UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1325

Philip van de Graaf

(Respondent/Applicant and Appellant on Cross-Appeal)

v.

Secretary-General of the United Nations

(Appellant/Respondent and Respondent on Cross-Appeal)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Sabine Knierim
Case No.:	2022-1703
Date of Decision:	24 March 2023
Date of Publication:	17 April 2023
Registrar:	Juliet Johnson

Counsel for Mr. Van de Graaf:	Ana Giulia Stella and Marcos Zunino
Counsel for Secretary-General:	Sylvia Schaefer and Amanda Stoltz

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Philip van de Graaf, a former staff member at the Regional Office of the United Nations Children's Fund (UNICEF) in Nairobi, Kenya, contested the Secretary-General's finding of misconduct resulting from a videotaped altercation he had with individuals on his neighbour's property (Count 1) and from allegedly trying to influence his neighbour on the content of her report to the United Nations Department of Safety and Security (UNDSS) (Count 2). The Administration imposed on him the disciplinary measure of separation from service with compensation *in lieu* of notice with termination indemnity (the contested decision).

2. In Judgment No. UNDT/2022/037[1] (the Judgment), the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) found that there was clear and convincing evidence to establish Count 1 but not Count 2. It found the disciplinary measure of separation from service disproportionate to the misconduct. It rescinded the contested decision and ordered that Mr. Van de Graaf be reinstated but with an election to the Respondent to pay financial compensation *in lieu* of rescission at a sum equivalent to two years' net base salary. The contested disciplinary measure of separation was replaced with a demotion of one level in grade and a two-year deferment of eligibility for consideration for promotion.

3. The Secretary-General appeals the Dispute Tribunal's findings on Count 2 and on the proportionality of the disciplinary sanction. Mr. Van de Graaf files a cross-appeal requesting compensation for economic and moral harm. There is no appeal of the Dispute Tribunal's finding of misconduct with regard to Count 1.

4. For the reasons set out below, the Appeals Tribunal dismisses both the appeal and the cross-appeal and affirms the impugned Judgment.

Facts and Procedure[2]

5. The facts are set out in the Judgment. Mr. Van de Graaf entered the service of the United Nations in 2005.[3] He joined UNICEF on 16 June 2010 as a Supply and Procurement Specialist, in Dakar, Senegal, at the P-4 level. On 20 March 2018, he was appointed as a Logistics Specialist in the Eastern and Southern African Regional Office in Nairobi, Kenya. On 1 July 2020,

[1] *Van de Graaf v. Secretary-General of the United Nations*, Judgment dated 22 April 2022.
[2] Summarized from the impugned Judgment as relevant to the appeal and the cross-appeal.
[3] The impugned Judgment, para. 15.

he was appointed as a Supply and Logistics Manager in the same office. He held a continuing appointment until his separation from service.

6. At that time of the underlying events, Mr. Van de Graaf lived together with his spouse and their two young children in Nairobi, in a rented house in a compound which consisted of five houses separated from each other only by a natural green fence.[4] The compound was surrounded by a perimeter wall and guarded by security guards at the gate, whose presence was arranged by the landlords. In addition, many tenants, including Mr. Van de Graaf, had contracted a residential security service to respond to the security needs at their residences.

7. Mr. Van de Graaf's neighbour, Ms. S.[5], had rented her residence on Airbnb to guests. On the evening of 12 September 2020, Mr. Van de Graaf went to Ms. S.' compound to stop a party that was being held there contrary to COVID protocols.[6] An altercation ensued, which was partially videorecorded by those present at the party. The altercation resulted in Mr. Van de Graaf being injured by some of the guests and some household goods being damaged.

8. On 13 September 2020, the UNICEF Office of Internal Audit and Investigations (OIAI) received a report of possible misconduct involving Mr. Van de Graaf.[7] The complaint, which was lodged by a person external to the United Nations (Ms. K.), stated that Mr. Van de Graaf had entered the property and engaged in a verbal and physical assault toward those present. A video of Mr. Van de Graaf was posted onto online media calling Mr. Van de Graaf, among other things, racist.

9. On 17 September 2020, OIAI informed Mr. Van de Graaf that it was investigating the allegations.[8] On 18 September 2020, he was placed on Administrative Leave with Full Pay (ALWFP), pending the completion of the investigation. He attended interviews by OIAI on 24 September and 16 October 2020. On 13 November 2020, his placement on ALWFP was extended for a further two months, pending completion of the investigation and any subsequent disciplinary process.

[4] *Ibid.*, para. 16.
[5] Signified as Ms. AS in the impugned Judgment.
[6] *Ibid.*, para. 17.
[7] *Ibid.*, para. 18.
[8] *Ibid.*, para. 19.

10. On 4 December 2020, OIAI submitted its Investigation Report to the Deputy Executive Director, Management (DED).[9] The complainant and others present at the party did not cooperate with the investigation and did not provide evidence, other than the videotaped altercation which was posted online.

11. On 16 December 2020, the DED charged Mr. Van de Graaf with the following misconduct: (a) engaging in a verbal and physical altercation with members of the public, at a house in Nairobi, Kenya, on 12 September 2020 (Count 1); and (b) seeking to influence Ms. S., his neighbour, between 15 and 17 September 2020, on the content of her report to the UNDSS Office in Nairobi and requesting her to include content that he knew to be incorrect (Count 2).[10]

12. Mr. Van de Graaf was asked to provide his response to the charges within 14 days of receipt of the letter and he submitted his response on 22 January 2021.

13. By a letter on 2 February 2021, the DED issued the contested decision, informing Mr. Van de Graaf that the allegations against him were established by clear and convincing evidence and his actions amounted to serious misconduct in violation of Staff Regulations 1.2(b) and 1.2(f) and Staff Rule 1.2(g).[11] The DED decided to impose on him the disciplinary measure of separation from service, with compensation *in lieu* of notice and with termination indemnity, in accordance with Staff Rule 10.2(a)(viii), effective upon receipt of the letter. Consequently, his appointment was terminated on 4 December 2021.[12]

The Impugned Judgment

14. In the Judgment, the Dispute Tribunal held that the misconduct as to Count 1 was established but not in relation to Count 2, and that the disciplinary sanction of separation was disproportionate to the misconduct. Therefore, the Dispute Tribunal (a) rescinded the contested decision and replaced the original sanction with the measure of demotion by one level in grade with deferment, for two years, of eligibility for consideration for promotion, (b) ordered that Mr. Van de Graaf be reinstated, with all his benefits and entitlement, including the education grant, from the date of separation, but at a level one below, (c) or be paid a sum equivalent to two years'

[9] *Ibid*., para. 23.
[10] *Ibid*., para. 24.
[11] Letter of 2 February 2021 (Annex 2 to his answer to the Secretary-General's appeal, Annex R/5 to the 28 February 2022 joint submission by the parties).
[12] An e-mail of 11 February 2021 (Annex 2 to his answer to the Secretary-General's appeal, Annex R/13 to the 28 February 2022 joint submission by the parties).

net base salary, based on his salary at the time of his separation, and that (d) the aforementioned sums bear interest at the United States prime rate with effect from the date the Judgment becomes executable, and an additional five per cent be applied to the United States prime rate 60 days from the date the Judgment would become executable. The Dispute Tribunal did not grant Mr. Van de Graaf compensation for harm.

15. The Dispute Tribunal was satisfied that the key elements of Mr. Van de Graaf's due process rights had been respected as per Staff Rule 10.3(a). This finding has not been appealed.

Submissions

The Secretary-General's Appeal

16. The Secretary-General requests that the Appeals Tribunal uphold the contested decision to separate Mr. van de Graaf from service with compensation *in lieu* of notice. The appeal does not challenge the Dispute Tribunal's finding that the facts of the case were established in relation to Count 1 and that his due process rights were respected.

17. The Secretary-General argues that the Dispute Tribunal erred in law and in fact by finding that Mr. Van de Graaf's attempt to influence the content of his neighbour's report to the UNDSS on the incident did not amount to misconduct, resulting in a manifestly unreasonable decision.

Mr. Van de Graaf's Answer

18. Mr. Van de Graaf requests that the Appeals Tribunal dismiss the Secretary-General's appeal.

19. Regarding Count 2, he submits that Ms. S. was looking for guidance on writing her report to the UNDSS and sent him a copy after, not prior to, submitting it to the UNDSS.[13] In his message, "minimum oversight" did not mean an intervention from him but only suggested that she had expected her neighbours to inform her if there was a problem in her house.[14] He did not expect an

[13] Mr. Van de Graaf references Ms. S.'s testimony before the Dispute Tribunal on 15 March 2022 according to the Dispute Tribunal hearing recording (Annex 1 to his answer to the appeal).
[14] Mr. Van de Graaf references the UNDT hearing recording (Annex 1 to his answer to the appeal), 00:20:27–00:30:20; and the charge letter (Annex R/2 to the 28 February 2022 joint submission by the parties), lines 1233 and 1235.

investigation to be initiated. The argument that he would knowingly incriminate himself defies common sense.

20. Mr. Van de Graaf notes that, contrary to the facts of *Ali Halidou v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1070, cited by the Secretary-General, he did not commit a physical assault, neither was he charged or sanctioned for this type of misconduct. As opposed to the facts of this incident, all the cases referenced in the Secretary-General's appeal were closely connected to the workplace. Mr. Van de Graaf acted in the way that he did in order to counteract being at risk of harm and was acting in self-defense. As to UNICEF's reputation, he did as requested of him, including not hiring a Kenyan lawyer to defend himself.

Mr. Van de Graaf's Cross-Appeal

21. Mr. Van de Graaf requests that the Appeals Tribunal award him compensation of USD 37,000 for economic loss, USD 10,000 for health damage and USD 10,000 for reputational damage. He says that the Dispute Tribunal failed to address any of the evidence of the economic damage resulting from the unexpected need to arrange a relocation of his family to his home country and that he produced medical evidence in support of his request for compensation for moral harm.

The Secretary-General's Answer

22. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Van de Graaf's cross-appeal because the Dispute Tribunal did not err in its assessment of the evidence and arguments presented before it and it awarded the maximum amount of compensation *in lieu* of reinstatement, which relief fully accounted for the purported illegality of the sanction of separation from service.

23. The Secretary-General maintains that Mr. Van de Graaf's pleadings identify that any health or reputational damage was caused by the investigation and not by the separation from service. He has provided no evidence supporting his argument of suffering stress as a result of the difficulties in finding permanent housing. In addition, the family's living situation in Brussels was not the direct consequence of his separation from service. His termination indemnity was intended to cover such costs.

Considerations

24. In disciplinary cases, the Dispute Tribunal must establish:

(a) whether the facts on which the sanction is based have been established by clear and convincing evidence when termination is a possible outcome,

(b) whether the established facts qualify as misconduct under the Staff Regulations and Rules,

(c) whether the sanction is proportionate to the offence, and

(d) whether the staff member's due process rights were observed in the investigation and disciplinary process.[15]

25. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt; it means that the truth of the facts asserted is highly probable.[16]

26. In the Judgment, the Dispute Tribunal held that Mr. Van de Graaf's actions in the altercation in question in Count 1 were established and qualified as misconduct under Staff Regulations 1.2(b) and 1.2(f)[17], however, Count 2 was not established. There is no appeal of the Dispute Tribunal's finding that there was misconduct established in regards to Count 1 nor that the staff member's due process rights were respected.

27. The Secretary-General appeals the Dispute Tribunal's finding that there was no misconduct in relation to Count 2 and that the disciplinary measure of separation from service with compensation *in lieu* of notice was disproportionate. Mr. Van de Graaf appeals the Dispute Tribunal's finding that there is no compensation for harm.

[15] *Bamba v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1259, para. 37; see also *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 29.
[16] *Ibid.*, para. 40 and para. 30, respectively.
[17] Secretary-General's Bulletin ST/SGB/2018/1/Rev.1 (Staff Regulations and Rules of the United Nations), applicable at the time of issuing the contested decision. Pursuant to Staff Regulation 1.2(b), "[s]taff 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". As specified in Staff Regulation 1.2(f), "(…) [staff members] 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. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status".

Have the facts relating to Count 2 been established by clear and convincing evidence?

28. In the contested decision, the Administration found that there was clear and convincing evidence that Mr. Van de Graaf sought to influence his neighbour, Ms. S., in relation to the content of her report to UNDSS about the altercation, including suggesting content that he knew to be incorrect.

29. The contested decision in respect of Count 2 largely relied on WhatsApp messages sent by Mr. Van de Graaf to Ms. S. on 15 September 2020.[18] In those messages, Mr. Van de Graaf provided "some elements that could [be] in the statement" of Ms. S. He suggested that she "explain that we are a peaceful compound, that [she] informed all the neighbours on the Airbnb guests coming for a week and that [she was] expecting from [the neighbours] a minimum of oversight in case something was going wrong". He also suggested to explain that "[t]he guests were not allowed to be in the house", and "[t]he fact that the rental was only valid for 3 guests" and to provide "[e-]mail exchanges/correspondences on the Airbnb rental" and "[a] small chronology of the events". He further suggested that it would have been "[g]ood to emphasize on their aggressivity", "[g]ood to mention that [she] had cancelled the booking and [reported] them to [Airbnb] as unsuitable guests" and "[g]ood to emphasize on their reluctance to stop the party and to leave the house".

30. The Administration held that this conduct violated the Staff Regulations and Rules. Staff Rule 10.1(a) provides 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 issuance or (…) the standards of conduct expected of an international civil servant may amount to misconduct (…)". This includes acts or behaviour that would discredit UNICEF or the United Nations and breaches of the Standards of Conduct for the International Civil Service.[19]

31. Staff Regulation 1.2(b) requires staff members to uphold the highest standard of integrity, including honesty and truthfulness in all matters affecting their work and status.[20] Staff Rule 1.2(g) provides that "[s]taff members shall not disrupt or otherwise interfere with any meeting or other

[18] Annex 10 to the 28 February 2022 joint submission by the parties.
[19] Sections 6.14 and 6.15 of UNICEF POLICY/DHR/2020/001 v. 7 May 2020 (UNICEF Policy on the Disciplinary Process and Measures). Section 6 specifies as follows: "The following is a non-exhaustive list of specific acts and/or omissions that may amount to misconduct under UN Staff Rule 10.1 (a): (…) 6.14. acts or behavior that would discredit UNICEF or the United Nations; 6.15. breaches of the Standards of Conduct for the International Civil Service; (…)".
[20] *Supra*.

official activity of the Organization, including activity in connection with the administration of justice system, nor shall staff members threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions. (…)".[21]

32. In the Judgment, the Dispute Tribunal found that Mr. Van de Graaf's messages had been simply suggestions to his neighbour who testified that she was not influenced by them and that she found them appropriate. Therefore, Count 2 was not properly established.

33. The Secretary-General contends that any attempt to influence an investigation or the Organization's process in assessing an incident stands clearly in contrast to the integrity of an international civil servant and interferes with an official activity of the Organization. The Secretary-General argues that Mr. Van de Graaf's messages to Ms. S. were not "suggestions" but an attempt to influence the content of her incident report.

34. We find that the Dispute Tribunal did not err in fact, resulting in a manifestly unreasonable decision, when it determined that the WhatsApp messages sent to Ms. S. were suggestions and statements to a person who was not a witness at the time. Mr. Van de Graaf was not under and did not suspect he would likely be under an investigation at the time he sent the messages. He says that the messages were sent in order to clarify what happened in a better way, without any intention to cover any fault. Moreover, Ms. S. found them appropriate and did not feel "influenced" by them. This finding is grounded in the evidence and the testimony of both Ms. S. and Mr. Van de Graaf. For example, when asked by the investigator whether Mr. Van de Graaf discussed or "suggest[ed] maybe elements" that Ms. S. "should include in [her] report or in [her] conversations with UNICEF", Ms. S. replied that she did "not remember that… no" and that "[h]e didn't tell me 'Okay, you have to tell this or that' but I have to say also that the things he says" in the WhatsApp messages are "true".[22]

[21] ST/SGB/2018/1/Rev.1, *supra*. Pursuant to Staff Rule 1.2(g), "[s]taff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization, including activity in connection with the administration of justice system, nor shall staff members threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions. (…)".
[22] Transcript of OIAI interview with Ms. S. (Annex R/10 to the 28 February 2022 joint submission by the parties), lines 1222–1230.

35. The Secretary-General also argues that the Dispute Tribunal erred in speculating that Mr. Van de Graaf had not suspected that the incident could lead to an investigation at the time he sent the WhatsApp messages because by that time, it was obvious that a formal investigation was very likely. However, at the time the WhatsApp messages were sent on 15 September 2020, a few days after the incident, Mr. Van de Graaf was not informed of the investigation (he was informed on 17 September 2020 by OIAI that it was investigating the allegations[23]). Also, by 15 September 2020, the video tape of the altercation had been posted online and on local media with headlines such as "Racist UNICEF Staff Storms Into a Neighbour's Party". As explained by Mr. Van de Graaf in his evidence, he spoke to Ms. S. "to discuss a bit of what happened", "she already prepared the reply for one of the news web" pages and he "tried to get as much as information [he] could to share with [his] management (…) so that they can understand what happened that night."[24] Mr. Van de Graaf's motivation of speaking to Ms. S. about the incident involved more than the investigation but also online media scrutiny that he was receiving.

36. The Secretary-General says that Mr. Van de Graaf knew that his statement that Ms. S. expected oversight of her property was incorrect.[25] The Secretary-General also argues that it could not be perceived as "perfectly conceivable in good neighbourliness" to enter a neighbour's property to stop a celebration, particularly since Ms. S. had expressly asked him not to intervene but rather to let security handle the incident.[26]

37. The Dispute Tribunal found this "totally irrelevant" because Mr. Van de Graaf was not charged for having intervened but the wrongful modalities of his intervention, and his intervention was "perfectly conceivable" as good neighbourliness. This finding is also grounded in the evidence before the Dispute Tribunal. In particular, Mr. Van De Graaf testified that though there was no "expectation" that he had oversight of Ms. S.'s property while she was away, there was an implied expectation from his experience in his home country of Belgium where neighbours are viewed as the first line of security when a neighbour is away. This informed his statement that, in

[23] Impugned Judgment, para. 19.
[24] Transcript of OIAI interview with Mr. Van de Graaf (Annex R/6 to the 28 February 2022 joint submission by the parties), lines 529–556.
[25] The Secretary-General references Ms. S.'s WhatsApp Chat History (Annex R/9 to the 28 February 2022 joint submission by the parties), 15–22 Sept. 2020, p. 1, at 1:48 PM, 1:53 PM and 1:54 PM; the charge letter (Annex R/2 to the 28 February 2022 joint submission by the parties), para. 44; transcript of OIAI interview of 6 Oct 2020 (Annex R/6 to the 28 February 2022 joint submission by the parties), lines 587-645, especially 606 and 607; and transcript of OIAI interview with Ms. S. (Annex R/10 to the 28 February 2022 joint submission by the parties), lines 1232, 1237–1252.
[26] The Secretary-General references the charge letter (Annex R/2 to the 28 February 2022 joint submission by the parties), para. 15.

a gated compound like theirs, if something happens on his neighbour's property, his expectation was "to go check whether everything [was] okay".[27]

38. Therefore, we agree with the Dispute Tribunal that the facts establishing the misconduct under Count 2 were not established by clear and convincing evidence, in other words, that it is not established that it was highly probable that Mr. Van de Graaf attempted to improperly influence or interfere with the investigation and the witness. The evidence on Count 2 did not meet the standard to establish misconduct because it was not clear (i.e., unequivocal and manifest) that he attempted to influence or interfere. Nor was the evidence on Count 2 convincing or persuasive to a high standard appropriate to the gravity of the allegation and in light of the severity of the consequence of its acceptance.[28]

39. As a result, we find that the Dispute Tribunal did not err in fact in its findings based on the evidence before it and certainly not in a manner that led to a manifestly unreasonable decision. It was open to the Dispute Tribunal to reach its findings after reviewing the credibility of the witnesses and weighing all of the evidence. The Appeals Tribunal will not interfere unless an error of fact leads to a manifestly unreasonable decision which is not the case here.

40. Given the finding that there was insufficient evidence of an attempt to influence an investigation, there can be no interference or disruption of the activities of the Organization contrary to the integrity of an international civil servant pursuant to the Staff Rules and Regulations[29].

Was the disciplinary sanction of separation proportionate to the misconduct in Count 1?

41. Staff Rule 10.3(b) requires that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".[30]

42. The Secretary-General submits that the Dispute Tribunal exceeded its jurisdiction and erred in law by substituting the disciplinary sanction that was imposed as a consequence of Count 1 (the altercation). The Secretary-General argues that it failed to consider whether other

[27] Transcript of OIAI interview with Mr. Van de Graaf (Annex R/6 to the 28 February 2022 joint submission by the parties), lines 606–640.
[28] *Ishfaq Hossain v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1181, para. 32; *Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.
[29] Staff Regulations 1.2(b) and 1.2(f), and Staff Rule 1.2(g), *supra*.
[30] ST/SGB/2018/1/Rev.1, *supra*. Note that Staff Rule 10.3(b) has since been amended terms that are not material here.

aggravating and mitigating factors were sufficient to support the imposed sanction; further, the facts of this case are materially different from those of *Applicant v. Secretary-General of the United Nations*[31] that the Dispute Tribunal relied upon.

43. As the misconduct of Count 1 (Mr. Van de Graaf's involvement in the altercation) was established, the Dispute Tribunal appropriately reviewed the disciplinary sanction of separation from service with compensation *in lieu* of notice and held that it was disproportionate.

44. In its analysis, the Dispute Tribunal correctly recalled Staff Rule 10.2(a) that disciplinary measures may take one or more of the enumerated forms such as written censure, loss of steps in grade, deferments of eligibility for salary increments or consideration for promotions for a specified period, suspension, fines, demotion, separation from service with notice or compensation *in lieu* of notice with or without termination indemnity, and dismissal.

45. The Dispute Tribunal also correctly considered that the Secretary-General had broad discretion in determining the most appropriate disciplinary measure but that discretion, however, was not unfettered but it had to be exercised in a manner consistent with due process and proportionality. The Dispute Tribunal rightly pointed out that the Tribunal's intervention was only warranted where the sanction imposed was "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity".[32]

46. The Secretary-General argues that, in the present case, the Dispute Tribunal wrongfully substituted its own decision for that of the Secretary-General and did not find that the disciplinary sanction was blatantly illegal, arbitrary, absurd, excessive, etc. The Secretary-General submits that rather, it found that the separation from service was "harsh and grossly disproportionate to the nature and gravity of the alleged misconduct", in violation of Rule 10.3(b) of the Staff Rules.

47. Staff Rule 10.3(b) provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".[33]

[31] Judgment No. 2013-UNAT-381.
[32] *Ganbold v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-976, para. 58; *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, para. 25; see also *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 39-40.
[33] ST/SGB/2018/1/Rev.1, *supra*.

48. The Secretary-General argues that this does not provide the Dispute Tribunal license to replace the sanction imposed by the Administration, particularly here where Mr. Van de Graaf applied physical force and verbal insults and threats (including a threat to kill another person) which are serious violations of the rules of the Organization and damaged the Organization's trust and rendered the continuation of the employment relationship intolerable.

49. In the Judgment, the Dispute Tribunal appropriately reviewed aggravating and mitigating factors and held that the Secretary-General failed to consider many exculpatory or mitigating circumstances. According to the Dispute Tribunal, these included health and security breaches (as the Airbnb guests of the neighbour were in contravention of COVID protocols), the unlawful resistance and the provocation by the guests of the Airbnb, the threats by a large group of angry male guests, the place and time of the incident, and the general context of it (the fact it happened in the private sphere, in a calm, gated compound, with missing security). The Dispute Tribunal correctly also noted Mr. Van de Graaf's unblemished career with a history of consistent good performance (including some outstanding achievements), with no prior allegations of misconduct against him.

50. The Secretary General contends that several exculpatory and mitigating factors considered by the Dispute Tribunal are irrelevant or speculative; some guests did cooperate with the investigation and offered to testify before the Dispute Tribunal, after an initial hesitation. The Secretary-General observes that since the Dispute Tribunal refused to grant a motion to call additional witnesses, it could not argue that it only had a partial picture of the events. The Secretary-General submits that Mr. Van de Graaf was the instigator of the incident and engaged in an altercation for over six minutes, which cannot be described as a "momentary loss of temper".

51. The Secretary-General maintains that the Dispute Tribunal, in considering whether the sanction was proportionate, wrongly took into account the contents of the initial complaint; they were not part of the charge or the Administration's consideration. The Secretary-General adds that the fact that altercations of a staff member of UNICEF in the context of its operations may lead to negative and exaggerated press coverage, cannot be viewed as "out of the ordinary".

52. The Dispute Tribunal, in its role as the trier of fact, must review all of the evidence before it and is entitled to assign the appropriate weight to it failing an error of fact that leads to a manifestly unreasonable decision.[34]

53. As previously explained in our jurisprudence, "due deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair."[35] This requires the Dispute Tribunal "to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality."[36] Finally, "[t]he ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline".[37]

54. It has been accepted in our jurisprudence that any "decision on the appropriate sanction for misconduct, therefore, involves a value-judgment and the consideration of a range of factors" and "the Tribunal remains vested with the authority to overturn a prescribed sanction if it is regarded as too excessive in the circumstances of the case". In assessing the proportionality of the disciplinary sanction, the most important factors to be taken into account 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".[38]

55. In the present case, the Dispute Tribunal appropriately reviewed these factors that supported its finding that the sanction of separation from service was excessive. It heard from a number of witnesses including the investigator, Mr. J., who admitted that some facts in the complaint were not supported (like the accusation about Mr. Van de Graaf's racism or his substance abuse, a dog threatening the guests), that some guests were not identified, that there were no police records of the incident, and that Mr. Van de Graaf had been cooperative throughout

[34] Article 2.1(e) of the Appeals Tribunal Statute provides as follows: "The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has (…) [e]rred on a question of fact, resulting in a manifestly unreasonable decision."
[35] *George M'mbetsa Nyawa v. Secretary General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 90.
[36] *Ibid.*
[37] *Ibid.*
[38] *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 48.

the investigative process and genuinely remorseful. In addition, the Dispute Tribunal correctly considered that Mr. B., another neighbour and a witness, stated in his testimony before the Dispute Tribunal that he had felt uncomfortable that there were unknown people in the compound and the video did not show the guests threatening Mr. Van de Graaf.

56. In terms of the most incriminating evidence against Mr. Van de Graaf, relied upon by the Administration, the Dispute Tribunal reasonably found that the videos raise questions as to the surrounding circumstances of the altercation, particularly, as the videos did not record the entire altercation. It found that they were only a "partial representation of the events" as they did not record the entire altercation which included Mr. Van de Graaf being beaten by male guests. The complainant and many of the guests did not cooperate with the investigation and did not testify to verify the events in the video tape and how it was taken. The Dispute Tribunal held that the altercation was a "single outburst and a momentary loss of temper."

57. Furthermore, some of the accusations were false which, along with the features of the online defamation against Mr. Van de Graaf with "information manipulated and tones artificially inflated" confirms the threatening attitude of the guests and their implication in the altercation. Mr. Van de Graaf was faced with guests who reacted by filming him, surrounding him in a large number with threatening behavior, pushing him, and threatening to make him leave the country; subsequently beaten by three people, he was in substance the victim of a physical assault and not in any way its perpetrator. The Dispute Tribunal's conclusion was therefore reasonable based on the evidence before it.

58. In terms of damage to the UNICEF reputation, the false and defamatory online media coverage could not be attributable to Mr. Van de Graaf and as such, can not be considered as an aggravating factor. Further, the Dispute Tribunal appropriately noted Mr. Van de Graaf's attitude, that he had expressed regret and cooperated in a transparent manner with the investigation and kept a low profile as requested by the Administration (in substance avoiding defending himself in the host country).

59. As stated in *Appellant v. Secretary-General of the United Nations*[39], the Dispute Tribunal "will only interfere and rescind or modify a sanction imposed by the Administration where [it] is blatantly illegal, arbitrary, adopted beyond the limits stated by the

[39] Judgment No. 2022-UNAT-1216, para. 45.

respective norms, excessive, abusive, discriminatory or absurd in its severity". In the present case, the sanction imposed was excessive and beyond the limits stated by the respective norms.

60. After a review of the case law developed in prior similar incidents involving altercations and disciplinary sanctions, it was reasonable for the Dispute Tribunal to find that the imposed sanction was unduly harsh and grossly disproportionate to the nature and gravity of the misconduct and the circumstances. As to the amount of the compensation *in lieu* of reinstatement, the Dispute Tribunal appropriately considered Mr. Van de Graaf's seniority, the type of contract held and the facts. The disciplinary measure of demotion by one level in grade with two years' deferment of eligibility for consideration for promotion is within a reasonable range of penalties appropriate in the circumstances.

Did the Dispute Tribunal err in not awarding compensation for economic damage or moral harm?

61. Mr. Van de Graaf cross-appeals and argues that the Dispute Tribunal should have compensated his harm based on its finding that the sanction was unduly harsh.

62. Article 10.5 of the Dispute Tribunal Statute provides that the Dispute Tribunal may only order one or both of the following:

> a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

63. In regards to compensation for harm, the Appeals Tribunal's jurisprudence establishes that it "must be supported by three elements: the harm itself; an illegality; and a nexus between both". In other words, "[i]f one of these three elements is not established, compensation cannot be

awarded. Furthermore, "the claimant bears the burden of proof to establish negative consequences" and harm to be shown to be directly caused by the contested decision.[40]

64. In this instance, the disciplinary sanction of separation from service was determined to be disproportionate and, therefore, unlawful. However, it is not enough to demonstrate an illegality to obtain compensation for harm because Mr. Van de Graaf bears the burden of establishing a nexus between this decision and any harm suffered.

65. Mr. Van de Graaf contends that he suffered economic harm due to the unexpected relocation back to his home country resulting from his separation; if he had received the demotion instead, he would have continued living in Nairobi with his children attending the same school and him receiving the education grant.

66. The Dispute Tribunal found that the economic damage or moral harm suffered by Mr. Van de Graaf could not be compensated. In doing so, it considered that the disciplinary sanction of demotion by one level in grade with two years' deferment for promotion implies that Mr. Van de Graaf must be reinstated with his benefits and entitlements, including the education grant, but at the level below his current grade.

67. Therefore, we find that any loss resulting from the lack of payment of the education grant has already been accounted for by the Dispute Tribunal. Further, Mr. Van de Graaf seeks compensation for the costs of his children's attendance at a private school in Belgium but the costs are not connected to the contested decision as it was solely Mr. Van de Graaf's decision to enroll his children in private school in his home country.

68. With regards to the claim for moral harm, Mr. Van de Graaf submits that he produced medical documents related to his severe stress which was a consequence of the lack of support, rude treatment, and the unlawful sanction by UNICEF. He provides a doctor's note referring Mr. Van de Graaf to a psychologist as he was suffering from depression from February 2021 "since he lost his job". However, this is not sufficient to discharge the burden to prove a nexus between the contested decision and the harm. Insufficient details are provided that his suffering from depression is connected to the contested decision and that the contested decision was the *cause* of his ailment.

[40] *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para 68.

69. As for reputational damage, the damage to his reputation arising from the defamation campaign was not caused by nor could it have been prevented by the Administration as the defamation was perpetuated by the guests at the party who were not under the Administration's control.

Judgment

70. The appeal and cross-appeal are dismissed, and Judgment No. UNDT/2022/037 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding	Judge Murphy	Judge Knierim

Judgment published and entered in the Register on this 17th day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar