show what was the direct prejudice she allegedly suffered from the delay particularly when the facts underlying her misconduct are not disputed. Her claim must be dismissed.

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<sup>19</sup> *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, para. 20.

<sup>20</sup> *Abu Jarbou* Judgment, *op. cit.*, para. 46.



82. Finally, there can be no causal link between the disciplinary sanction (which we find the Dispute Tribunal wrongfully held was excessive) and her medical issues. To reiterate, a staff member cannot receive compensation for harm for their misconduct except in extenuating circumstances which are not present here.

**Judgment**

83. The Secretary's General appeal's is granted, and the Judgment is vacated. The cross-appeal is dismissed. The contested decision is reinstated.

Original and Authoritative Version: English

Decision dated this 1<sup>st</sup> day of July 2022 in New York, United States.

*(Signed)*

Judge Sandhu, Presiding

*(Signed)*

Judge Colgan

*(Signed)*

Judge Halfeld

Judgment published and entered into the Register on this 19<sup>th</sup> day of August 2022 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar