UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/087
Judgment No.: UNDT/2020/209
Date: 15 December 2020
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

KENNEDY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Lucienne Pierre, AAS/ALD/OHR, UN Secretariat
Isavella Maria Vasilogeorgi, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant contests the decision to impose against him the disciplinary sanctions of written censure, two years ineligibility for promotion and loss of four steps of grade (from step 11 to step 7) after having been found to have acted with gross negligence by losing some allegedly confidential documents in the premises of the United Nations Secretariat and then failing to report the incident.

2. The Respondent submits that the application is without merit.

3. As reasoned below, the Tribunal rejects the application.

Facts

The agreed and disputed facts, as well as evidence, including the hearing

4. The basic facts are set out in the letter dated 1 October 2018 informing the Applicant of the contested disciplinary decision. The Under-Secretary-General for Management ("the USG/DM") concluded that "after a thorough review of the entire dossier, including [the Applicant's] comments dated 29 August 2018", the following facts had been established by "clear and convincing evidence":

> a. "After printing, on 17 May 2017, confidential [United Nations] information, in the form of email correspondence about security-related issues, [the Applicant] lost this printed correspondence and did not report this loss to anyone"; and
>
> b. "The same printed correspondence containing [this] confidential information was published by [a private online blog that has no association with the United Nations ("the Blog")] the next day".

5. The Applicant indicated in the application that "[w]hile the underlying facts in this case are not in dispute, the interpretation given by the Administration appears

contrived and retaliatory". After some case management, the Applicant agreed that the only fact in dispute in the present case was whether the information in the printed copies of the correspondence that he lost, namely two email exchanges from March 2017, was actually "confidential" as stipulated by the USG/DM.

6. On this factual issue, a hearing was held on 20 November 2020 where one of the authors of the relevant emails ("the Witness") gave oral evidence. At the hearing, as part of the Respondent's trial bundle, he filed copies of all of the relevant emails in the two email exchanges, and the Applicant accepted that this collection of emails was correct.

*The first email exchange with the subject line, "*Confidential: Incident at [name and location redacted]: Update on STI [Security Threat Information]"*

7. The email exchange starts with an email of 16 March 2017 from the Witness to five United Nations senior officials of the Department of Safety and Security ("DSS"), copying seven other United Nations staff members ("Email 1"). The email has the subject line, "*Confidential: Incident at [name and location redacted]: Update on [STI]".

8. In the body of this email, under the headline "UN STRICTLY CONFIDENTIAL", the Witness wrote about a recent and very serious security incident at an international entity, which had resulted in the injuries to one of its staff members, and described how he, the Witness, had previously been deployed as an analyst to this location and reported on the "vulnerabilities" to a high-level United Nations official working for another international entity. He further indicated that a similar incident had previously occurred with respect to a high-level national government official involving a specific militant group and that the entity responsible for both incidents appeared to be the same, and also referred to other previously similar incidents in the region. The Witness described how various international entities cooperated on the issue and detailed how the current incident had been handled. As sources, the Witness made a generic reference to some security officials not working with the United Nations and

"open source media reporting". In various places of the email, the Witness indicated "INTERNAL UN STI", "MEMBER STATE STI" or "SBU" before setting out his analysis (at the hearing, the Witness explained that "SBU" is an abbreviation for "sensitive but unclassified" and that this is a term that is not used by the United Nations). The Witness indicated "UNCLASSIFIED" at the very end of the body of the text before writing his email signature, in which he presented his own name, title and contact information at the United Nations.

9. In response to Email 1, one of the addressees copied, made a response on the same date (16 March 2017).

*The second email exchange with the subject line: "*Confidential: Potential Implications of [DSS]"*

10. This longer email thread begins with an email of 16 March 2017 from the Witness to the Under-Secretary-General of DSS ("the USG/DSS") with the subject line, "*Confidential: Potential Implications of [DSS]" ("Email 2").

11. In this email, also under the headline "UN STRICTLY CONFIDENTIAL", the Witness brings the issue of the recent and very serious security incident to the USG/DSS's attention and describes how "wrong doing" had been made by the Office of the USG/DSS in connection with the handling of a security assessment report that the Witness had submitted earlier the same year regarding the United Nations high-level official he also mentioned in Email 1. The Witness indicated that he had made "the following assertion as Staff Representative and furthermore, as a staff member of this department" and would also "seek specific guidance and direction from the ethics office, [the Office of Human Resources Management ("OHRM")], Staff Union and [the Office of Internal Oversight Services ("OIOS")] and recommended that an "independent investigation" be initiated into the matter.

12. By an email of the same date (16 March 2017), the USG/DSS briefly responded to the Witness.

13. On 17 March 2017, the Witness forwarded Email 2 and the USG/DSS's response to a group of seven United Nations officials, including the Applicant, for their "information and appraisal".

14. By an email of 20 March 2020, the Applicant forwarded the Witness' 17 March 2017 email to the USG/DSS, indicating his title as "Vice President UN Staff Union". The Applicant criticized some aspects of DSS's handling of staff members' security, *inter alia*, with reference to the recent very serious security incident and another earlier security incident. The Applicant recommended that "an independent panel" outside DSS "be convened" to make an investigation.

15. The following day (21 March 2017), the USG/DSS responded to the Applicant, also copying some other United Nations officials, requesting him to provide further information about the other specific similar security incident, noting that this was "a serious allegation".

16. Later the same date (21 March 2017), the Applicant replied to the USG/DSS in a lengthy email in which, among other matters, he referred to yet another previous similar serious security incident at a United Nations entity.

Consideration

The issues of the case

17. The Appeals Tribunal has consistently held that the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed" (see *Fasanella* 2017-UNAT-765, para. 20).

18. In the present case, the Tribunal defines the issues to be adjudicated upon as follows, as per Order No. 146 (NY/2020) dated 1 October 2020:

> a. Was it lawful to impose the disciplinary sanction of placing a written censure against the Applicant, two years ineligibility for promotion, and reduction of four steps in grade from S-3, step 11 to step 7?
>
> b. If so, what relief, if any, is the Applicant entitled to?

The relevant legal framework for imposing the disciplinary sanction

19. Regarding imposing a disciplinary sanction for misconduct, staff rule 10.1(a) provides that "[f]ailure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct".

20. In this regard, staff rule 10.1(b) further stipulates that "[t]he decision … to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority". Among the exhaustive list of possible disciplinary sanctions, it follows from staff rule 10.2(a) that "[d]isciplinary measures may take one or more of the following forms only: (i) Written censure; (ii) Loss of one or more steps in grade; … (vi) Deferment, for a specified period, of eligibility for consideration for promotion …".

21. Regarding the judicial review of a disciplinary sanction, the Appeals Tribunal has consistently held that this requires the Dispute Tribunal "to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration". In this context, [the Dispute Tribunal] is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". In this regard, "the Administration bears the

burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred", and when "termination is a possible outcome, misconduct must be established by clear and convincing evidence [which] means that the truth of the facts asserted is highly probable". See para. 32 of *Turkey* 2019-UNAT-955.

22. The Appeals Tribunal has generally held that the Administration enjoys a "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment *Sanwidi* 2010-UNAT-084, at para. 40, "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

23. The Appeals Tribunal, however, underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40). In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

24. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

Were the facts on which the sanctions were based appropriately established?

25. To start with, regarding evidence before the Tribunal, it is affirmed (a) that all the documents that were submitted before the Tribunal by both parties prior to the hearing, as well as the evidence produced during the witness examinations and cross-examinations, have been admitted into evidence, and (b) that each piece of evidence, if relevant, has been weighed by the Tribunal after which its legal value, if any, has been determined.

26. The Tribunal further observes that the only factual finding that the Applicant is challenging is the USG/DM's determination that the information encompassed in the printed copies of the email exchanges was confidential. The Respondent essentially submits that all the Applicant's submissions are without merit.

27. The Applicant firstly submits he has "openly acknowledged that he copied the email correspondence in question and that he inadvertently misplaced it", and "no evidence [shows], and it is not alleged, that he leaked the information intentionally". He copied the correspondence "pursuant to a protected Staff Union activity as a Vice President of the Union Leadership", which was not "improper".

28. The Tribunal notes that the USG/DM never found the Applicant to have intentionally leaked any information, but instead found that he had acted grossly negligent when after having copied the relevant allegedly confidential email correspondence, he lost these documents and then failed to report the incident. While the Applicant questions the USG/DM's characterization of his behavior as gross negligence, which is a legal and not a factual determination (see further below), the Applicant has explicitly agreed to all the other specific facts that do not concern the question of confidentiality. Also, no issue has been raised regarding the Applicant initially copying the email correspondence, and as such, the disciplinary case only concerns his subsequent loss of these printed copies and his failure to report this.

29. On the issue of the confidentiality of the information contained in the relevant email exchanges, the Applicant contends that no evidence demonstrates "any negative

results from [the article on the Blog] for the safety and security of the organization or the staff". The "only issue of consequence in the leaked information was the fact that [the USG/DSS] had committed possible acts of misconduct, and that neither he nor [the Office of Internal Oversight Service ("OIOS")] had taken any action for his errors of judgment that far exceeded the consequences of the Applicant's lost correspondence". The relevant "issues over security and safety had already been publicly discussed in various staff union meetings, raised officially by staff representatives and written about extensively in public staff federation reports as well as in the press prior to 17 May 2017".

30. The Applicant further submits that the "inclusion of the term 'confidential' on some of the correspondence as well as from the issues addressed does not appear on the Applicant's memoranda to [the USG/DSS] or [his] reply except as to the repetition of a subject title from [the Witness'] prior correspondence". The Witness "testified that he used that terminology and marked his own communication as '[United Nations] Strictly Confidential' not because of any sensitive security information, but because it alleged possible misconduct by [the USG/DSS]". No evidence shows that "the content of the attached email trail posed a grave threat to the work of the Organization".

31. The Applicant adds that the relevant "vulnerability assessment [of a high-ranking United Nations official] was never leaked and has never been published". The "security incident in question occurred two months before and the subject matter of the emails from the two staff representatives was not about what action the [United Nations] would be taking in the future but what action the leadership had failed to take in the past", which was "not a new issue". As "the communications point out, the staff federations had been discussing concerns over security of staff in [various countries] for several years under [the USG/DSS's] tenure", and "the information contained in the email messages was already in the public domain". The article in the Blog reflected this since it was stated therein, the Blog "exclusively reported that [the USG/DDS] ordered a security report on [the high-ranking United Nations official] … 'buried' last year…".

32. The Applicant also contends that the Witness' message included "an email chain copied to a number of individuals that referred to [a certain security incident] and which reproduced [United Nations] and Member State STI's … that summarized public information on what had happened, most marked as 'unclassified'". The Witness explained in his testimony "the nature of this information", and the classifications referred to "such as SBU and [non-United Nations security officers]" are not United Nations designations, and all "these communications referred to events that occurred two or more months before". No negative effect has been demonstrated by this information other than "the obvious embarrassment of [the USG/DSS] over the issue of how it had been handled".

33. The Applicant finally observes that none of the information "had been designated by the Organization as privileged, restricted or confidential and it contained no operational information, no information from the security risk assessment and no threat to anyone's safety". Also, no national government had "expressed concern" and the only sensitive information concerned USG/DSS, but "that information was already the subject of open discussion in staff/management consultations and had already been reported in [the Blog]". The Witness had added "the notation of confidentiality due to the discussion of possible misconduct by the officials mentioned in the correspondence [was] not because of any 'security related' information and that the attached background information was derived from public sources and did not carry UN designations". While "there was never an intent to publish this information, its unfortunate publication has never been proven to be due to the Applicant and did not form part of the charges" and "OIOS and [the Office of Human Resources Management ("OHRM")] never investigated the other recipients of the emails or the information in the emails, and never clearly identified the facts".

34. At the outset, the Tribunal notes that it is undisputed—and explicitly follows from Emails 1 and 2, which initiated the two different email exchanges under review—that the Witness stipulated "*Confidential" in the beginning of subject line of each email and "UN STRICTLY CONFIDENTIAL" on top of the body text. The essence of the Applicant's contention is, therefore, that the information contained in these email

threads was, nevertheless, not confidential at the time when he lost the printed copies of them on 17 May 2017, approximately two months later.

35. The Tribunal further observes that the USG/DM's finding that the Applicant had committed misconduct is solely focused on his loss of the printed copies of the email exchanges and his subsequent failure to report this. He is not blamed for the printing of the emails or their publication on the Blog. The relevant point of time for determining whether the information in the emails was confidential was consequently when the Applicant actually lost the printed copies, namely on 17 May 2017, and not at any time before or after.

36. The Tribunal also takes note that the Witness did not prepare and send Emails 1 and 2 in his personal capacity, but as part of undertaking different professional functions within the Organization. The confidentiality designations therefore reflected his official professional opinion as a United Nations security analyst and staff representative, and they did not represent his personal and private views. This explicitly follows from the Witness indicating in his email signature in Email 1 that his title was "Security Analyst, Senior UN Officials" at the "Threat and Risk Assessment Service" at the United Nations Headquarters. In the email signature of Email 2, the Applicant stated that he was, "[DSS] Staff Represen[t]ative and "Security Advisor", [the Coordinating Committee of International Staff Unions and Associations of the United Nations System]". In Email 2, he also explicitly indicated that this email to the USG/DSS was sent from him in his capacity as a DSS staff member and a staff representative.

37. Considering the Witness' professional background and his expertise in confidentiality labels, which he persuasively demonstrated at the hearing, the Tribunal is convinced that the various confidentiality designations indicated in Emails 1 and 2 represented his professional assessment that information contained therein was sensitive and, in some instances, also confidential and should therefore not be made public. Also, when examining the topics described in the emails, such as, for instance, the recent and very serious security incident at a United Nations entity and other similar

incidents in the past, a vulnerability analysis regarding a specific high-level United Nations official, safety and security measures and cooperation, and domestic issues of some countries, the Tribunal finds that the Witness' confidentiality designations were indeed only appropriate in the given circumstances.

38. The Tribunal is, therefore, unconvinced by the Applicant's submission and the Witness' testimony at the hearing that aside from the circumstances related to the USG/DSS, no other information in Emails 1 and 2 were of a confidential nature. In line herewith, the Tribunal notes that in the Witness' testimony at the disciplinary investigation, which the Respondent presented to him as part of the cross-examination at the hearing on 20 November 2020, the Witness stated that the leak of information was a very sensitive issue that put the specific high-level UN official at the location of similar security incidents, as well as himself, in jeopardy.

39. Even if the Applicant's submission is, nevertheless, accepted to the effect that the sensitive part of the information in the emails only concerned the USG/DSS's situation, this question alone—the Witness is essentially accusing the USG/DM of misconduct in Email 2—is one that is only for the eyes of a very limited number of United Nations officials and therefore was also confidential. In addition to the confidential information stated in Emails 1 and 2, the Tribunal further notes that in the email exchange that followed Email 2 between the Applicant and the USG/DSS, additional sensitive information is disclosed regarding security and safety of United Nations and the Organization's internal dealings.

40. As for the sources of the information, while the Witness stated at the hearing that the information contained in the emails all came from the public domain, this is, in fact, not clear from Email 1 because other sources, namely some non-United Nations officials, are also mentioned. Also, the Witness, a United Nations security professional in the field of senior United Nations officials, analyzed the relevant information in Emails 1 and 2 and his professional assessments were evidently not intended for other than a limited circle of addressees at the United Nations, as demonstrated by his secrecy designations.

41. Regarding the importance of the possibly previous disclosure of some of the issues on the Blog or in other places, the Tribunal finds that this does not remove the confidential status of the information included in the emails. Even if some of the relevant information was already in the public domain, the entire context and the analyses presented in the email exchanges would not have been disclosed, and the United Nations would indeed have had a very reasonable interest in maintaining this *status quo*. In this regard, by the Applicant's own admission, the Tribunal notes that only some—and therefore not all—of the issues dealt with in the emails had previously been disclosed, and that it is not clear what this information is or how it could be accessed in the public domain at the relevant time when the Applicant lost the printed copies of the emails. Also, the Tribunal finds that the Applicant has not demonstrated why and/or how the confidential nature of the information, as indicated by the Witness, had elapsed only two months later when the Applicant lost the printed copies of them.

42. In conclusion, the Tribunal finds that the USG/DM's determination that the information in the printed copies of the lost emails was "confidential" was an appropriate exercise of discretion in accordance with ***Ladu*** and *Sanwidi*. The facts on which the sanctions were based were therefore also lawfully established pursuant to *Turkey*.

Did the established facts amount to misconduct?

43. The Applicant submits that "[n]o authority is cited for sanctioning the copying of correspondence that was either authored by or shared with the Applicant" or for "the claim of failing to report that the envelope containing the documents, which was addressed to the Staff Union, was missing". No precedents or similar cases "have been cited for suggesting that misplacing copies of correspondence is an act of misconduct or justifies the measure of imposing three disciplinary penalties".

44. The Applicant adds that "[i]t is clear from the careless terminology used by the Respondent that every effort has been made to magnify the seriousness of the alleged misconduct through hyperbole". The "harshness is justified by reference to 'willful

reckless actions' and 'gross negligence' in the decision letter, which are terms that "have specific meanings in law that cannot be justified in this case since the elements for these accusations are not present". Willful recklessness, which "seems a contradiction in terms", is "used for more than gross negligence; it is defined in Black's Law Dictionary as a wanton disregard of the risks concerning the circumstances and the actor is aware of them but disregards these significant risks". Similarly, "gross negligence is regarded as a thoughtless disregard of others or a reckless abuse of duty". The Respondent has "not met the burden of proving these elements, or shown any consequences justifying this categorization". The distinction was "recognized" in *Kanganathan* UNDT/2016/017, para. 51. The Applicant "explained the particular circumstances including his preoccupation with a family crisis at the time, and confusion over what had actually occurred" and that he was "not made aware of the publication, which was hardly foreseeable, until his return from leave".

45. The Applicant finally contends that "[n]o foreseeable risk was intentionally ignored", and the Respondent "has not shown how reporting the loss of the envelope, even if it had been realized immediately, could have prevented its publication, which took place the very next day". At the same time, "the protection of the Applicant's staff representative activities, which does not cease at the end of one's term of office was ignored", and "[i]t was a fundamental failure for the Respondent not to have considered this factor, which framed the Applicant's intentions".

46. The Tribunal notes that the statutory basis for a finding of misconduct is found in staff rule 10.1 (misconduct) in which it is provided that "[f]ailure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct".

47. No specific statutory directions are given on the specific situation of the present case, namely a staff member's loss of confidential information and her/his failure to report the incident, but the Respondent refers to the following:

a. Staff regulations 1.2(b), (i) and (q) according to which,

i. "(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

ii. "(i) Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service"; and

iii. "(q) Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets".

b. ST/SGB/2004/15 (Use of information and communication technology resources and data), secs. 5.1(b) and (c), which state that, "Users of [information and communication technology ("ICT")] resources and ICT data shall not engage in any of the following actions: … (b) Knowingly, or through gross negligence, making ICT resources or ICT data available to persons who have not been authorized to access them; (c) Knowingly, or through gross negligence, using ICT resources or ICT data in a manner contrary to the rights and obligations of staff members …".

48. The Tribunal notes that as a Vice President of the Staff Union—a leadership position in which one can expect to be entrusted with, and have access to, a lot of privileged and confidential information—the Applicant should have understood the significance and particular sensitivity of the information encompassed in the email exchanges, at least by way of the confidentiality designations of the Witness (a United Nations security analyst). The Applicant should also have known that if he lost the printed versions of the emails and thereby also the confidential information, this could have serious ramifications, including for his own career. Rather than immediately reporting the loss to the relevant United Nations authorities, he, however, did nothing. While the Tribunal cannot speculate in what would have occurred had he done so, the reporting would, in any event, have provided the Administration with an opportunity to manage and prepare for any adversarial repercussions.

49. In these given and also very unique circumstances, the Tribunal therefore finds that the USG/DM did not exceed the scope of her authority, as per *Ladu* and *Sanwidi*, when concluding that the Applicant had acted with gross negligence in accordance with the definitions presented by the Applicant in his submissions, as summarized above, with some of his actions that could even be defined as willfully reckless.

50. On the other hand, the Tribunal finds that it was inappropriate for the USG/DSS to state that the Applicant's "actions" amounted to "gross negligence, in particular in view of the fact that, at the relevant time, [he] had worked as a Security Officer with the Organization for almost twenty-four years". It is nowhere substantiated why a Security Officer would have a heightened responsibility in handling confidential information than any other United Nations staff member.

51. Consequently, the Tribunal finds that the USG/DSS properly exercised her discretion when finding that the established facts amounted to misconduct.

Was the sanction proportionate to the offence?

52. With reference to the Appeals Tribunal's judgment in *Samandarov* 2018-UNAT-859, the Applicant submits that "[w]hile ignoring the Applicant's role as

an elected staff representative and his unblemished record of service, the Respondent felt, without further explanation, that his being a security officer constituted an aggravating factor". The incident had, however, nothing to do with the Applicant's security functions, and "[h]e was not in a high security position dealing with sensitive or privileged information" as he "was an S-3 trainer for the K-9 corps".

53. The Applicant further contends that no "acknowledgment whatsoever was given to the fact that this was in connection with a protected Staff Union activity that arose out [of] his staff representative functions" and "[i]n fact, his Staff Union role appears to be an aggravating factor". While "ignoring his role as a [Vice President] of the Staff Union as a mitigating factor, the decision appears more designed at punishing the Applicant for pursuing criticism of [the USG/DSS], whose negligence over sensitive security matters appears far more serious than that for which the Applicant has been faulted". The fact that the Applicant's "term had ended when he had planned to hand over the documents to the new leadership does not diminish his right to be protected from retaliation for doing so", and "[b]y ignoring this important factor entirely, the Respondent sent an implicit message that staff representatives are at risk for their actions". The decision refers to "sharing other Staff Union correspondence that was also part of his legitimate role as an elected Vice President of the Union and cites this as an indicator of a voluntary disregard of the proper standard of care", which is "not supported and is misplaced". The decision has a "chilling effect on all staff representative activities which is why the Staff Union has strongly supported this case", which also has "implications for the protection of whistleblowers who are entitled to report any improper activity both within and outside the UN, but who are protected from any act of retaliation under the UN's own instruction (ST/SGB/2017/2)". The "requirements for a finding of misconduct are not present, and the imposition of the contested disciplinary measures represents a harsh and disproportionate response".

54. The Applicant finally contends that the Respondent has "not cited a single case in which losing a document and/or failing to report a lost copy of a communication, even one marked confidential, has been treated with the severity imposed on the Applicant", and that the "cases and the SGB[s] [Secretary-General Bulletin] cited by

the Respondent ('improper discharge of functions', 'failure to report misconduct') have not been shown to be comparable or justified". Nor has the Respondent "demonstrated how being a security officer whose functions had nothing to do with handling confidential material, warranted more severe punishment". Also, "[d]ue process implies that investigators verify the truthfulness and accuracy of the complaint and present exculpatory as well as incriminating evidence", which "did not happen". The USG/DSS, "who was never interviewed, made highly prejudicial and false claims with impunity but never undertook a preliminary inquiry himself before assuming the Applicant's guilt for the "leak", and "[t]he investigation and subsequent reviews by OHRM never addressed this, which would have never justified the severe sanction that was imposed, had they done so".

55. The Tribunal notes that the Respondent in his closing statement refers to some other disciplinary cases in an effort to compare the sanctions to the disciplinary decision in the present case. Regarding these other cases, the Respondent submits that "the improper discharge of functions specifically entrusted to certain staff members have led to either dismissal or separation" and that "failure to report misconduct have resulted in the imposition of written censure, along with two year deferment of consideration for promotion and/or loss of steps in grade, as well as fines" (references to footnotes omitted).

56. The Tribunal notes that the very particular situation of the present case distinguishes it from all these other cases. Considering the Applicant's offences—in a grossly negligently manner, losing the printed version of the two confidential emails, including highly sensitive information, exchanges and subsequently failing to report the incident—the Tribunal, however, finds that the imposition of the disciplinary sanctions of written censure, two years ineligibility for promotion and loss of four steps of grade, nevertheless, fell within the scope of discretion of the USG/DM.

57. In this regard, the Tribunal further notes that the Applicant's career as a Security Officer does not appear to have suffered much harm from the impositions of

the disciplinary sanctions, because, as he explained himself in this proposed written witness testimony dated 26 October 2020 to the Tribunal,

> … [the Applicant has] been reassigned to the Secretary General's Residence (known as Post 1[XXX] … since April of this year … The nature of Post 1[XXX] is of grave sensitivity. It is a specialized post. Officers assigned to this post are extremely professional, reliable, trustworthy, discretionary, and vigilant in protecting (via close protection, physical security, communications and video surveillance) the Secretary General and immediate family members, as well as any and all other occupants who may visit the residence ... Officers assigned to the Residence are selected and certified by that squad's respective Officer-In-Charge …

58. At the same time, with reference to its above considerations, the Tribunal finds that the fact that the Applicant was employed as a Security Officer should not have influenced the disciplinary decision, whereas him serving as a Vice President of the Staff Union could have been taken into account due to his distinct access to privileged and confidential information.

59. Regarding the Applicant's long and untarnished work record, the Tribunal notes that if found culpable of misconduct, this does not exempt him from disciplinary sanctions by itself, and that it follows from the disciplinary decision dated 1 October 2018 that his "long service to the Organization" was found "to constitute a mitigating factor" (in line herewith, see *Ibrahim* 2017-UNAT-776, para. 21).

60. The Tribunal finally finds that the Applicant has not been able to lift his onus of proof in order to substantiate how the disciplinary decision taken by the USD/DM was possibly tainted by any ulterior motives (on this burden, see, for instance, the Appeals Tribunal's judgment in *Ross* 2019-UNAT-944, para. 25)—the person who the Applicant claims should have retaliated against him was the USG/DSS.

61. Accordingly, the Tribunal finds that as the imposition of the disciplinary sanctions was a lawful exercise of the USG/DM's discretion, they were also proportionate to the offence.

Conclusion

62. The application is rejected.

(Signed)
Judge Alexander W. Hunter, Jr.
Dated this 15th day of December 2020

Entered in the Register on this 15th day of December 2020

(Signed)
Nerea Suero Fontecha, Registrar, New York