UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1490

John Gerald O'Brien

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Abdelmohsen Sheha, Presiding Judge Gao Xiaoli Judge Leslie F. Forbang
Case No.:	2023-1876
Date of Decision:	25 October 2024
Date of Publication:	3 December 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Francisca Lagos Pola

JUDGE ABDELMOHSEN SHEHA, PRESIDING.

1. Mr. John Gerald O'Brien, a former staff member of the United Nations Development Programme (UNDP), contested a disciplinary decision to separate him from service with compensation in lieu of notice and without termination indemnity for the following acts of misconduct:

(i) improper use of his UNDP-issued laptop to access websites which contained pornography and other sexually explicit material and advertised escort services (count one);

(ii) engaging in multiple instances of unauthorized outside activities: (1) held the position of the majority shareholder and the Director of a company named Carbon Market Solutions (CMS), (2) established another company named New Sun Solar Limited (NSS), in which he held a controlling interest and acted as one of the Directors, (3) participated, through CMS, in a commercial venture to establish a EUR 2,000,000 solar energy project in Ukraine, and (4) prepared a bid for and participated in providing advisory services by CMS (count two);

(iii) not disclosing multiple instances of potential conflict of interest that arose due to the unauthorized outside activities (count three); and

(iv) knowingly making a false statement and providing false documents to investigators of the Office of Audit and Investigations (OAI) (count four).

2. By Judgment No. UNDT/2023/110 (impugned Judgment),[1] the United Nations Dispute Tribunal (UNDT) dismissed the application on the merits.

3. Mr. O'Brien lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).

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

Facts and Procedure[2]

5. Mr. O'Brien joined UNDP in September 2009.

[1] *O'Brien v. Secretary-General of the United Nations*, Judgment dated 2 October 2023.
[2] Summarized from the impugned Judgment as relevant to the appeal.

6. Upon joining UNDP, Mr. O'Brien remained the majority shareholder in CMS.[3]

7. At the time of the material events, he served as Regional Technical Adviser, Bureau for Policy and Programme Support (BPPS), Istanbul Regional Hub of UNDP, working in the field of climate change mitigation.[4] In this role, he secured funding for projects from the Global Environment Facility (GEF) and the Green Climate Fund (GCF), and supported the implementation of related projects through various implementation partners. His portfolio of projects on climate change mitigation primarily involved the energy sector and included projects relating to emissions, trading, and sustainable energy.

8. In 2016, Mr. O'Brien became the sole Director of CMS.[5] The business of CMS included trading carbon credits in New Zealand and internationally, advisory services including carbon assessments and carbon offsetting for companies in New Zealand, and private investments in projects with returns from carbon credits.[6]

9. Apart from the events that are the subject of the present case, in Spring 2018, various staff members made allegations that Mr. O'Brien had viewed sexually explicit images on his smartphone during a workshop held on 27 March 2018 in Paris.[7] Based on those allegations, OAI launched an investigation and found the allegations substantiated.[8] However, on 18 October 2019, the Administration decided that there was insufficient evidence to charge him with misconduct.[9] On 6 January 2020, the Director of OAI decided that an independent review of that investigation, as requested by Mr. O'Brien, was not warranted.[10] The UNDT dismissed his application contesting that decision of the Director of OAI.[11] The Appeals Tribunal later affirmed the UNDT Judgment.[12]

[3] Impugned Judgment, para. 48.
[4] *Ibid.*, para. 75.
[5] *Ibid.*, para. 48.
[6] *Ibid.*, para. 76.
[7] *John O'Brien v. Secretary-General of the United Nations (O'Brien I)*, Judgment No. 2023-UNAT-1313, para. 3.
[8] *Ibid.*, paras. 3 and 6. At the time of that investigation, Mr. O'Brien submitted a request for protection against retaliation to the UNDP Ethics Office based on him having raised allegations of corruption with regard to the UNDP Global Environment Facility (GEF) in 2017 (*O'Brien I* Judgment, *op. cit.*, para. 4) but the Director of the UNDP Ethics Office informed him that a *prima facie* case of retaliation was not supported (*ibid.*, para 5).
[9] *O'Brien I* Judgment, *op. cit.*, paras. 7 and 25.
[10] *Ibid.*, paras. 8-9.
[11] *O'Brien v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/166; *see also O'Brien I* Judgment, *op. cit.*, para. 9.
[12] *O'Brien I* Judgment, *op. cit.*, para. 33.

10. On 30 January, 8, 13, 16, and 20 February, and 7, 15, 17, and 22 March 2018, Mr. O'Brien accessed pornographic websites during core working hours, i.e., between 10 a.m. and 4 p.m., using his UNDP-issued laptop.[13] Between 30 January and 29 March 2018, he also used it to view websites that contained other sexually-explicit material and advertised escort services (escort websites).[14]

11. On 28 March 2018 and 30 August 2018, proposals of CMS, which were signed by Mr. O'Brien as its Director, were submitted to the Cook Islands Ports Authority (Ports Authority) to carry out advisory services, namely a carbon assessment in Rarotonga, Cook Islands.[15] The proposals named Mr. O'Brien as a member of the CMS team to carry out that assessment. One or more of those proposals included his biography, which referred to his experience with UNDP. On or about 23 January 2019, he visited Rarotonga and discussed the draft report of CMS with the Chief Executive Officer (CEO) of the Ports Authority.

12. On 21 January 2019, Mr. O'Brien incorporated NSS in New Zealand and held an interest in that company through its holding company, CMS.[16] He was one of the two Directors of NSS. NSS had planned to invest in solar energy in Ukraine but eventually only invested in shares of a publicly-listed solar company in the United States. As a Director of NSS, on 18 July 2019, he filed an updated Particulars of Shareholding with the New Zealand Companies Register and on 12 June 2020, he filed an Annual Return for that company.

The investigation and disciplinary process

13. During Mr. O'Brien's second OAI interview on 30 June 2020, he denied that he had been involved in carrying out the carbon assessment for the Ports Authority, or that he had met the CEO of the Ports Authority in this respect, and stated that in November 2018 he had not travelled to Rarotonga with the CMS team.[17]

14. When requested by the investigators to provide them with the revised proposal of CMS, Mr. O'Brien indicated to them that the document attached to his e-mail of 3 July 2020 was the

[13] Impugned Judgment, para. 38.
[14] *Ibid.*, paras. 37, 40.
[15] *Ibid.*, paras. 67-69. Cook Islands Ports Authority manages the international ports in the Cook Islands, including the port on Rarotonga.
[16] Impugned Judgment, paras. 63-65.
[17] *Ibid.*, paras. 80-81 and 83.

final version of the proposal submitted to the Ports Authority.[18] That version had no reference to him. The CEO of the Ports Authority provided the investigators with the final proposal submitted by CMS, which was different from the one provided by Mr. O'Brien: it indicated him as the contact person and was signed by him.

15. By the first charge letter dated 26 October 2021, the Assistant Secretary-General (ASG), Assistant Administrator and Director (AAD), Bureau for Management Services (BMS), UNDP, informed Mr. O'Brien that he was being charged on the four counts of misconduct.[19] During the review of his comments, OAI discovered an error in its forensic examination of his UNDP-issued laptop, re-extracted data using additional forensic tools, and prepared a supplementary forensic report dated 25 January 2022.[20] By the updated charge letter dated 10 February 2022, addressing count one, the ASG informed Mr. O'Brien that the updated evidence was sufficient to maintain the charge.[21]

16. On 25 March 2022, Mr. O'Brien was informed of the contested decision.[22] In the Sanction Letter, the Associate Administrator, UNDP, noted that he had breached (i) Staff Regulation 1.2(q) and paragraphs 7 and 9 of the UNDP ICT Policy[23] in count one; (ii) Staff Regulations 1.2(o) and 1.2(p) and Staff Rules 1.2(s) and 1.2(t) in count two; (iii) Staff Regulation 1.2(m) and Staff Rule 1.2(q) in count three; and (iv) Staff Regulation 1.2(b) in count four.[24]

17. Finding that Mr. O'Brien's admissions were limited and, in some cases, inconsistent and that he had not shown to appreciate the seriousness of his misconduct, the Associate Administrator rejected Mr. O'Brien's claims that the infrequency of accessing the websites in question, the lack of harm caused by accessing such websites, his apologies and expressions of remorse and lack of ill intent were mitigating factors.[25] The Sanction Letter stated:[26]

> You are a relatively senior professional staff member at the P4 level, and you have managerial responsibilities (…).

[18] *Ibid.*, paras. 85-86.
[19] *Ibid.*, para. 3.
[20] *Ibid.*, para. 5.
[21] *Ibid.*, para. 6.
[22] *Ibid.*, para. 8.
[23] UNDP Policy titled "Bring Your Own Devices and Acceptable Usage of UNDP ICT Resources", version #8, 26 July 2026.
[24] Sanction Letter, Sections A-D.
[25] *Ibid.*, Section F.
[26] *Ibid.*

> An aggravating factor is that you have engaged in four separate forms of misconduct, including one instance of dishonesty, and engaged in multiple instances of two forms of misconduct (…). The length of time that you have engaged in misconduct is also material: (…) over 10 years, since you joined UNDP in 2009. Your unauthorized outside activities and potential conflict of interest are in (…) the same field in which you work for UNDP, and your potential conflicts of interest may have a negative impact on the reputation of UNDP.
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> …
>
> (…) It also bears noting that your total period of service with UNDP is over 12 years. [Y]our length of service (…) as a mitigating factor is largely negated by your misconduct for most of the period of service, and by the fact that, given your length of service, you should have known better.

18. On 21 June 2022, Mr. O'Brien filed the application challenging the contested decision.[27]

The impugned Judgment

19. By Judgment No. UNDT/2023/110 dated 2 October 2023, the UNDT dismissed the application.

20. The UNDT found that Mr. O'Brien's admission that he may have occasionally used the UNDP-issued laptop to visit the websites in question in his free time affirmed the integrity of the forensic evidence.[28] Contradictions in his explanations and the sequence of events render his assertion that third persons may have been responsible for viewing the inappropriate content questionable. Count one has been established by clear and convincing evidence.

21. Turning to count two, the UNDT held that since the role of a Director is to manage the business of a company, directorship constituted employment.[29] Based on this alone, Mr. O'Brien's admissions are a concession that he engaged in outside activities.

22. Moreover, with regard to his directorship at CMS, the UNDT was of the view that Mr. O'Brien's reliance on an alleged approval and advice from a Human Resources Advisor (HRA) back in 2009 regarding Staff Regulations and Rules concerning outside activities had been misplaced.[30] He does not dispute that any approval of outside activities was to be sought from the Director, Office of Human Resources (OHR), and upon a recommendation from the UNDP Ethics

[27] Impugned Judgment, para. 9.
[28] *Ibid.*, paras. 33-40.
[29] *Ibid.*, paras. 48 and 63.
[30] *Ibid.*, paras. 49-56.

Office.[31] Even if the advice from July 2009 were correct, he should have sought additional advice in 2016 when his standing in CMS changed and he became its sole Director, thus rendering void his former resignation. However, he did not.

23. Further to Mr. O'Brien's activities in relation to NSS, the UNDT found that he had not denied them.[32] He executed those activities as a Director of the company.

24. Concerning his alleged participation through CMS, in a commercial venture to establish a EUR 2,000,000 solar energy project in Ukraine, the UNDT found that the alleged misconduct was not established by clear and convincing evidence.[33]

25. On the last outside activity, the UNDT noted that Mr. O'Brien's categorization of the decision to visit Rarotonga as an error of judgment did not negate that he had participated in the successful bid of CMS to carry out a carbon assessment for the Ports Authority, and in the subsequent carbon assessment.[34] The charges were proved by clear and convincing evidence.

26. Turning to count three, the UNDT held that there was an overlap between Mr. O'Brien's UNDP portfolio and his outside activities.[35] His dual roles of Director/majority shareholder in CMS and of Regional Technical Advisor performing functions on climate change mitigation in UNDP could reasonably be perceived as problematic by a neutral observer in that he might have used his office for personal or third parties' gain.[36]

27. In respect of count four, the UNDT found that Mr. O'Brien's oral evidence at the hearing contradicted his earlier explanation about the content of his statements made to the OAI investigators.[37] His explanations were not credible. The statement of the CEO of the Ports Authority supports the fact that Mr. O'Brien met him in the context of the carbon assessment. The CEO of the Ports Authority had no reason to lie, and his evidence was therefore credible. Concerning the allegation that Mr. O'Brien provided a false document to the investigators, it was

[31] Referring to its finding that Mr. O'Brien had not declared the full extent of his shareholding in CMS, the UNDT noted that any advice he received based on incomplete information could not be blamed on the Organization.
[32] Impugned Judgment, paras. 63-66.
[33] *Ibid.*, para. 61.
[34] *Ibid.*, paras. 67-69.
[35] *Ibid.*, paras. 74-79.
[36] The UNDT noted that Mr. O'Brien's participation in the successful bid of CMS for the carbon assessment for the Ports Authority, during which his biography and role at UNDP were displayed, was a graphic illustration of such conflict.
[37] Impugned Judgment, paras. 81-87.

found that he does not dispute the evidence. Therefore, it is established that he knowingly made false statements and misled OAI investigators with respect to the proposal of CMS to the Ports Authority.

28. The UNDT was of the view that Mr. O'Brien's acts constituted misconduct: improper use of the UNDP-issued laptop had violated Staff Regulations 1.2(b) and 1.2(q); failure to obtain approval to hold a controlling interest in and the position of the Director of CMS as well as approval to incorporate NSS and conduct activities on its behalf had breached his obligations under Staff Regulations 1.2(o) and 1.2(p) and Staff Rules 1.2(s) and 1.2(t); failure to seek prior approval before participating in the successful bid of CMS for carbon assessment for the Ports Authority had been a breach of his obligations under Staff Regulation 1.2(p); engagement in the unauthorized outside activities had given rise to potential conflicts of interest, in violation of paragraph 23 of the Standards of Conduct for the International Civil Service, Staff Rule 1.2(q) and Staff Regulation 1.2(m); failure in his duty to fully cooperate with a duly authorized investigation and to release a document under his control as requested had violated Staff Rule 1.2(c) and Staff Regulation 1.2(r); and he had also breached the required standard of integrity under Staff Regulation 1.2(b).[38]

29. The UNDT held that declaring his ownership and investment in CMS, which Mr. O'Brien had been legally obliged to do, was not a mitigating factor.[39] There is no nexus between his claims of retaliation, which are related to the first investigation, and the investigation that culminated in the instant proceedings. His "admissions of misconduct", apologies, and expressions of remorse are not mitigating factors since he mostly denies that he engaged in any wrongdoing. His misconduct is very serious. The aggravating factors outweigh any mitigation that could be available to him. The disciplinary measure is in line with established jurisprudence and past UNDT practice. The Appeals Tribunal has recognized that serious cases of unauthorized outside activities, conflict of interest, and dishonesty warrant termination of appointment.

30. Lastly, the UNDT found that Mr. O'Brien's due process rights had been respected throughout the investigation and disciplinary process.[40] He was provided with the charge letter

[38] *Ibid.*, paras. 92, 96, 98 and 101.
[39] *Ibid.*, paras. 105-111.
[40] *Ibid.*, paras. 112-114.

and the supporting documentation and was given the opportunity to comment on the allegations and provide countervailing evidence, and his comments were duly considered.

Procedure before the Appeals Tribunal

31. On 1 December 2023, Mr. O'Brien filed an appeal of the impugned Judgment with the Appeals Tribunal, to which the Secretary-General filed an answer on 9 February 2024.

Submissions

Mr. O'Brien's Appeal

32. Mr. O'Brien requests the Appeals Tribunal to reverse the impugned Judgment and order the following remedies: acknowledgement and a letter of apology from the Secretary-General;[41] an Agreed Separation Agreement including an indemnity in the amount of 50 per cent above what would be paid in accordance with Annex III to the Staff Regulations, or compensation in the equivalent amount; compensation for all his legal fees; compensation in the amount of two years' net base salary for abuse of process and moral damage; and removal of adverse material from his Personal File. He also seeks a finding by the Appeals Tribunal ("acceptance") that he did not make a false statement or provide a false document to OAI.

33. Mr. O'Brien argues that the UNDT failed to consider multiple procedural irregularities and the incompetence and bias in the OAI investigations, which had been carried out with management interference and false statements and without respecting due process.[42] The UNDT was incorrect to conclude that his due process rights had been respected in the investigations. The due process violations were a mitigating factor but the UNDT was unwilling to take any mitigating factors into consideration. The UNDT erred in determining that separation was the appropriate sanction.

34. Further to due process violations, Mr. O'Brien maintains that malicious reporting with fabricated evidence from anonymous individuals against him had taken place twice and counsel for the Secretary-General made false statements when denying that fact. Second, from 2018 to 2022, when OAI had possession of his UNDP-issued laptop, it was not provided to him to conduct

[41] Mr. O'Brien seeks the Secretary-General's acknowledgement that the OAI investigations into his acts were carried out with "bias, incompetence, and management interference" and that he was not offered due process.
[42] Mr. O'Brien submits that he is a recognized whistleblower who exposed corruption and cover-up in UNDP and appeared in a June 2022 BBC documentary titled "Inside the UN: the Whistleblowers".

his own forensic analysis, despite multiple requests. Third, the bias of the Secretary-General and of the UNDT is apparent in accepting the OAI's repeated attempts to interview his girlfriend, a terminally-ill person, in a hospital which amounted to intrusive, disgusting, repugnant harassment and unacceptable bullying.

35. Construing that the charges about watching the inappropriate video content in the office were used as a reason for the sanction of separation, Mr. O'Brien contends that the disciplinary measure imposed for count one was disproportionate.[43] Despite the mistake in the original charge, the discovery of links to inappropriate websites was still used as one reason to justify separation. The Secretary-General removed this false claim only in January 2022 and such protracted incompetence raises the question of what other mistakes OAI may have made. Furthermore, possible access to such material in a private setting, where nobody is harmed, is hardly a case for separation. There was no malice, bad faith or intent to harm.

36. With regard to count two and count three, Mr. O'Brien submits that the UNDT was wrong not to have considered, as a mitigating factor, the fact that he had been told in 2009 by UNDP that he did not need to declare CMS and that it was not a conflict of interest.[44] There are multiple incorrect statements in the charge letter and in the impugned Judgment. A non-Executive Director does not run a company. His involvement in CMS and NSS was an investment and not an outside activity. The UNDT has provided no explanation as to why a neutral observer might construe it as a potential conflict of interest. Investing in forestry and carbon credits in New Zealand has nothing to do with the work of UNDP.

37. In respect of count four, Mr. O'Brien argues that in the impugned Judgment, the UNDT provided no evidence for and erred in its conclusion that he had knowingly made false statements to the OAI investigators. He has maintained and shared proof that when the work was won, he did not form part of the team that carried out the work.[45] In addition to ignoring the testimonies of witnesses A, K and U, it also ignored the evidence of CB.

[43] Mr. O'Brian draws a comparison to *Massah v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-274.
[44] Mr. O'Brien refers to the testimonies of witnesses A, K and U, heard at the UNDT hearing in July 2023. He simultaneously asserts that he declared his engagement in CMS when he joined UNDP.
[45] Mr. O'Brien refers to the written statement of CB who "travelled to Rarotonga to replace Mr. John O'Brien who was unable to travel to Rarotonga in November [2018] to carry out the work" and CB confirms that Mr. O'Brien "was not present while the work was being carried out".

The Secretary-General's Answer

38. The Secretary-General requests the Appeals Tribunal to dismiss the appeal and affirm the impugned Judgment.

39. The Secretary-General argues that the UNDT correctly determined that the disciplinary measure was lawful. Mr. O'Brien has not established any errors warranting reversal of the impugned Judgment. His arguments are a mere repetition of what was considered by the UNDT.

40. The Secretary-General submits that the UNDT did not err in finding that Mr. O'Brien's due process rights had been respected during the investigation. A previous 2018 OAI investigation is unrelated to the present proceedings. Mr. O'Brien did not make a formal request for protection against retaliation with respect to any action in relation to the 2019 OAI investigation, nor has he submitted any relevant evidence showing that the 2019 investigation was improper or biased or that there was malicious reporting against him. Moreover, the additional forensic examination shows the extent of the fact-finding efforts and the absence of a predetermined conclusion. There is no evidence on the record of him requesting an opportunity to conduct his own forensic examination of his UNDP-issued laptop.

41. The Secretary-General contends that the UNDT's finding that Mr. O'Brien had made contradictory statements on his use of the UNDP-issued laptop does not invalidate the UNDT's conclusion that there was clear and convincing evidence of improper use. Furthermore, he admitted viewing the inappropriate material while he was off-duty.

42. The Secretary-General submits that the UNDT did not err in finding that UNDP had established by clear and convincing evidence that Mr. O'Brien had engaged in unauthorized outside activity. Even if this evidence were to show that he had disclosed his interest in CMS to his prospective supervisor, witness A, in 2009, this would not exempt him from his obligation of seeking the required authorization. An investment by NSS denotes a business activity, which means that NSS was not dormant.

43. The Secretary-General argues that the UNDT did not err in finding that Mr. O'Brien's involvement in CMS gave rise to a potential conflict of interest. There is nothing in A's witness statement or other evidence on record to support the assertion that witness A, his supervisor,

or OHR told him that there was no conflict of interest or that there was no need to speak to the Ethics Office. An e-mail submitted as additional evidence should not be admitted or considered.[46]

44. The Secretary-General maintains that the UNDT did not err in finding that it had been established that Mr. O'Brien had willingly made false statements or provided false documents to OAI investigators. His arguments are misleading as they fail to distinguish between the November 2018 trip[47] and the 2019 trip to Rarotonga, and between the 30 August 2018 proposal and the 31 August 2018 proposal to the Ports Authority.[48]

45. The Secretary-General contends that the UNDT did not err in its determination on the proportionality of the disciplinary measure. *Massah* does not provide persuasive guidance,[49] as in the present case the disciplinary measure was not imposed for count one alone. The considerations argued by Mr. O'Brien are not mitigating factors.

Considerations

46. Mr. O'Brien requested the UNAT to hold an oral hearing to further explain his contentions in greater detail.

47. We recall that this Tribunal is not a trial court. Under Article 2(4)(a) of its Statute, the UNAT relies on the written record of the case as it was before the lower court. Indeed, this Tribunal may exceptionally, pursuant to Article 8(3) of its Statute and Article 18(1) of its Rules of Procedure, decide to hold oral hearings when such hearings "would assist in the expeditious and fair disposal of the case". This is not the case when the factual and legal issues are clearly defined by the parties.[50]

[46] The Secretary-General also raises a concern of the authenticity and credibility of the e-mail as it purportedly appears to differ in its content from an e-mail presented by Mr. O'Brien in 2019 with the same date, time, recipients and subject line.
[47] The Secretary-General submits that during the 2018 trip, a crew of three people, which did not include Mr. O'Brien, conducted a preliminary carbon assessment, and the 2018 trip is not relevant to this case.
[48] The Secretary-General points out that the proposal Mr. O'Brien submitted to OAI (31 August 2018 version) as the final version accepted by the Ports Authority, had not been, in reality, the final proposal, as confirmed by the CEO of the Ports Authority.
[49] *Massah* Judgment, *op. cit.*
[50] *Ibrahim Bah v. Secretary-General of the United Nations*, Judgment No. 2024-UNAT-1437, para. 53.

48. In the present appeal, the factual and legal issues of Mr. O'Brien's case are clearly defined by the parties. Therefore, we find no need to hold an oral hearing. Mr. O'Brien's request for an oral hearing must be denied.

49. We turn now to the merits of the appeal.

50. Mr. O'Brien contends that the UNDT made several errors of fact, resulting in a manifestly unreasonable decision, and of law in concluding that the sanction imposed on him was based on, and proportionate to, the established misconduct, with full respect of due process.

51. We first recall our consistent jurisprudence in reviewing disciplinary sanctions. In *Ganbold*, we held that "the Tribunals will examine the following: (i) whether the facts on which the disciplinary measure is based have been established (where termination is a possible sanction, the facts must be established by clear and convincing evidence); (ii) whether the established facts amount to misconduct; (iii) whether the sanction is proportionate to the offence; and (iv) whether the staff member's due process rights were respected".[51]

52. We have also held in *Molari* that "when termination is a possible outcome, misconduct must be established by clear and convincing evidence. 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."[52]

53. Considering the multiple contentions made by Mr. O'Brien and their scope, we shall address each of them within the four-prong test adopted by this Tribunal in disciplinary matters.

Whether the UNDT erred in determining that the facts have been established

54. Mr. O'Brien was accused of four charges of misconduct. In the present appeal, he is trying to convince this Tribunal that the UNDT erred in its determinations that the facts of two of these charges, counts one and two respectively, were established to the clear and convincing evidence standard. We shall review the contentions related to each of these counts separately below.

[51] *Ganbold v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-976, para. 36 (internal citation omitted).
[52] *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 30.

(i) The improper use of UNDP-issued laptop to access websites which contained pornography and other sexually-explicit material and advertised escort services

55. Mr. O'Brien contends that the UNDT erred when it relied on the forensic report of the Secretary-General. He recalls that, upon his comments, a mistake was found therein, and the Secretary-General had to rectify the original report. In his view, the discovery of such a mistake undermines the reliability of the report.

56. We find no merit in this contention. The rectification of the original forensic report following the comments of the subject to the investigation is not proof that the totality of the forensic report is unreliable. It is rather proof that the Administration gave due regard to the subject's comments. Mr. O'Brien failed to prove that the forensic report after rectification was intrinsically unreliable. Hence, the UNDT did not err when it relied on that report.

57. Next, Mr. O'Brien claims that, contrary to the UNDT's findings, there was no inconsistency between his allegations that the OAI's forensic analysis was false, and his own admission that he used the IT equipment in his spare time to view pornographic material. Read within its context, we agree with the UNDT that there was indeed an inconsistency. The UNDT rightly found that by his own admission of using the UNDP-issued laptop to view pornographic material, Mr. O'Brien implicitly affirmed the integrity of the forensic analysis that he sought to challenge. We find no fault on the part of the UNDT.

(ii) The unauthorized outside activities

58. We recall that Mr. O'Brien was accused of four instances of unauthorized outside activities. In his appeal, he seeks to challenge the UNDT's findings of fact in three of these instances. We will address his contentions towards each of these findings below.

a. The activities under CMS

59. Mr. O'Brien contends that the UNDT erred when it disregarded the fact, established on the evidence of witnesses, that he had declared his shares and involvement in CMS before accepting to work for UNDP in 2009.

60. We disagree. The UNDT did not disregard the fact that he had asked for guidance from his colleagues at the relevant time of events. The Dispute Tribunal had, however, established

that Mr. O'Brien had not obtained approval to continue being the majority shareholder of CMS and its Director. This is, in essence, the fact upon which the unauthorized activity was established.

b. The activities in a commercial venture to establish a solar energy project

61. Mr. O'Brien makes several contentions against the UNDT's determinations in respect of the alleged misconduct that he participated in a venture to establish a EUR 2,000,000 solar project in Ukraine. However, we recall that the UNDT found that the alleged misconduct was not proven by clear and convincing evidence, and was thus not established. Therefore, we find no need to address Mr. O'Brien's contentions directed towards a finding that was advantageous to his case.

c. The activities under NSS

62. The UNDT held that by managing NSS through his directorship of CMS, Mr. O'Brien engaged in an unauthorized outside activity. The UNDT found that because NSS made an investment in the shares of a publicly-listed company in the United States, Mr. O'Brien's claim that NSS was dormant lacked merit.

63. Mr. O'Brien takes issue with these findings. He contends that there was no evidence suggesting that NSS had employees or earned revenues. He maintains that NSS was a dormant company that had no activity. In addition, he claims that NSS's purchase of shares in a publicly-listed company is merely a passive investment, not an outside activity.

64. We agree with the UNDT. We find that a company buying shares in other publicly-listed companies is strong evidence that the purchaser is not dormant. Investing in a publicly-listed company is in itself an activity of the purchasing company. This type of activity could even be the main commercial activity of investment entities and financial vehicles such as hedge funds. The UNDT had valid grounds to conclude that NSS had not been a dormant company.

65. In his second contention, Mr. O'Brien's seems to misrepresent the UNDT's findings with regard to his activities under NSS. The question before the UNDT was whether Mr. O'Brien had engaged in unauthorized outside activities by managing NSS, and whether NSS was a dormant company. The UNDT did not characterize NSS's actions as outside activities. The only conclusion of the UNDT, on which we agree, is that Mr. O'Brien

participated in the directorship of NSS that was an active company at the relevant time of events. Mr. O'Brien's arguments are, therefore, misplaced.

Whether the UNDT erred in determining that the established facts amounted to misconduct

66. Out of the four counts of established conduct, Mr. O'Brien challenges three as constituting misconduct. This goes to counts two, three and four. We shall review each of these challenges below.

(i) The unauthorized outside activities

67. Mr. O'Brien maintains that he resigned from the directorship of CMS in 2009 before joining UNDP. He further contends that his activity in CMS as a non-Executive Director was subsidiary to his passive investments in the company, and as such, it was permissible for him to undertake such activity that does not qualify as an unauthorized outside activity.

68. We recall that Staff Regulation 1.2 reads, in relevant part:[53]

> **Outside employment and activities**
>
> (o) Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General;
>
> (p) The Secretary-General may authorize staff members to engage in an outside occupation or employment, whether remunerated or not, if:
>
> (i) The outside occupation or employment does not conflict with the staff member's official functions or the status of an international civil servant;
>
> (ii) The outside occupation or employment is not against the interest of the United Nations; and
>
> (iii) The outside occupation or employment is permitted by local law at the duty station or where the occupation or employment occurs[.]

69. In the same vein, Staff Rule 1.2 provides, in relevant part:[54]

> **Outside employment and activities**
>
> (s) Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General.

[53] Secretary-General's Bulletin ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations).
[54] *Ibid.*

> (t) Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any outside activities that relate to the purpose, activities or interests of the United Nations. Outside activities include but are not limited to:
>
> (i) Issuing statements to the press, radio or other agencies of public information;
>
> (ii) Accepting speaking engagements;
>
> (iii) Taking part in film, theatre, radio or television productions;
>
> (iv) Submitting articles, books or other material for publication, or for any electronic dissemination.
>
> Approval may be granted in accordance with staff regulation 1.2 (p).

70. Furthermore, Administrative Instruction ST/AI/2000/13 (Outside Activities) provides, in relevant part:

> **Section 3. Outside occupation or employment**
>
> 3.1 Under staff regulation 1.2 (o), a staff member shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General. For the purposes of the present instruction, the expression "occupation" shall include the exercise of a profession, whether as an employee or an independent contractor.

71. It follows that Staff Regulations and Rules, and administrative instructions prohibit staff members from engaging in any outside employment or occupation, whether remunerated or not, without prior authorization from the Secretary-General.

72. Staff Regulations and Rules give no definition of an outside activity. Staff Rule 1.2(t) only provides examples of what constitutes an outside activity. It does not mention investments.

73. In our view, investment activities normally involve monetary contribution to buy shares in a project or purchase bonds or other similar financial products. As such, the investment is passive when it does not require involvement of the investor in managing the business he or she invested in. On the contrary, an active investment would occur when the investor becomes involved in managing the business, whether it be by being director, employee, or the like. This is the case when the staff member fulfils an advisory role or provides

material support to the functioning of the company.[55] In these cases, the staff member could be held accountable for carrying out an outside activity.

74. In Mr. O'Brien's case, it is not disputed that he contributed to the operations of CMS in the period from 2009 to 2016. The dispute is whether these operations were substantial, exceeding a mere passive investment. In this regard, even if we allowed Mr. O'Brien's allegation that a non-Executive Director does not participate in the day-to-day running of the company, this would not change the fact that his contributions to the overall running of the business were material, including, as admitted by Mr. O'Brien himself, being actively and directly involved in decisions about the strategic orientations of CMS, and filing statutory documents with the New Zealand Companies Office, such as tax returns. Indeed, when a Director, whether Executive or non-Executive, engages in filing tax declarations and the like, he or she does so on behalf, and in the interest, of the company, hence exercising one of its regular and vital activities to ensure the financial welfare of the company and compliance with the applicable law. This appears to be a subsidiary activity of directorship. Even unpaid, such activity, if done without approval, amounts to an unauthorized activity. Therefore, we agree with the UNDT that Mr. O'Brien had engaged in an unauthorized outside activity.

75. Mr. O'Brien argues that if filing tax returns is an outside activity, then all UNDP staff who own shares in public companies should be dismissed. We disagree. Filing tax returns or making tax declarations in an individual capacity must be distinguished from filing tax returns on behalf of a legal entity. If both acts represent compliance with the law, it stands without doubt that the former is an act to meet individual legal obligations, while the latter, be it periodical or not, represents an activity that is normally delegated to the persons in charge of managing the business.

76. In any case, it is not disputed that exercising the functions of the Executive Director of CMS was employment that represented an outside activity for which approval had to be obtained. In this regard, Mr. O'Brien challenges the UNDT's determination that he managed CMS after the resignation of its Executive Director in 2016 for lack of evidence. However, the case record shows that Mr. O'Brien's status in CMS had evolved following witness K's resignation from its directorship in 2016. There are three pieces of corroborating evidence that Mr. O'Brien assumed the role of Managing Director following witness K's resignation. The first

[55] *Koutang v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-374, paras. 2 and 27.

is the New Zealand Companies Register website that listed Mr. O'Brien as the sole Director of CMS after 2016. The second is a draft contract of CMS to the Ports Authority dated 30 August 2018, signed by Mr. O'Brien. This fact was not denied by him. Rather, he admitted that, in signing that document, he made "a mistake of judgment". In any event, in doing so, Mr. O'Brien had in fact admitted that, at the relevant time of events, he was the Director of CMS which was an active company. This fact is supported by a third piece of evidence. In his testimony before the UNDT, witness K stated that, to his knowledge, Mr. O'Brien as the major shareholder of CMS, and other minor shareholders were managing the company after K's resignation.[56] Taken cumulatively, the evidence strongly suggests that Mr. O'Brien was managing CMS from 2016 upwards. We find that the UNDT did not err when it found that such activity constituted misconduct which overrides all other arguments related to the role of non-Executive Director.

(ii) The conflict of interest

77. Mr. O'Brien contends that the UNDT erred when it considered that there was an overlap of his activities with CMS and his functions at the UNDP. He claims that there was absolutely no overlap as CMS was operating in forestry and carbon credits, and was established in New Zealand where the UNDP does not have an office. He maintains that, as such, the geographical and material scope of CMS's activities had nothing to do with those of GEF and GCF.

78. We recall that Staff Regulation 1.2 provides, in relevant part:[57]

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

79. In the same vein, Staff Rule 1.2 reads:[58]

[56] *Ibid.*
[57] ST/SGB/2018/1.
[58] *Ibid.*

> **Conflict of interest**
>
> (q) A staff member whose personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant shall disclose any such actual or possible interest to the head of office and, except as otherwise authorized by the Secretary-General, formally excuse himself or herself from participating with regard to any involvement in that matter which might give rise to a conflict of interest situation.

80. Furthermore, paragraph 23 of the Standards of Conduct for the International Civil Service, issued by the International Civil Service Commission (ICSC), reads:[59]

> Conflicts of interest may occur when an international civil servant's personal interests interfere with the performance of his/her official duties or call into question the qualities of integrity, independence and impartiality required the status of an international civil servant. *Conflicts of interest include circumstances in which international civil servants, directly or indirectly, may benefit improperly, or allow a third party to benefit improperly, from their association with their organization*. Conflicts of interest can arise from an international civil servant's personal or familial dealings with third parties, individuals, beneficiaries, or other institutions. If a conflict of interest or possible conflict of interest does arise, the conflict shall be disclosed, addressed and resolved in the best interest of the organization. Questions entailing a conflict of interest can be very sensitive and need to be treated with care.

81. In this regard, we recall that rules prohibiting conflicts of interest are a safeguard to the independence, impartiality, and integrity of international civil servants. These rules have evolved over the years, covering not only actual situations of direct or indirect conflicts of interest, but also situations of potential or perceived conflict. The approach has become increasingly preventive, acting against suspicions of partiality that could result from ambiguous situations in which the international civil servant chooses to place himself or herself. The rules governing conflicts of interest can, thus, be construed as being concerned with any objectively perceived partiality.

82. Staff members must, therefore, preclude themselves from entering situations where they entertain, or may be perceived to entertain, directly or indirectly, for their benefit, or for that of others, interests that compete with those of the Organization. When in doubt, the staff

[59] Emphasis added.

member must disclose the situation to the head of office, to be addressed and, eventually, resolved, in the ultimate interest of the Organization.

83. Therefore, for misconduct of conflict of interest to be established, it is sufficient for the Administration to prove that the staff member was in a non-disclosed situation that gave rise, for a fair-minded and informed observer, to a possible conflict of interest.

84. In the present case, we agree with the UNDT that Mr. O'Brien was indeed in a position of possible conflict of interest when he maintained his financial interests as a majority shareholder and Director of CMS. We recall that CMS's activity was in forestry and carbon credits, while Mr. O'Brien's portfolio of activities, as a Regional Technical Advisor on climate change mitigation, included securing funds for UNDP GEF and GCF. Although CMS was established in New Zealand, where the UNDP did not have an office, an average person would reasonably perceive the activities of CMS and those of Mr. O'Brien as overlapping, giving rise to at least a potential indirect conflict of interest.

85. We also agree with the UNDT that the following events confirmed the materialization of the potential conflict of interest. It is undisputed that Mr. O'Brien improperly benefitted from his status as staff member of UNDP to advance his proposal to the Ports Authority in 2018 that was related to carbon assessment—a field clearly related to Mr. O'Brien's area of work with UNDP. Albeit Mr. O'Brien's express remorse for that mistake, it stands that his receipt of the financial benefit without doubt materialized the conflict of interest, transforming it from a potential to an established one. For these reasons, we do not find that the UNDT erred.

86. Mr. O'Brien's argument that he had disclosed his involvement in CMS prior to his work with UNDP in 2009 is irrelevant. It was established that Mr. O'Brien became the sole Director of CMS in 2016 after the resignation of witness K. Thus, it was incumbent upon him to disclose that situation to UNDP. He did not do so and was therefore in a situation of conflict of interest, prohibited under Staff Regulation 1.2, Staff Rule 1.2, and the relevant Standards of Conduct for International Civil Servants.

87. Mr. O'Brien's contentions cannot, therefore, succeed.

(iii) Knowingly making a false statement and providing a false document to OAI investigators

88. In the impugned Judgment, the UNDT found it established by clear and convincing evidence that Mr. O'Brien had made misleading statements to OAI investigators, in denying his involvement in the activity of carbon assessment with the Ports Authority, and his meeting with its CEO. The UNDT also found that Mr. O'Brien had submitted a false document to the investigators by providing a copy of the alleged final proposal of CMS to the Ports Authority that did not have Mr. O'Brien's name on it. That document was contradicted by the Ports Authority's CEO who provided OAI investigators with another version of the final proposal that had the name of Mr. O'Brien as a contact person and bore his signature.

89. In his appeal, Mr. O'Brien takes issue with that determination. He contends that the evidence on record shows that it was witness K who had led the carbon assessment team of CMS to meet with the Ports Authority in November 2018. He argues that this should have been viewed as evidence that he was not involved in the carbon assessment.

90. We agree with the Secretary-General that Mr. O'Brien's argument is misleading. The question was not about the November 2018 visit to Rarotonga, but rather that of 23 January 2019 where Mr. O'Brien discussed the CMS proposal with the CEO of the Ports Authority. He did not contest that essential fact, which was posterior to the November 2018 visit. The visit was also proven by witness K's testimony before the UNDT.[60] Mr. O'Brien's argument is, therefore, irrelevant, misplaced, and misleading.

91. On another level, Mr. O'Brien maintained that multiple versions of the CMS proposals to the Ports Authority were made, as established by the evidence on record. In his view, this proves that the version of 31 August 2018 submitted to OAI was authentic.

92. Mr. O'Brien's argument is not persuasive. The question was not whether CMS made several proposals to the Ports Authority. It was rather whether the document submitted by Mr. O'Brien to OAI, and argued to be CMS's final proposal to the Ports Authority, was indeed the final proposal. We agree with the UNDT that the CEO of the Ports Authority had no reason to submit a false document against Mr. O'Brien. Unlike Mr. O'Brien's document, the document submitted by the CEO had Mr. O'Brien's name on it as a contact person and his signature. This

[60] Hearing of 7 July 2023, part II, 00:09:10 to 00:10:18.

is strong evidence that Mr. O'Brien, by submitting a false document to the OAI, committed an act of dishonesty in breach of Staff Regulation 1.2(b).

Whether the UNDT erred in determining that the imposed sanction was proportionate to the established misconduct

93. We recall that, in reviewing proportionality, the UNDT and the UNAT do not substitute their views for that of the Administration. The Secretary-General has wide discretion to choose the most appropriate disciplinary measure amongst the various measures open to him and we do not interfere with that choice.[61] However, the exercise of that discretion is not unfettered, and the Tribunals have the authority to intervene when the sanction imposed is disproportionate or excessive.

94. As we ruled in *Maguy Bamba*, "an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline".[62] We have also held that rather than focusing solely on the misconduct, the test of proportionality is circumstantial, considering all relevant aggravating and mitigating factors.[63]

95. In his appeal, Mr. O'Brien maintains that the UNDT erred in its determination regarding the proportionality when it did not consider the following mitigating factors: (i) the nature and gravity of the first count; (ii) the fact that he had not travelled to Rarotonga to participate with the CMS team carrying out the work in November 2018; and (iii) the previous disclosure of his interests in CMS in 2009.

96. Mr. O'Brien's arguments are not convincing.

97. Indeed, Mr. O'Brien's case would have attracted a less severe sanction if he had committed the first count of misconduct alone. But it is established that Mr. O'Brien committed two other major acts of misconduct, with multiple unauthorized activities. When imposing a disciplinary sanction, the Secretary-General considers the totality of the charges established against the staff member. Therefore, Mr. O'Brien is not right in measuring the

[61] *Sanwidi* Judgment, *op. cit.*, para. 40.
[62] *Maguy Bamba v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1259, para. 52 (internal citation omitted).
[63] *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 48 (internal citations omitted).

proportionality of the sanction imposed according to one count, possibly the least grave, of the established counts of which he was accused.

98. The fact that Mr. O'Brien did not join the team involved in the travel to Rarotonga in November 2018 cannot be considered as a mitigating factor. For the staff member to abstain from engaging in an unauthorized activity is mere compliance with his or her duties, for which he or she need not to be commended. Therefore, it was the normal course of action for Mr. O'Brien to excuse himself from such outside activity. As such, we disagree with Mr. O'Brien's characterization of that fact as a mitigating factor.

99. Although we may partially agree with Mr. O'Brien that his disclosure of interests with CMS in 2009 is a mitigating factor, the weight we attach to such factor is limited. That mitigating factor relates to the third count of conflict of interest only, in the limited period of 2009 to 2016 when Mr. O'Brien was a non-Executive director of CMS. It does not cover the following period when Mr. O'Brien assumed the executive directorship of CMS. As such, the earlier disclosure of these interests would not be sufficient to outweigh the significant aggravating factors proven by the Secretary-General, and rightly affirmed by the UNDT, especially his involvement in the serious misconduct of dishonesty.

Whether the UNDT erred in determining that due process rights had been preserved

100. Mr. O'Brien holds that the UNDT erred when it considered that his due process rights had been preserved.

101. With regard to count one, Mr. O'Brien takes issue with the UNDT's finding that his due process rights were not breached in respect of the forensic analysis report. He alleges that multiple requests were made to UNDP to allow him to undertake his own forensic analysis. His requests were allegedly disregarded, breaching his due process rights. However, Mr. O'Brien has not substantiated his contention in any way in these proceedings. Therefore, his contention must be denied.

102. Second, Mr. O'Brien submits that the UNDT erred when it did not consider retaliatory OAI's insistence on interviewing his girlfriend who was a terminally-ill person. The UNDT did not err. IT equipment entrusted to staff members remains their own responsibility. The use of such equipment, and the responsibility resulting therefrom, is naturally attributed to the staff member to whom it is entrusted. It follows that if OAI discovered any misuse of such

equipment, it was for the staff member to prove that the equipment had not been used by him or her at the relevant time of events. That was the case of Mr. O'Brien, who claimed that the UNDP IT equipment entrusted to him had been used by his girlfriend. In such circumstances, it was normal for OAI, whose function is to gather and assess inculpatory and exculpatory evidence, to convey to Mr. O'Brien their wish to interview his girlfriend as a relevant witness. In doing so, we find no proof of retaliation or disregard of his due process rights.

103. Third, Mr. O'Brien contends that the UNDT ignored his due process rights when it disregarded the System and Silos Russia Independent Review, which found that OAI investigations were characterized by bias, incompetence, and management interference. However, the accusations included in the report were general statements that do not meet the standard of convincing evidence. The review has no bearing on the individual investigations of which Mr. O'Brien was subject. Instead of relying thereon, he should have presented specific evidence establishing that OAI had not respected his due process rights in relation to the particular investigations undertaken against him. He did not do so, and his argument is, therefore, without basis.

104. Finally, Mr. O'Brien reiterates before this Tribunal that he was a whistleblower who was targeted by anonymous individuals with false and fabricated evidence. In his view, this factor should undermine the credibility of the investigations, rendering them unreliable, if not void. We agree with the UNDT that being a whistleblower is not an absolute shield against accountability. Even a whistleblower engaging in a protected activity can, and must, be held accountable to his or her actions and omissions.[64] In Mr. O'Brien's case, it is established that he requested the UNDP Ethics Office to grant him protection against retaliation in respect of the first investigation of which he was subject. However, absent *prima facie* evidence of retaliation, the request was denied. Furthermore, even if he had enjoyed such protection, because the UNDT correctly established the facts of Mr. O'Brien's misconduct to the standard of clear and convincing evidence, we are satisfied that the Administration would have taken the same investigative and disciplinary action absent the protected activity.[65] Therefore, Mr. O'Brien's claim cannot succeed.

[64] *See* Secretary-General's Bulletin ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations), Section 2.2.
[65] *Ibid.*

105. In light of the foregoing, Mr. O'Brien's appeal is dismissed.

Judgment

106. Mr. O'Brien's appeal is dismissed, and Judgment No. UNDT/2023/110 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 25th day of October 2024 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Sheha, Presiding	Judge Gao	Judge Forbang

Judgment published and entered into the Register on this 3rd day of December 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar