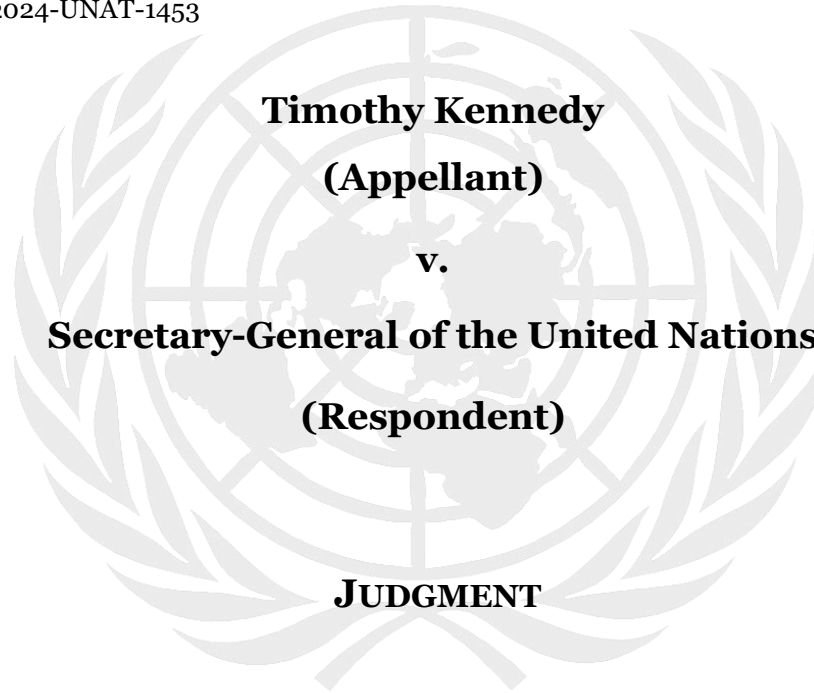




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2024-UNAT-1453



Before:	Judge Nassib G. Ziadé, Presiding Judge Graeme Colgan Judge Abdelmohsen Sheha
Case No.:	2023-1847
Date of Decision:	28 June 2024
Date of Publication:	23 July 2024
Registrar:	Juliet E. Johnson

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

JUDGE NASSIB G. ZIADÉ, PRESIDING.

1. Timothy Kennedy (Mr. Kennedy), a staff member with the Department of Safety and Security (DSS), contested the decision of the Administration to impose on him the disciplinary measures of written censure, loss of four steps in grade, and deferment, for two years, of eligibility for consideration for promotion. These measures were imposed due to mishandling e-mail communications that became public and for failing to report the loss.
2. On 15 December 2020, by Judgment No. UNDT/2020/209 (first UNDT Judgment),¹ the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed Mr. Kennedy's application.
3. Mr. Kennedy appealed the first UNDT Judgment before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal). On 29 October 2021, the Appeals Tribunal issued Judgment No. 2021-UNAT-1184 (UNAT Judgment),² in which it found that the "UNDT did not err in fact or in law on the question of whether the established facts qualify as misconduct but did err on the proportionality of the disciplinary sanctions".³ Consequently, the Appeals Tribunal partially granted Mr. Kennedy's appeal, rescinded the decision imposing the disciplinary sanctions and concluded that it was "open to the Administration to issue a new administrative decision on disciplinary sanctions with adequate reasons".⁴
4. On 22 February 2022, Mr. Kennedy was informed of the decision of the Administration to impose on him the disciplinary measures of written censure with loss of four steps in grade (contested decision), which he challenged before the Dispute Tribunal.
5. On 19 July 2023, by Judgment No. UNDT/2023/072 (impugned Judgment),⁵ the Dispute Tribunal dismissed Mr. Kennedy's application.
6. Mr. Kennedy lodged an appeal against the impugned Judgment with the Appeals Tribunal.
7. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

¹ *Kennedy v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/209.

² *Timothy Kennedy v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1184.

³ *Ibid.*, para. 50.

⁴ *Ibid.*, para. 74.

⁵ *Kennedy v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/072.

Facts and Procedure⁶

8. Mr. Kennedy has been serving with the United Nations since September 1993. At the relevant time of events, he was a Security Officer with DSS in New York, United States, and an outgoing Vice President of the Headquarters Staff Union (Staff Union).

9. On 16 March 2017, a staff member acting in his role of Security Analyst (the Analyst) initiated two e-mail exchanges. Both e-mail exchanges began with the same subject line, i.e., “Confidential”.

10. The first e-mail exchange referenced a recent and serious security incident at an international entity, which had resulted in staff injuries.

11. In the second e-mail exchange, the Analyst brought the issue of the recent security incident to the Under-Secretary-General of DSS (USG/DSS) and set out his belief of potential wrongdoings by senior managers of the department in question. He indicated that he would also seek specific guidance and direction from the Ethics Office, the Staff Union and the Office of Internal Oversight Services (OIOS). The Analyst then mentioned an incident in 2016, assessments that were made towards it, and “operational concerns” for the premises and a named high-level official for that location. In addition, details regarding death threats were referenced. The Analyst then alleged that an official DSS assessment was “buried” due to personal political implications for individuals involved. The Analyst then requested an independent investigation into the matter.

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

⁶ Summarized from the UNAT Judgment.

13. On 19 May 2017, following the receipt of a report of possible unsatisfactory conduct implicating Mr. Kennedy, OIOS opened an investigation.⁷ Several staff members were interviewed, including Mr. Kennedy on 7 and 16 March 2018.⁸ Mr. Kennedy stated that the documents were lost “due to his negligence, and it was irresponsible to leave confidential documents on the bench”.⁹ He did not report the loss to anybody “because he was embarrassed” and it was his “mistake”.¹⁰ He further stated that losing the envelope with the e-mails was “careless (...) [b]ecause it’s confidential information”.¹¹

14. On 29 June 2018, OIOS issued its Investigation Report, in which it found that Mr. Kennedy was on duty when he printed the e-mail correspondence from a desktop computer on 17 May 2017, and that on 18 May 2017, ICP published the same correspondence with Mr. Kennedy’s e-mail account identification and an indication it was printed on 17 May 2017. OIOS concluded that the established facts constituted reasonable grounds to conclude that the conduct of Mr. Kennedy was inconsistent with the standards expected of a United Nations civil servant and recommended that the Administration take appropriate action against him.¹²

15. On 1 August 2018, Mr. Kennedy received formal allegations of misconduct, namely that he provided confidential United Nations information, in the form of e-mail correspondence about security-related issues, to the ICP or, in the alternative, negligently lost this printed correspondence and did not report this loss to anyone. In his written response to the allegations of misconduct, Mr. Kennedy stated that he did not provide the confidential United Nations document to the ICP; his statement further indicated that he was aware the e-mail communications were “confidential”. He also stated that he was “careless” due to distractions from family issues. He apologized for the mistake and understood the possible consequences of the disciplinary proceedings but asked for consideration of his long service, performance history, contribution to the Organization and his personal circumstances.

16. By letter dated 1 October 2018, Mr. Kennedy was informed that, after a thorough review of the entire dossier, the USG for Management (USG/DM) concluded that it had been established by clear and convincing evidence “that after printing, on 17 May 2017, confidential

⁷ Investigation Report dated 29 June 2018, para. 1.

⁸ *Ibid.*, paras. 9-10.

⁹ *Ibid.*, para. 55.

¹⁰ *Ibid.*, para. 56.

¹¹ Mr. Kennedy’s interview transcript dated 7 March 2018, p. 715: 741.

¹² Investigation Report dated 29 June 2018, paras. 62-64.

[United Nations] information, in the form of [e-mail] correspondence about security-related issues, [he] lost this printed correspondence and did not report this loss to anyone. The same printed correspondence containing confidential information was published by ICP the next day”.¹³

17. The USG/DM concluded that the established facts amounted to “gross negligence”. In determining the appropriate sanction, the USG/DM stated that it considered “the nature of [Mr. Kennedy’s] actions, the past practice of the Organization in matters of comparable misconduct, as well as whether any mitigating or aggravating factors apply to [his] case”.¹⁴ In particular, the USG/DM considered Mr. Kennedy’s long service to the Organization as a mitigating factor and the fact that he was employed as a Security Officer as an aggravating factor. Consequently, Mr. Kennedy received the disciplinary measures of written censure, loss of four steps in grade, and deferment, for two years, of eligibility for consideration for promotion.

18. On 27 December 2018, Mr. Kennedy filed an application with the Dispute Tribunal challenging the sanctions received on 1 October 2018.

First UNDT Judgment

19. On 15 December 2020, the Dispute Tribunal issued its first UNDT Judgment in which it dismissed Mr. Kennedy’s application. The UNDT first observed that the only issues in dispute were whether the information contained in the printed copies of the e-mail correspondence was “confidential” and whether the disciplinary sanctions were proportionate.

20. The UNDT found that the USG/DM’s discretion was exercised properly in determining that “the information in the printed copies of the lost [e-mails] was ‘confidential’”.¹⁵ The UNDT further held that the USG/DM did not err by concluding that Mr. Kennedy acted with gross negligence (although not because of his role as a Security Officer) and that the established facts amounted to misconduct.¹⁶ In this regard, the UNDT further observed that Mr. Kennedy, as Vice President of the Staff Union, which is a leadership position in which one can expect to be entrusted with and have access to a lot of privileged and confidential information, should have understood the significance and particular sensitivity of the e-mails; in addition, he should

¹³ Sanction letter dated 1 October 2018.

¹⁴ *Ibid.*

¹⁵ First UNDT Judgment, para. 42.

¹⁶ *Ibid.*, paras. 50-51.

have known that if he lost the printed e-mails, this could have serious ramifications, including for his career.¹⁷

21. As for the proportionality of the disciplinary sanctions imposed, the UNDT concluded that the sanctions imposed fell within the scope of the Administration's discretion and were proportionate to the offense. It observed that the facts in the present case were different from all other cases.¹⁸ It further found that Mr. Kennedy's career as a Security Officer did not appear to have "suffered much" harm from the sanctions, as he was reassigned to a sensitive post at the Secretary-General's residence.¹⁹ The UNDT also found that the fact that Mr. Kennedy was a Security Officer should not have influenced the disciplinary decision while his responsibilities as Vice President of the Staff Union could have been taken into account due to his access to privileged and confidential information.²⁰ The UNDT further noted that Mr. Kennedy's long and untarnished work record did not exempt him from disciplinary sanctions for misconduct, but it had been a mitigating factor.²¹ Last, the UNDT held that Mr. Kennedy had not met the onus of proof to substantiate that the disciplinary decision had possibly been tainted by ulterior motives.²²

22. Mr. Kennedy filed an appeal against the first UNDT Judgment.

UNAT Judgment

23. On 29 October 2021, the Appeals Tribunal issued the UNAT Judgment, in which it found that the UNDT correctly determined that the established facts qualified as misconduct, but erred in determining that the sanctions were proportionate to the misconduct.²³

24. Explaining various important factors that must be considered in assessing the proportionality of a sanction, the Appeals Tribunal concluded that, in the present case, the sanctions imposed on Mr. Kennedy were arbitrary due to the lack of discernible reasons from the sanction letter dated 1 October 2018 and the record. In particular, the Appeals Tribunal held that those documents provided "inadequate reasons for judicial review leading to the

¹⁷ *Ibid.*, para. 48.

¹⁸ *Ibid.*, para. 56.

¹⁹ *Ibid.*, para. 57.

²⁰ *Ibid.*, para. 58.

²¹ *Ibid.*, para. 59.

²² *Ibid.*, para. 60.

²³ UNAT Judgment, para. 50.

finding that no rational connection or relationship between the evidence and the objective of the disciplinary action has been established” and, that as a result, it “was unable to assess the proportionality and lawfulness of the imposition of the disciplinary sanctions”.²⁴

25. Therefore, the Appeals Tribunal granted Mr. Kennedy’s appeal in part, rescinded the decision imposing the disciplinary sanctions and concluded that it was “open to the Administration to issue a new administrative decision on disciplinary sanctions with adequate reasons”.²⁵

Contested decision

26. On 22 February 2022, the USG for Management Strategy, Policy and Compliance (USG/DMSPC) informed Mr. Kennedy by letter of her decision to impose on him the disciplinary measures of written censure with loss of four steps in grade in accordance with Staff Rule 10.2(a)(i) and (ii). She provided detailed reasons in support of her conclusion in an annex to the letter. In particular, the USG/DMSPC considered the past practice of the Organization in matters of comparable misconduct and also conducted a proportionality analysis using the various factors detailed in the UNAT Judgment. Moreover, the USG/DMSPC considered as aggravating factors the fact that Mr. Kennedy’s actions: “(i) exposed the Organization to a potential reputational risk; and (ii) put in jeopardy both the Security Analyst who sent the e-mails containing confidential information, and the high-level [United Nations] official referred to in the e-mails”.²⁶

27. The USG/DMSPC concluded that the commensurate sanction would have been demotion, but considered as mitigating factors the fact that Mr. Kennedy had more than 20 years of service and that he expressed sincere remorse. The USG/DMSPC further confirmed that the disciplinary measures of written censure with loss of four steps in grade and deferment, for two years, of eligibility for consideration for promotion, previously imposed, were proportionate. However, considering that more than two years had elapsed since the first disciplinary decision, the USG/DMSPC decided not to reimpose the disciplinary measure of deferment, for two years, of eligibility for consideration for promotion.

28. On 1 April 2022, Mr. Kennedy challenged the contested decision before the Dispute Tribunal.

²⁴ *Ibid.*, para. 70.

²⁵ *Ibid.*, para. 74.

²⁶ Annex to the sanction letter dated 22 February 2022.

Impugned Judgment

29. On 19 July 2022, the Dispute Tribunal issued the impugned Judgment, in which it dismissed Mr. Kennedy's application and concluded that the Administration had provided "sufficient reasoning in the contested decision and ha[d] established a rational connection or relationship between the evidence and the objective of the disciplinary action".²⁷ To reach that conclusion, the UNDT reviewed each factor considered by the USG/DMSPC.

30. First, considering, *inter alia*, Mr. Kennedy's "length of service with the Organization, his position of responsibility and his overall experience", the UNDT concluded that the Administration demonstrated that he acted with "gross negligence" in his handling of the confidential United Nations communications at issue in the present case.²⁸ In this regard, the UNDT highlighted that the concept of "gross negligence" used in Section 5.1 of Secretary-General's Bulletin ST/SGB/2004/15 (Use of information and communication technology resources and data) does not require a wrongful intent.

31. Second, the UNDT found that the Administration had demonstrated that Mr. Kennedy failed to uphold the highest standard of integrity and competence required under Staff Regulation 1.2(b) by failing to report immediately the loss of confidential information, although he had ample opportunity to do so.²⁹

32. Third, the UNDT concluded that Mr. Kennedy's misconduct was not the result of a rash action or a temporary lapse of judgment, especially since he did not report the loss as soon as possible.³⁰

33. Fourth, the UNDT agreed with the Secretary-General's contention that Mr. Kennedy's actions were also not the result of a lack of experience, since at the relevant time of events, he had worked as a Security Officer with the Organization for over 20 years and was therefore supposed to be aware of his obligations to protect the property and assets of the Organization.³¹ Therefore, the UNDT concluded that Mr. Kennedy's conduct was contrary to his duties and obligations as a United Nations staff member.

²⁷ Impugned Judgment, para. 46.

²⁸ *Ibid.*, para. 14.

²⁹ *Ibid.*, para. 18.

³⁰ *Ibid.*, paras. 22-23.

³¹ *Ibid.*, paras. 24 and 27.

34. Fifth, the UNDT found that the Administration correctly concluded that Mr. Kennedy's misconduct was not a single act, but rather involved multiple violations, as he not only lost confidential United Nations information but also failed to report the loss.³² In this regard, the UNDT, while observing the absence of cases identical to the present case, noted that the Administration nevertheless reviewed at least eight cases presenting similarities to the present one and appropriately considered the "benign nature" of Mr. Kennedy's conduct compared to these other cases.³³

35. Sixth, the UNDT concluded that the Administration appropriately found that Mr. Kennedy's misconduct exposed not only the Organization to a potential reputation risk but also put in jeopardy the United Nations personnel mentioned in the confidential communications.³⁴

36. Seventh, the UNDT observed that Mr. Kennedy had no history of disciplinary violations. It further found that the Administration appropriately took into consideration several mitigating factors, including his long and praiseworthy service with the Organization, his absence of prior violations, his expression of sincere remorse as well as his personal issues at the relevant time of events.³⁵ The UNDT also rejected Mr. Kennedy's contention that the contested decision stemmed from retaliation.³⁶

37. Last, the UNDT found that Mr. Kennedy appeared "not to have suffered any excessively severe professional consequences as a result of the disciplinary measures imposed on him", since he has "been assigned high-profile security responsibilities including protecting the Secretary-General's residence".³⁷

38. Therefore, the Dispute Tribunal concluded that in taking the contested decision, the USG/DMSPC "made a good-faith effort to take relevant factors into consideration, to fully explain her reasoning, and to ensure that the disciplinary measure imposed on [Mr. Kennedy was] proportional to the misconduct".³⁸ In this regard, the UNDT held that the contested decision imposed "only a 'written censure with loss of four steps in grade', which correspond

³² *Ibid.*, paras. 31-32.

³³ *Ibid.*, para. 30.

³⁴ *Ibid.*, paras. 35-36 and 43.

³⁵ *Ibid.*, para. 39.

³⁶ *Ibid.*

³⁷ *Ibid.*, para. 45.

³⁸ *Ibid.*, para. 42.

to the two most lenient options in the list of disciplinary measures available under Staff Rule 10.2(a)".³⁹

Submissions

Mr. Kennedy's Appeal

39. Mr. Kennedy requests the Appeals Tribunal to rescind the contested decision, to remove the written censure, and to reinstate his lost steps in grade. He also requests the Appeals Tribunal to award him compensation for the loss of opportunity for promotion as well as one year's net base salary for damages to his reputation and moral damages.⁴⁰

40. Mr. Kennedy submits that the Dispute Tribunal committed several errors of fact in the impugned Judgment.

41. In this regard, Mr. Kennedy argues that the UNDT erred in characterizing the second sanction decision (i.e., the contested decision) as a lower sanction. He contends that the disciplinary measure of deferment, for two years, of eligibility for consideration for promotion was never rescinded. On the contrary, this sanction had already been executed at the time of the contested decision and significantly impacted his career advancement prospects. Mr. Kennedy emphasizes that this fact was never "weighed in assessing the proportionality of the new sanction, and is entirely overlooked in the [impugned] Judgment".

42. Mr. Kennedy disputes the UNDT's finding that he appeared "not to have suffered any excessively severe professional consequences as a result of the disciplinary measures imposed on him".⁴¹

43. Mr. Kennedy argues that the UNDT erred in referring to the evidentiary standard of "clear and convincing evidence" instead of "preponderance of evidence".

44. Mr. Kennedy asserts that the UNDT failed to demonstrate how his conduct amounted to gross negligence or to specify the steps he should have taken to avoid such negligence.

³⁹ *Ibid.*, para. 48.

⁴⁰ Appeal form.

⁴¹ Impugned Judgment, para. 45.

45. Mr. Kennedy submits that the UNDT erred by concluding that he had “ample opportunity” to report the loss of confidential information. He argues that it is clear from his testimony that he “was unaware of the blog appearing the next day, did not work the following day and left for vacation the day after that”. Furthermore, he contends that the UNDT gave him “no credit (...) for acknowledging his role completely and apologizing for it as soon as he was informed”.

46. Next, Mr. Kennedy submits that the Dispute Tribunal committed several errors of law in the impugned Judgment.

47. In this regard, Mr. Kennedy first challenges the UNDT’s adoption of the Secretary-General’s contention regarding his misconduct involving multiple violations, namely that he not only lost confidential United Nations information but also failed to report the loss. He further emphasizes that it was his first misconduct in over 29 years of career within the Organization.

48. Mr. Kennedy also contests the UNDT’s finding that he demonstrated “gross negligence” in his handling of United Nations confidential communications, arguing that this finding was not supported by evidence. In particular, he contends that the UNDT erroneously equated “careless or inadvertent action with grossly reckless behavior”.

49. Mr. Kennedy contends that his misconduct had no adverse impact on the Organization, “aside from the personal embarrassment of the USG in being criticized”, and that the UNDT erred in concluding otherwise.

50. Moreover, relying on the Compendium of Disciplinary Measures, Mr. Kennedy submits that the UNDT erred by concluding that the Administration’s review of the Organization’s past practice was appropriate, as he was in fact “treated much more harshly than other cases involving misuse of [information technology] resources or a failure to exercise reasonable care (generally censure only)”.

51. Mr. Kennedy argues that the UNDT failed to consider the fact that he “was not even sure that his lost document was the source of the ICP article but as soon as he was asked about it, he was entirely truthful in his account of what had occurred”.

52. Finally, Mr. Kennedy contends that the UNDT erroneously concluded that his role as a staff representative was irrelevant. In this regard, he also asserts that the UNDT’s assessment of

mitigating factors was “dismissive”, especially since his role in the Staff Union was considered as an aggravating rather than a mitigating factor.

53. Therefore, Mr. Kennedy submits that the impugned Judgment “does little more than endorse the views of the USG/DMSPC”. He also highlights the absence of an oral hearing before the Dispute Tribunal.

The Secretary-General’s Answer

54. The Secretary-General requests that the Appeals Tribunal uphold the impugned Judgment and dismiss the appeal.

55. The Secretary-General submits that the Dispute Tribunal correctly found that the contested decision was lawful and contends that Mr. Kennedy has failed to establish any error warranting the reversal of the impugned Judgment. Consequently, his claims for remedies must be dismissed. Alternatively, should the Appeals Tribunal consider the contested decision unlawful, the Secretary-General contends that Mr. Kennedy failed to demonstrate that compensation is warranted.

56. The Secretary-General argues that Mr. Kennedy failed to demonstrate that any of the alleged errors of fact resulted in a manifestly unreasonable decision from the Dispute Tribunal, a requirement outlined in Article 2(1) of the Appeals Tribunal Statute. On the contrary, the Secretary-General observes that Mr. Kennedy merely disagrees with the impugned Judgment.

57. In this regard, the Secretary-General first submits that Mr. Kennedy’s contention regarding the UNDT’s alleged error in characterizing the second sanction decision (i.e., the contested decision) as a lower sanction is irrelevant, as the present appeal solely concerns the proportionality of the second sanction decision. The Secretary-General also notes that while the first sanction decision was rescinded by the Appeals Tribunal, no determination was made regarding whether the Administration should revise this initial sanction. Additionally, the Secretary-General argues that the contested decision did not reimpose the disciplinary measure of deferment, for two years, of eligibility for consideration for promotion. The Secretary-General also asserts that Mr. Kennedy’s reference to the impact of the sanction on his career is irrelevant, as the effect of a sanction on a staff member does not demonstrate its disproportionality. The Secretary-General also notes that this is a new argument that cannot be raised for the first time on appeal.

58. Similarly, the Secretary-General submits that Mr. Kennedy's reference to the UNDT's conclusion that he appeared "not to have suffered any excessively severe professional consequences as a result of the disciplinary measures imposed on him" does not establish that the contested decision is disproportionate.⁴²

59. The Secretary-General highlights that both instances referred to the evidentiary standard of clear and convincing evidence. Nevertheless, as such standard is higher than that of preponderance of evidence, the Secretary-General argues that "if the standard of clear and convincing [evidence] was met, the standard of preponderance of evidence was also met".

60. The Secretary-General asserts that the Administration provided clear explanations on how Mr. Kennedy could have prevented the loss of confidential information.⁴³ Consequently, the Secretary-General maintains that the UNDT accurately concluded that Mr. Kennedy's misconduct amounted to gross negligence.

61. The Secretary-General contends that the UNDT correctly determined that Mr. Kennedy had ample opportunity to report the loss of confidential information, and by failing to do so, acted recklessly. In this regard, the Secretary-General also highlights that both the Administration and the UNDT took into consideration his sincere remorse.⁴⁴ As a result, the Administration reduced the appropriate sanction from a potential demotion.

62. Next, the Secretary-General contends that Mr. Kennedy failed to demonstrate any of the purported errors of law in the impugned Judgment. In this regard, relying on *Cabrera*, the Secretary-General recalls that a sanction is not deemed unfair or disproportionate solely because "the Secretary-General, in his discretion, could have come to a different conclusion".⁴⁵ Therefore, in the present case, Mr. Kennedy's mere disagreement with the sanctions imposed on him does not constitute an error in the impugned Judgment.

63. The Secretary-General submits that the UNDT correctly identified two instances of misconduct in Mr. Kennedy's actions, i.e., the loss of confidential information and the failure

⁴² *Ibid.*

⁴³ *Ibid.*, para. 12. The Secretary-General also refers to paragraph 15(a) of the annex to the sanction letter dated 22 February 2022.

⁴⁴ Impugned Judgment, paras. 39-40. The Secretary-General also refers to paragraph 17(b) (initially misquoted as paragraph 16(b)) of the annex to the sanction letter dated 22 February 2022.

⁴⁵ *Cabrera v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-089, para. 27.

to report the loss. Furthermore, both the Administration and the UNDT took into consideration that it was Mr. Kennedy's first misconduct.⁴⁶

64. The Secretary-General argues that the UNDT correctly categorized Mr. Kennedy's misconduct as "gross negligence" according to ST/SGB/2004/15. Mr. Kennedy also failed to point out which evidence was disregarded by the UNDT in reaching this conclusion.

65. Furthermore, relying on Appeals Tribunal jurisprudence,⁴⁷ the Secretary-General submits that Mr. Kennedy's contention that his misconduct had no adverse impact on the Organization merely repeats an argument already submitted before the Dispute Tribunal and should thus be rejected on this basis alone. Nevertheless, even if the Appeals Tribunal were to consider this argument, the Secretary-General argues that Mr. Kennedy still failed to demonstrate any error in the UNDT's conclusion that the "unauthorized publication of confidential United Nations communications, including communications with Member States, showing certain security vulnerabilities clearly exposed the Organization to a potential reputational risk".⁴⁸

66. The Secretary-General asserts that the contested decision is consistent with the Organization's past practice. Furthermore, Mr. Kennedy's reference to the Compendium of Disciplinary Measures lacks specificity, as it fails to cite any specific case.

67. The Secretary-General highlights that the Appeals Tribunal found that Mr. Kennedy's misconduct violated the United Nations legal framework. Consequently, Mr. Kennedy cannot contend that he had no duty to report the loss of confidential United Nations communications.

68. Finally, the Secretary-General contends that Mr. Kennedy's role as a staff representative bears no relevance to his misconduct.

69. Therefore, the Secretary-General submits that the UNDT's findings are "evidently very thorough and based on the submissions [of] the parties". Additionally, the Secretary-General highlights that Mr. Kennedy never requested an oral hearing before the UNDT.

⁴⁶ Impugned Judgment, para. 39. The Secretary-General also refers to paragraph 16 of the annex to the sanction letter dated 22 February 2022.

⁴⁷ *Al-Moued v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-458, para. 19.

⁴⁸ Impugned Judgment, para. 35.

Considerations

70. In light of the procedural history described above, the sole issue for our consideration is whether the UNDT erred in finding that the sanctions imposed by the USG/DMSPC on 22 February 2022 were proportionate to the nature and gravity of Mr. Kennedy's misconduct, pursuant to Staff Rule 10.3(b).

71. Under our jurisprudence, the proportionality inquiry of Staff Rule 10.3(b) seeks to ensure that a disciplinary measure is reasonable and not more excessive than necessary to obtain the desired result.⁴⁹ This analysis respects the need for decision-makers to balance legitimate concerns and respond to individual facts, while also meeting the obligation to treat staff members fairly and rationally. We thus look, among other factors, to the seriousness of the offence, the employment history of the staff member, including any prior discipline as well as aggravating or mitigating factors, and the context of the violation.⁵⁰ The proportionality analysis also involves examining whether similar violations have resulted in similar disciplinary measures.⁵¹

72. When this case was last before this Tribunal, we determined that the sanctions imposed on Mr. Kennedy were arbitrary because they had not been properly explained or justified by the USG/DM. Therefore, we vacated the decision, leaving open the option to issue a new administrative decision that is sufficiently explained. In the contested decision, the USG/DMSPC provided a thorough and detailed analysis of the factors identified in our prior Judgment, and which our precedents require to be considered in the disciplinary context. The factors include: the past practice of the Organization in comparable matters; the seriousness of the misconduct; whether the conduct was accidental, careless, reckless, or deliberate; whether the staff member followed procedures and was self-aware of the conduct; whether, given the staff member's experience, the misconduct was minor, substantive, or severe; the risk of damage to the Organization and staff; as well as any mitigating factors.⁵²

73. On its review of the contested decision, the UNDT did not second-guess the USG/DMSPC's analysis, but looked primarily at whether the appropriate factors were analysed

⁴⁹ *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, para. 23.

⁵⁰ *Sajiv Nair v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1394, para. 68.

⁵¹ *Balint Szvetko v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1311, para. 57.

⁵² Annex to the sanction letter dated 22 February 2022.

in a rational manner consistent with the facts.⁵³ This was the correct approach, which we adhere to as well,⁵⁴ giving due consideration to the UNDT's analysis, as our function is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction.⁵⁵

74. In light of the detailed explanation for the contested decision, there can be no meaningful claim that the appropriate factors were not considered. Instead, Mr. Kennedy takes issue with how those factors were analysed.

75. Mr. Kennedy first challenges the characterization of his underlying misconduct, claiming that: i) it was not "gross negligence"; ii) he had committed only one violation and not two; and iii) there had been no adverse impact on the Organization. However, this Tribunal has already determined that Mr. Kennedy's actions constituted misconduct under Staff Rule 10.1(a), Staff Regulations 1.2(b), (i) and (q), and Section 5.1 of ST/SGB/2004/15.⁵⁶ The arguments he now raises on appeal are not supportable nor do they alter the underlying analysis. The UNDT was correct to find that the negligence in leaving confidential documents and the failure to timeously report the loss of those documents were separate violations, and that the loss of confidential security-sensitive material, which was then published without authorization, posed a significant risk to the Organization and staff members. Mr. Kennedy raises no meaningful point of error in the impugned Judgment.

76. With regard to the primary issue of proportionality, we also find no grounds to reverse the impugned Judgment.

77. As an initial matter, the disciplinary measures issued here – written censure and loss of four steps in grade – are well within the range of sanctions contemplated by Staff Rule 10.2(a) and are far from being the most extreme sanction available to the Administration.

78. The disciplinary measures issued to Mr. Kennedy were also appropriate to obtain the desired result of imposing a meaningful consequence for a serious violation of important

⁵³ Impugned Judgment, paras. 10-11.

⁵⁴ *Hasmik Egian v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1333, para. 104; *Sajiv Nair* Judgment, *op. cit.*, paras. 66-69; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

⁵⁵ *Abdulhamid Al Fararjeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2021-UNAT-1136, para. 37.

⁵⁶ UNAT Judgment, paras. 51-60.

Staff Rules and Staff Regulations. Mr. Kennedy, an experienced professional with a long history of security-sensitive responsibilities, made a significant error of judgment which exposed sensitive material to unauthorized persons, resulting in public disclosure. He also failed to promptly report his error. Therefore, we cannot consider that the disciplinary measures imposed on him were excessive or arbitrary, given the severity of his misconduct within a framework of progressive or corrective discipline.⁵⁷

79. The disciplinary measures at issue here are also proportionate when viewed in relation to other cases. The annex to the sanction letter dated 22 February 2022 summarized in detail cases in which more severe penalties were imposed for arguably comparable misconduct.⁵⁸ Among the matters which have reached this Tribunal, *AAD* is instructive.⁵⁹ There, the Organization imposed sanctions in the form of loss of two steps in grade and written censure for multiple instances of using United Nations resources for outside activities without authorization, which the UNDT found to be disproportionate.⁶⁰ On appeal, this Tribunal reversed the UNDT Judgment on the grounds that since the Secretary-General had taken into consideration the relevant facts, and the disciplinary measures were neither arbitrary nor outside established norms, they were proportionate. The disciplinary measures imposed in the present case are consistent with those in *AAD*. The Appeals Tribunal's Judgment in *AAD* and the precedents relied upon by the USG/DMSPC strongly support a finding of proportionality in the present matter.

80. Mr. Kennedy suggests that our Judgment in *Samandarov* undermines a finding of proportionality in the present case. In *Samandarov*, a staff member threatened to damage the cell phone of another staff member during a verbal altercation and was punished with a written censure and loss of two steps in grade. The UNDT found the sanctions to be disproportionate, and this Tribunal affirmed this decision, holding that a written censure alone was appropriate.⁶¹ However, the misconduct in the present case far exceeds that in *Samandarov*. Mr. Kennedy's actions, whether negligent or grossly negligent, created a serious security risk and, at a minimum, caused reputational damage to the United Nations and its staff. Furthermore, his failure to timeously report his mistake was in itself additional misconduct.

⁵⁷ *Samandarov* Judgment, *op. cit.*, para. 25.

⁵⁸ Annex to the sanction letter dated 22 February 2022.

⁵⁹ *AAD v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1267/Corr. 1, paras. 73-77.

⁶⁰ *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/066.

⁶¹ *Samandarov* Judgment, *op. cit.*, paras. 26-28.

Nothing in *Samandarov* supports Mr. Kennedy's claim that the disciplinary measures here were disproportionate.

81. The USG/DMSPC properly performed her role, and the UNDT's analysis was not erroneous in fact or law. The disciplinary measures imposed on Mr. Kennedy were proportionate to the nature and gravity of his misconduct.

Judgment

82. Mr. Kennedy's appeal is dismissed, and Judgment No. UNDT/2023/072 is hereby affirmed.

Original and Authoritative Version: English

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

(Signed)

Judge Ziadé, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Sheha

Judgment published and entered into the Register on this 23rd day of July 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar