



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

Judgment No. 2024-UNAT-1462

Firas Shaker Mihyar

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Gao Xiaoli, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2023-1827
Date of Decision:	28 June 2024
Date of Publication:	1 August 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant: Self-represented

Counsel for Respondent: Amanda Stoltz

JUDGE GAO XIAOLI, PRESIDING.

1. Mr. Firas Shaker Mihyar (Mr. Mihyar) has filed an appeal of Judgment No. UNDT/2023/040 (impugned Judgment) rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal).¹
2. In the impugned Judgment, the Dispute Tribunal dismissed his application challenging the disciplinary sanction of written censure and loss of two steps in grade. This sanction was re-imposed following the Dispute Tribunal's prior rescission of the disciplinary measure and remand for redetermination in Judgment No. UNDT/2022/085 (Prior UNDT Judgment).
3. For the foregoing reasons, the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure

4. Mr. Mihyar has been employed with the United Nations since 2005. At the time of the events in question, he held a fixed-term appointment with the United Nations Development Programme (UNDP) at grade P-4, step XII, at the United Nations Assistance Mission for Iraq (UNAMI).²
5. In 2016, Mr. Mihyar was involved in a recruitment process for a Local Security Assistant (LSA) with the United Nations Department of Safety and Security (UNDSS) in Sulaymaniyah, Iraq. He reported to Mr. H.K., the most senior security officer in the Kurdistan Region of Iraq.³
6. Following receipt of an allegation that Mr. Mihyar improperly interfered with the above-mentioned recruitment exercise, the Office of Audit and Investigations (OAI) conducted an investigation between March 2018 and January 2019.
7. On 16 December 2020, following review of the investigation report, and Mr. Mihyar's comments on the misconduct charges, the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) concluded that it had been established by clear and convincing evidence, and in any case, by a preponderance of the evidence, that he had engaged in misconduct. In a letter to Mr. Mihyar (2020 Sanction Letter), the USG/DMSPC decided to

¹ *Mihyar v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/040 (30 May 2023).

² *Ibid.*, paras. 2-3.

³ *Ibid.*, para. 5.

impose the disciplinary measure of written censure and loss of two steps in grade, having found no aggravating or mitigating circumstances.⁴

8. On 12 March 2021, Mr. Mihyar filed an application challenging the disciplinary decision before the UNDT, which was registered as Case No. UNDT/GVA/2021/016.

9. Upon review of this first application, the UNDT concluded that the Administration had established to the requisite standard that Mr. Mihyar had improperly interfered with the recruitment exercise.⁵

10. In the Prior UNDT Judgment, the UNDT found that Mr. Mihyar did not deny that he had moved one candidate's application from "not under consideration" to the long list, and later added him to the shortlist. Moreover, Mr. Mihyar did not deny that he shared the log-in details for the UNDP Human Resources (HR) online platform with Mr. H.K. who did not otherwise have access at that stage of the recruitment process.⁶

11. Mr. Mihyar argued that he was acting under the instructions of his supervisor and hiring manager, Mr. H.K. However, the Dispute Tribunal "consider[ed] that acting under the instructions from one's supervisor does not have any impact on the establishment of the facts, nor does this excuse [Mr. Mihyar] from the alleged conduct".⁷

12. The Dispute Tribunal also concluded that the Administration had established to the requisite standard of proof that Mr. Mihyar had failed to report Mr. H.K for potential misconduct with respect to this recruitment exercise.⁸

13. The Dispute Tribunal concluded that the established facts constituted misconduct, in that Mr. Mihyar had breached Staff Regulations 1.2(b), 1.2(i), and 1.2(q), and Staff Rules 1.2(c) and 1.2(i).⁹

⁴ *Ibid.*, para. 8.

⁵ Prior UNDT Judgment, para. 24.

⁶ *Ibid.*, para. 25.

⁷ *Ibid.*, para. 30.

⁸ *Ibid.*, para. 35.

⁹ *Ibid.*, para. 40.

14. With regard to the sanction, the Dispute Tribunal considered that the Administration failed to consider several potential mitigating factors, namely: (i) Mr. Mihyar's long satisfactory service, (ii) the lack of financial gain, and (iii) that he was acting under the instructions of his supervisor.¹⁰

15. The Dispute Tribunal also took note that the Administration had not specified what past practice it considered in terms of discipline for similar instances of misconduct. The Tribunal identified two similar cases of improper interference with a recruitment exercise where the sanction was less than that received by Mr. Mihyar.¹¹

16. The Dispute Tribunal concluded that:¹²

[I]n determining the sanction, the Administration failed to duly consider all relevant factors including mitigating factors and past practice, and as such, the cumulative imposition of a written censure and the loss of two steps in grade on [Mr. Mihyar] was excessive, unreasonable and disproportionate to the misconduct.

17. The Dispute Tribunal also found that Mr. Mihyar's due process rights were respected during the investigation and disciplinary phase.

18. Accordingly, in the Prior UNDT Judgment issued on 21 September 2022, the Dispute Tribunal rescinded the disciplinary measure and remanded the case to the Administration for proper determination of the applicable sanction.¹³

19. On 18 October 2022, the Administration issued a revised Sanction Letter (2022 Sanction Letter) in response to the Prior UNDT Judgment. The Administration examined cases involving the purposeful manipulation/altering of, breach of confidentiality of, or the unauthorized use/access of, official United Nations documents/databases. They also examined cases involving failure to report potential misconduct of other staff members.¹⁴

20. The Administration noted that the disciplinary measures for the foregoing types of misconduct was more lenient if the misconduct was relatively minor or the staff member showed remorse and made an early admission of misconduct. Whereas stricter measures were imposed where the integrity of the process/operation was compromised, confidentiality breached, and the

¹⁰ *Ibid.*, paras. 56-59.

¹¹ *Ibid.*, para. 65.

¹² *Ibid.*, para. 68.

¹³ *Ibid.*, para. 76.

¹⁴ 18 October 2022 letter from USG/DMSPC to Mr. Mihyar (2022 Sanction Letter).

staff member showed no remorse or was untruthful during the investigation. Cases of compound misconduct also attracted stricter disciplinary measures.

21. The USG/DMSPC examined the proportionality factors recommended by the Appeals Tribunal Judgment in *Kennedy*,¹⁵ and considered how they applied to Mr. Mihyar's conduct.¹⁶ In particular, the USG/DMSPC noted that Mr. Mihyar's conduct was "compound misconduct", because he took deliberate action to interfere with the recruitment exercise and also failed to report misconduct of another staff member (his supervisor).

22. The USG/DMSPC also took into account that during a Case Management Discussion (CMD) with the UNDT in an earlier stage of his case, Mr. Mihyar made various admissions which materially contradicted his statements during the investigation and disciplinary process, when he had been under oath.

23. The USG/DMSPC considered as aggravating factors:¹⁷

- 1) Lack of integrity by deliberately altering the pool of candidates and advancing two unsuitable candidates;
- 2) Breached the trust placed in him by UNDP HR, by allowing unauthorized use to the UNDP recruitment platform to his supervisor, whom he knew was not supposed to be involved in the process at the early stages.

24. The USG/DMSPC reviewed as possible mitigating factors:¹⁸

- 1) Clean disciplinary record was considered inapplicable, because this is expected of United Nations staff members;
- 2) Long years of service, including in hardship duty stations was considered partially applicable;
- 3) No personal financial gain was considered partially applicable. However, the USG/DMSPC observed that a loss of integrity and trust in the Organization's processes can be equally harmful to financial loss;
- 4) Unfamiliarity with recruitment exercise was considered inapplicable, but Mr. Mihyar's following instructions of his supervisor was considered partially applicable;

¹⁵ *Timothy Kennedy v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1184, para. 69.

¹⁶ 2022 Sanction Letter, pp. 12-13.

¹⁷ *Ibid.*, pp. 14-15.

¹⁸ *Ibid.*, pp. 15-16.

- 5) Operational necessity with respect to the recruitment was considered inapplicable, because no operational requirement can justify misconduct;
- 6) Limited involvement in recruitment was not a mitigating factor, because while his involvement was short (four days), he conducted himself in the direct opposite of what was required;
- 7) Occurrence of allegedly similar procedural regularities in other duty stations was considered inapplicable, as actual or perceived violations in other duty stations do not excuse Mr. Mihyar's conduct.

25. In the 2022 Sanction Letter, the USG/DMSPC concluded as follows:¹⁹

Taking into consideration the UNAT findings regarding the integrity of the recruitment process and the compound nature and severity of Mr. Mihyar's misconduct, the commensurate disciplinary measure to be imposed would have been *demotion*. However, in view of the applicable or partially applicable mitigating factors present in this case, the USG/DMSPC has found that a less strict disciplinary sanction, that would still correspond to the fact that Mr. Mihyar committed two separate types of misconduct (interference in recruitment process and failure to report potential misconduct), would be appropriate and proportionate. The USG/DMSPC concluded that more lenient disciplinary measures that had in the past been imposed in cases where the staff member concerned only committed one class of misconduct and where multiple mitigating factors applied, such as written censure and a fine of one month's net base salary, would not properly address Mr. Mihyar's misconduct. Consequently, the USG/DMSPC concluded that the disciplinary measures of written censure with loss of two steps in grade that had been previously imposed on Mr. Mihyar in accordance with Staff Rules 10.2(a)(i) and (ii) appropriately addressed Mr. Mihyar's compound misconduct, taking into account applicable aggravating and mitigating factors.

26. On 13 January 2023, Mr. Mihyar filed an application with the Dispute Tribunal challenging the reimposition of the disciplinary sanction. This application was registered as Case No. UNDT/GVA/2023/002.

Impugned Judgment

27. The Dispute Tribunal first observed that the parties did not appeal the findings it made in the Prior UNDT Judgment, namely that the Administration had established Mr. Mihyar's conduct

¹⁹ *Ibid.*, p. 16 (emphasis added).

to the requisite standard of proof, that the established facts amounted to misconduct, and that his due process rights had been respected. Accordingly, none of these findings could be relitigated.²⁰

28. The Dispute Tribunal limited the scope of its judicial review to whether the sanction imposed was proportionate to Mr. Mihyar's misconduct and whether he was entitled to any remedies.

29. The Dispute Tribunal rejected Mr. Mihyar's contention that the Administration raised new facts because the 2022 Sanction Letter relied upon his statements at the CMD. The Tribunal stated that the reference to the CMD in the proportionality analysis was "fundamentally different" from introducing new facts into the investigation.²¹

30. The Dispute Tribunal rejected Mr. Mihyar's arguments that the Administration had not considered comparable cases when it reviewed whether the sanction imposed was consistent with past practice. The Tribunal found no merit to these submissions. It was satisfied that the Administration had properly considered previous cases involving comparable misconduct.²²

31. The Dispute Tribunal rejected Mr. Mihyar's complaint that the Administration did not consider an investigation report related to irregular UNDP recruitment processes in Malaysia, finding that it had no bearing on Mr. Mihyar's case. The fact that the Administration may not have issued sanctions in the Malaysia instance was not relevant because the Tribunal cannot compel the Administration to take disciplinary action in cases that are not before it. Moreover, it is within the prerogative of the Administration to reach different conclusions from case to case.²³

32. The Dispute Tribunal next considered Mr. Mihyar's argument that the Administration should have considered his long and unblemished service and lack of financial gain as "full" rather than "partially applicable" mitigating factors. Mr. Mihyar contended that in finding these factors only "partially applicable" that the Administration did not follow the instructions of the Prior UNDT Judgment.

²⁰ Impugned Judgment, paras. 25-27.

²¹ *Ibid.*, para. 29.

²² *Ibid.*, paras. 39-41.

²³ *Ibid.*, paras. 42-45.

33. The Dispute Tribunal held that Mr. Mihyar misunderstood the Prior UNDT Judgment, and that the Tribunal had ordered the Administration to consider mitigating factors, but not how much weight to give to those factors.²⁴

34. The Dispute Tribunal was satisfied that the Administration had duly considered the nature and gravity of Mr. Mihyar's misconduct as well as all the aggravating and mitigating factors in accordance with the proportionality analysis in *Kennedy*.²⁵

35. The Dispute Tribunal concluded that Mr. Mihyar had failed to demonstrate that the disciplinary measure imposed in the 2022 Sanction Letter was disproportionate to the offence, and accordingly, upheld the measure. Having found no illegality, the Tribunal rejected Mr. Mihyar's requests for remedies.²⁶

36. Mr. Mihyar filed an appeal of the impugned Judgment on 23 July 2023, to which the Secretary-General responded on 18 September 2023.

Submissions

Mr. Mihyar's Appeal

37. Mr. Mihyar submits that the impugned Judgment contradicts the Prior UNDT Judgment on the same case, and requests that the UNAT rectify this unfairness.

38. Mr. Mihyar observes that the Prior UNDT Judgment examined whether there were sufficient facts established to support the disciplinary sanction. He argues that in this Prior UNDT Judgment, the Dispute Tribunal gave no weight to: (a) the fact that he was acting under the instruction of his supervisor in good faith; (b) there was an operational basis and explicit instructions for him to be involved in the recruitment process; (c) his actions in the recruitment process were endorsed by the hiring manager, UNDSS at the Headquarters level, UNDP HR and the UNDP Country Office; (d) the hiring manager had made an exigent business case for the recruitment that justified Mr. Mihyar's actions; (e) he never took any initiative but always acted under the instruction of others, and was not involved in the final decision; (f) none of the hiring managers or the UNDP Country Director were found to have committed acts of misconduct and

²⁴ *Ibid.*, paras. 48-49.

²⁵ *Ibid.*, para. 56.

²⁶ *Ibid.*, paras. 58 and 60.

he was the only person treated unfairly and subject to discipline; (g) OAI excluded a key witness in this case, namely the hiring manager; (h) he had unblemished long years of service including in hardship duty stations; (i) there was no personal gain or loss to the Organization; and (j) Mr. Mihyar had no personal interest in the recruitment and his actions were in good faith based on operational requirements provided by the hiring manager.

39. Mr. Mihyar points out that in the Prior UNDT Judgment, the Dispute Tribunal was concerned that the Administration did not take into account his long satisfactory service, and the fact that he did not have any financial or personal gain from his acts, as mitigating factors. He also emphasizes that the Dispute Tribunal was concerned that the Administration did not adequately consider the Organization's past practice, in terms of disciplinary measures imposed in cases of comparable misconduct.

40. Mr. Mihyar argues that in the Prior UNDT Judgment, the Dispute Tribunal found the sanction imposed – a written censure and loss of two steps in grade – to be excessive, unreasonable and disproportionate, but the Administration ignored this instruction and reimposed the same sanction.

41. Mr. Mihyar submits that the impugned Judgment is inconsistent and contradictory to the Prior UNDT Judgment. In the Prior UNDT Judgment, the UNDT asserted that there was a miscarriage of justice against him, but in the impugned Judgment, the Administration reinstated the disciplinary sanction and measures that were previously revoked.

42. Mr. Mihyar submits that in reimposing the same sanction, the Secretary-General displayed a failure to adhere to past practice and neglected to consider all pertinent aggravating and mitigating factors, particularly Mr. Mihyar's limited involvement in the recruitment process.

43. Mr. Mihyar submits that there was a failure to include statements from crucial witnesses in this case, namely the hiring manager, the Deputy Security Advisor, and the UNDP Country Director. These witnesses' testimonies would shed light and justify that Mr. Mihyar's actions underwent diligent scrutiny and received approval from all responsible authorities within the Organization. The absence of these statements undermines the fairness of the ongoing case review.

44. Mr. Mihyar emphasizes that it is undisputed that he followed the explicit instructions of his supervisor. He claims that the UNDP has confirmed the absence of irregularities in this case. He questions why OAI started this investigation and what was the motivation.

45. Mr. Mihyar insists that he should not be subject to any sanctions because he was following the directives of his supervisor.

46. Mr. Mihyar submits that he has undergone acute stress from this process which dates back to 2016, with the investigation ending in 2019, and this has had an adverse psychological impact on his well-being.

47. Mr. Mihyar concludes that he should not be subject to any unwarranted sanctions so that his professional standing can be safeguarded.

The Secretary-General's Answer

48. The Secretary-General recalls that the Prior UNDT Judgment was not appealed by either party, and thus neither party can relitigate the Dispute Tribunal's findings in that case. These findings include that the facts upon which the sanction was based were established to the requisite standard, that they amounted to misconduct, and that Mr. Mihyar's due process rights were respected.

49. The Secretary-General argues that the UNDT correctly noted that the Administration had provided a thorough analysis of sanctions in comparable cases and gave a detailed explanation as to how this past practice had been taken into account in imposing the sanction on Mr. Mihyar.

50. The Secretary-General submits that the UNDT confirmed that the Administration properly identified and considered the applicable aggravating and mitigating factors and explained how they had been taken into account.

51. The Secretary-General submits that the UNDT properly declined to interfere with the sanction imposed by the Administration, in light of the Secretary-General's recognized broad discretion in disciplinary matters.

52. The Secretary-General argues that Mr. Mihyar has failed to demonstrate any error on the part of the UNDT and instead seeks to impermissibly relitigate his case before the UNAT.

53. The Secretary-General points out that Mr. Mihyar argues about the Dispute Tribunal not giving any weight to certain factors in the Prior UNDT Judgment, and that he also asserts that he did not commit any misconduct and should not be subject to *any* disciplinary measure.

The Secretary-General emphasizes that the fact that Mr. Mihyar committed misconduct was not in dispute in the impugned Judgment, and also cannot be challenged on appeal.

54. The Secretary-General notes that Mr. Mihyar complains that statements from crucial witnesses that would have justified his actions were not taken, and that he seeks to bring into question the motives of OAI. The Secretary-General submits that the conduct of the investigatory and disciplinary process were not before the UNDT in the impugned Judgment. The finding that his due process rights were respected was in the Prior UNDT Judgment and cannot be challenged in this appeal.

55. The Secretary-General submits that the UNDT did not err in affirming the Administration's reimposition of the same sanction. The Administration was not precluded from determining that the same sanction was proportionate to Mr. Mihyar's misconduct after reconsidering all relevant aggravating and mitigating factors.

56. The Secretary-General requests the Appeals Tribunal to dismiss the appeal in its entirety.

Considerations

Oral hearing

57. Mr. Mihyar requested an oral hearing to "present the significant impact of unfair decision on his career, well-being and health in relation to this case".²⁷

58. Oral hearings are governed by Article 8(3) of Appeals Tribunal Statute (Statute) and Article 18 (1) of Appeals Tribunal Rules of Procedure (Rules). According to this framework, the UNAT has discretion to determine whether to hold an oral hearing or not with the aim to deal with the case efficiently and fairly. In this case, Mr. Mihyar has offered no additional evidence and argument beyond his pleadings before the UNDT. He has presented his view in his submission and attached annex files to this Tribunal. Accordingly, we do not see that an oral hearing would "assist in the expeditious and fair disposal of the case".²⁸ His request for an oral hearing is therefore denied.

²⁷ Appeal form, p. 4.

²⁸ Rules, Article 18 (1).

May Mr. Mihyar challenge the disciplinary process or the misconduct findings from the Prior UNDT Judgment in this appeal?

59. In his appeal brief, Mr. Mihyar dedicates several sections (Sections III through VII) to the Prior UNDT Judgment.

60. Article 11(3) of Dispute Tribunal Statute (UNDT Statute) provides:

The judgements and orders of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the statute of the United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal.

61. In *Chernov*,²⁹ we decided that, “a staff member cannot bring the same case twice before the UNDT. As the matter had already been decided in the impugned Judgment No. 1, Mr. Chernov’s second application is not receivable under the doctrine of *res judicata* and has to be dismissed”.

62. Similarly here, the Prior UNDT Judgment was not appealed by either party. It is binding upon the parties as evidenced by the Administration’s compliance with the Prior UNDT Judgment in issuing another administrative decision in the revised 2022 Sanction Letter. Thus, Mr. Mihyar cannot relitigate the Dispute Tribunal’s findings in the Prior UNDT Judgment. He is estopped from raising that issue in the application in this case.

63. In fact, the Administration issued the revised 2022 Sanction Letter in response to the Prior UNDT Judgment on 18 October 2022. Mr. Mihyar challenged this administrative decision in the present case and the UNDT delivered the impugned Judgment. Therefore, the issue in this case is the following.

Did the UNDT err in concluding that the Administration’s chosen sanction was proportionate to the misconduct?

64. Staff Rule 10.3(b) provides:³⁰

²⁹*Andrey Chernov v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1320, para. 70.

³⁰ Secretary-General’s Bulletin ST/SGB/2018/1/Rev. 2 (Staff Regulations and Rules of the United Nations).

Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of the staff member's misconduct.

65. Under the fundamental principle well-established by the jurisprudence of this Tribunal, deference is given to the broad discretion of the Administration when it comes to the choice of disciplinary sanction; however, the discretionary authority of the Administration is not unfettered. "The Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee are implied in every contract of employment. Both parties must act reasonably and in good faith."³¹

66. Concerning the prerogative of Administration in imposing a disciplinary sanction, we said in *Moya*:³²

... It follows from the reasoning of the quoted jurisprudence that the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case and to the actions and behaviour of the staff member involved.

... This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration which carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures: a sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance, etc.

... That is why only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, that the judicial review would conclude in its unlawfulness and change the consequence (i.e., by imposing a different one). This rationale is followed in the jurisprudence of this Tribunal. If that is not the case, judicial review should not interfere with administrative discretion.

67. As also stated by the Appeals Tribunal in *Rajan*, a decision on the appropriate sanction for misconduct involves a "value-judgment and the consideration of a range of factors. (...) The

³¹ *Marina Mancinelli v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1339, para. 60.

³² *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 19-21.

most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency”.³³

68. Mr. Mihyar argues that in reimposing the same sanction, the Secretary-General failed to adhere to past practice and neglected to consider all pertinent aggravating and mitigating factors. In the impugned Judgment, the Dispute Tribunal analyzed “whether the sanction imposed was consistent with past practice” and “whether the Administration properly considered aggravating and mitigating factors” in detail, which is the main part of the Judgment in consideration. The UNDT rejected Mr. Mihyar’s arguments and was satisfied that the Administration had properly considered previous cases involving comparable misconduct, as well as all aggravating and mitigating factors. Mr. Mihyar’s re-argument in this regard is without merit.

Mitigating factors

69. Mr. Mihyar alleged in his submissions that there were three mitigating factors which had been omitted by the Administration, namely, his long years of service, lack of financial gain on his side, and his acting under the instructions of his supervisor, but which were supposed to play a part. However, we find that in the 2022 Sanction Letter all three factors were considered by the Administration, but just not to the extent that Mr. Mihyar wished. Unfortunately, as his acts of misconduct were of a serious nature, these factors, while relevant to the sanction to be imposed, could not reduce its severity to the extent that he submitted they should.

70. First, Staff Regulation 1.2(b) makes it clear that, as a “core value” of the Organization, staff members shall uphold the highest standards of integrity. This concept includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status. As a general rule, any form of dishonest conduct compromises the necessary relationship of trust between employer and employee and will generally warrant a disciplinary sanction or even a dismissal, if necessary.³⁴ By illegally interfering with the recruitment process, and failing to report the misconduct of his supervisor, Mr. Mihyar violated his

³³ *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 48.

³⁴ *Ibid.*, para. 37.

fundamental obligations of integrity and honesty under the United Nations Charter and the Staff Regulations and Rules.

71. Second, as the preeminent international organization, the United Nations is supposed to be administrated in a credible and transparent way. Improper manipulation of the recruitment process at issue undermined the credibility of this Organization. To this extent, such immaterial loss may have imposed more severe impacts on the Organization than any financial loss.

72. Third, as a staff member with long service and having been involved previously in recruiting exercises, Mr. Mihyar should have been familiar with the Organization's regulations. That is to say, long service and recruiting experience could not only be considered as a mitigating factor, but might also act as an aggravating factor, as Mr. Mihyar is expected to perform at a higher standard in light of his cumulative working experience in the Organization. Nonetheless, we are sympathetic to Mr. Mihyar's claim that his long years of service should not have been considered "inapplicable", as the Administration determined in this case. We note that in the 2022 Sanction Letter several of the comparable cases that the Administration used to support the discipline imposed, expressly included "long service" as a mitigating factor.³⁵ Thus, the Administration's finding that long service was "inapplicable" is not consistent with the Administration's usual practice nor with the Dispute Tribunal's guidance in the Prior UNDT Judgment. However, for the reasons elaborated below, we do not find this to be reversible error by the UNDT in the impugned Judgment.

73. Mr. Mihyar also alleged that he was the only person subject to disciplinary measures for the misconduct at issue. On the contrary, as the UNDT found, Mr. Mihyar's supervisor was subject to a separate investigation and disciplinary process but may have left the Organization before this disciplinary process was completed. Furthermore, Mr. Mihyar must accept the consequences of his own deeds. Whether other persons involved have been punished or not may not serve as a mitigating factor for his own disciplinary sanctions, although it may still be an independent proportionality factor to be taken into account.

74. Therefore, although we disagree with the Administration's treatment of the "long service" factor, when one takes all of the factors into consideration, we find insufficient basis

³⁵ 2022 Sanction Letter, p. 10, footnote 34. See, e.g., case reference no. 553 (2020), case reference 537 (2020).

to interfere with the sanction and, as he appears to wish, to excuse Mr. Mihyar from the established misconduct. The UNDT correctly highlighted that “the Administration’s consideration of certain factors as mitigating factors does not automatically result in a less severe sanction because the decision-maker must weigh and balance all the circumstances of the case and all the relevant factors when choosing the appropriate sanction”.³⁶

Aggravating factors

75. As we discussed above, Mr. Mihyar performed contrary to the most basic and minimum standards that staff members are expected to meet, and thereby undermined the credibility and reputation of the Organization. The misconduct constituted two violations of the Staff Regulations and Rules which attracted a stricter disciplinary sanction than if it had been a single breach.

76. Although it does not affect our ultimate disposition of the appeal, we strongly disagree with the Administration’s consideration of Mr. Mihyar’s statements at the CMD in the litigation underlying the Prior UNDT Judgment in its proportionality analysis in the 2022 Sanction Letter. In this Letter, as regards the factor “whether the conduct involves fraudulent, deceptive or manipulative acts or statements” the Administration stated the following:

Mr. Mihyar was untruthful in connection with his conduct during the investigation and the disciplinary process, and recanted on his denials before the UNDT.

As discussed in the Prior UNDT Judgment, at the CMD, Mr. Mihyar no longer disputed some of the material events that were the subject of the investigation and admitted to moving a candidate that HR had rejected as “not under consideration” to the long list, and eventually the short list. Moreover, he admitted to sharing the log-in details for the UNDP HR platform with his supervisor, who was not authorized to access the platform. These admissions were contrary to his sworn statements to OAI during the investigation, which led to the above-mentioned finding by the Administration.

77. It was not appropriate for the Administration to use these admissions against Mr. Mihyar in the 2022 Sanction Letter. The Administration’s finding amounts to a serious accusation of perjury, and Mr. Mihyar was entitled as a matter of natural justice to address and respond to this allegation. Moreover, the Administration should not have used what transpired

³⁶ Impugned Judgment, para. 49.

at the CMD, which occurred after the misconduct and the administrative decision in question, as an *ex post facto* reason in its proportionality analysis.

78. Nonetheless, the proportionality analysis conducted by the Administration looked at a total of eighteen factors, and thus the erroneous inclusion of this one factor among eighteen cannot disturb the ultimate outcome.

Past practice

79. First, we recognize that in the 2022 Sanction Letter, the Administration provided fifteen analogous cases of disciplinary measures while highlighting their similarities and differences. Then it came to the conclusion that the misconduct at issue deserved the imposed sanction. While it might have been helpful to Mr. Mihyar's acceptance of the decision for the Administration to have expressly explained how Mr. Mihyar's case differed from the two cases identified by the UNDT in the Prior UNDT Judgment,³⁷ for our purposes, the important point is that the Administration did take these two examples into account.

80. Second, we are of the view that the evaluation of relevant factors in a disciplinary case is delicate work. As complex factual circumstances vary in different cases and the ranking of values which the Organization attached importance to may change over time, we agree that it is well within the discretion of the Administration to reach different conclusions from case to case since it is the Administration who carries out every specific administrative action and deals with the staff members. Therefore, we are convinced that the previous cases had been taken into account by the Administration and could not invalidate the contested decision.

81. Furthermore, as stated in *Ilic*, "the appellant has the burden of satisfying the Appeals Tribunal that the judgment rendered by the Dispute Tribunal is defective".³⁸ However, Mr. Mihyar failed to do this. As shown by the foregoing, although the final sanctions imposed in the 2022 Sanction Letter were the same as those in the 2020 Sanction Letter, we find that the challenged process here was not a simple repetition of the disciplinary process in 2020. In reconsidering the disciplinary measures imposed on Mr. Mihyar, the Administration fully followed the UNDT's instruction in the Prior UNDT Judgment, and after analyzing in detail all relevant factors including mitigating and aggravating ones and comparing with the past

³⁷ Prior UNDT Judgment, para. 65. See also 2022 Sanction Letter, Annex 1, para. 24, footnote 34 (Reference No. 267 (2016) and Reference No. 379 (2017)).

³⁸ *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051, para. 29.

practice of the Administration in like cases, imposed a sanction proportionate to the misconduct of Mr. Mihyar.

82. As elaborated above, while we have some concerns about how the Administration approached certain factors, we are mindful of the high bar for interfering with the Administration's disciplinary decision. In the oft-cited *Samandarov* Judgment, we expressed the standard for interference as requiring the sanction to be "blatantly illegal" or "absurd in its severity".³⁹ Despite the errors identified, we cannot say that they render the disciplinary decision in this case either illegal or absurd. The imposed sanction was still within a reasonable range of disciplinary measures available to the Administration.

83. Furthermore, the appeal is not an opportunity to reargue the case with the same arguments already presented before the UNDT. As we confirmed in *Branglidor*, "the Appeals Tribunal is not an instance for a party to reargue the case without identifying the defects and demonstrating on which grounds an impugned Dispute Tribunal judgment is erroneous".⁴⁰

84. In conclusion, with the aim to guarantee a satisfactory performance of all staff members in the Organization and by balancing the pertinent factors, the Administration properly conducted the disciplinary decision-making process and abided by the principle of proportionality of disciplinary measures. Accordingly, the impugned Judgment correctly found that the contested decision was made with due consideration.

Remedy

85. Since no irregularity or invalidity in the contested decision has been found, we agree with the UNDT that Mr. Mihyar is not entitled to any remedies in this case.

³⁹ *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, para. 25.

⁴⁰ *Gabriel Vincent Branglidor v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1234, para. 62 (citing *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-711, and *Aliko v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-540, paras. 28-29).

Judgment

86. Mr. Mihyar's appeal is dismissed, and Judgment No. UNDT/2023/040 is hereby affirmed.

Original and Authoritative Version: English

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

(Signed)

Judge Gao, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Sandhu

Judgment published and entered into the Register on this 1st day of August 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar