UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/031
Judgment No.: UNDT/2022/037
Date: 22 April 2022
Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

VAN DE GRAAF

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Ana Giulia Stella, OSLA
Marcos Zunino, OSLA

Counsel for the Respondent:
Matthias Schuster, UNICEF
Alister Cummings, UNICEF

Introduction

1. The Applicant, who at the time of the application was serving as the Supply and Logistics Manager, on a continuing appointment, at the Regional Office of the United Nations Children's Fund ("UNICEF") in Nairobi, Kenya, is challenging the Respondent's finding of misconduct and decision to separate him from service of the Organization with compensation *in lieu* of notice and termination indemnity.

Procedural History

2. On 3 May 2021, the Applicant filed with the United Nations Dispute Tribunal sitting in Nairobi the application above mentioned.

3. The Respondent filed his reply to the application on 7 June 2021.

4. On 14 January 2022, the case was assigned to the undersigned Judge.

5. On 7 February 2022, the Tribunal issued Order No. 011 (NBI/2022) on case management, in which the parties were given directions in order to preparing an oral hearing.

6. In compliance with those directions, the parties filed their respective submissions on 11 February 2022.

7. On the same date, the Applicant filed in addition two motions, to introduce other documents in support of the application and for leave to adduce evidence on harm.

8. The Tribunal issued Order No. 018 (NBI/2022) granting the Applicant's motions and setting this matter down for oral hearing.

9. On 17 February 2022, both parties made submissions in response to Order No. 018 (NBI/2022).

10. On 22 February 2022, the Tribunal issued Order No. 023 (NBI/2022) for further management of the case.

11. On 1 March 2022, the Respondent filed a motion for leave to call witnesses and admit additional evidence. The Applicant filed his objection to the motion on 2 March 2022.

12. On 7 March 2022, the Tribunal issued Order No. 032 (NBI/2022): in particular, the Tribunal, noting that the deadline set in its previous Order No. 011 for both parties to indicate the witnesses had elapsed, without any timely indication of additional identified witnesses, and considered that the administrative decision challenged before the Tribunal was not based on the witnesses the Respondent asked to hear and on the documents he asked to produce, which were not part of the investigation, dismissed the Respondent's motion.

13. The matter was heard at the UNDT courtroom in Nairobi over six trial days from 8 March 2022. Co-counsel for the Applicant was present in the courtroom. Lead counsel for both parties appeared remotely, as did the Applicant.

14. The Applicant and nine other witnesses, including the investigator, testified; two in person, and the others remotely (mainly for reasons related to lack of Covid-19 vaccinations, necessary to get into the United Nations compound hosting the courtroom).

Facts

15. The Applicant entered service of the United Nations in 2005. He joined UNICEF on 16 June 2010 as a Supply and Procurement Specialist, in Dakar, Senegal, at the P-4 level. On 20 March 2018, he was appointed as a Logistics Specialist in the Eastern and Southern African Regional Office in Nairobi, Kenya. On 1 July 2020, he was appointed as a Supply and Logistics Manager in the same office. The Applicant held a continuing appointment until his separation from service.

16. At that time, he lived together with his spouse and their two young children in High view lane, Ridgeways, Nairobi, in a rented house which was included in a compound which consists of five houses separated from each other only by a natural green fence. The compound is surrounded by a perimeter wall and guarded by

security guards at the gate, whose presence is arranged by the landlords. In addition, many tenants, including the Applicant, also contracted a residential security service to respond to the security needs at their residences.

17. On the evening of 12 September 2020, the Applicant went into his neighbour's compound to stop an ongoing party that was being held there. An altercation ensued, which was video recorded by those present at the party. The altercation resulted in the Applicant being injured and some household goods being damaged.

18. On 13 September 2020, the UNICEF Office of Internal Audit and Investigations ("OIAI") received a report of possible misconduct involving the Applicant. The complaint, which was lodged by a person external to the United Nations (Ms. K), stated that the Applicant had entered his neighbour's property and engaged in a verbal and physical assault towards those present.

19. On 17 September 2020, OIAI informed the Applicant that it was investigating the allegations.

20. On 18 September 2020, the Respondent placed the Applicant on Administrative Leave with Full Pay ("ALWFP"), pending completion of the investigation.

21. The Applicant attended interviews by OIAI on 24 September and 16 October 2020.

22. On 13 November 2020, the Applicant's placement on ALWFP was extended for a further two months, pending completion of the investigation and any subsequent disciplinary process.

23. On 4 December 2020, OIAI submitted its Investigation Report to the Deputy Executive Director, Management ("DED").

24. On 16 December 2020, the DED charged the Applicant with misconduct. Specifically, the Applicant was charged with

a. Engaging in a verbal and physical altercation with members of the public, at a house in Nairobi, Kenya, on 12 September 2020; and

b. Seeking to influence Ms. AS, his neighbour, between 15 and 17 September 2020, on the content of her report to the Department of Safety and Security ("DSS"), United Nations Office in Nairobi, and requesting her to include content that he knew to be incorrect.

25. The charge letter informed the Applicant that the allegations, if established, would constitute a violation of United Nations staff regulations 1.2(b) and (f), and staff rule 1.2(g). The Applicant was asked to provide his response to the charges within 14 days of receipt of the letter and advised that he had the right to seek legal assistance from the Office of Staff Legal Assistance ("OSLA"), or from any other counsel at his own expense.

26. Following two extensions of time, the Applicant submitted his response on 22 January 2021.

27. By a letter on 2 February 2021, the DED decided to impose on the Applicant the disciplinary measure of separation from service, with compensation *in lieu* of notice and with termination indemnity, in accordance with United Nations staff rule 10.2(a)(VIII), effective upon receipt of the letter. Consequently, the Applicant was separated from service.

Parties' Submissions

The Applicant's case.

28. The Applicant's principal contention is that the facts on which the sanction is based have not been properly established.

29. The Applicant maintains that the video recording that formed the basis of the Respondent's decision was edited by the Complainant to suit the narrative that was being put forward to paint him as racist and belligerent. The video was not properly and forensically analysed by the Respondent.

30. While the Applicant does not dispute that the footage in the video that was released on social media, he insists that that was not the whole story and that what was released was entirely out of context.

31. The Applicant readily admits having used an inappropriate language, that he sincerely regrets, but absolutely denies having been physical during the incident. On the contrary, he was attacked and beaten several times, and by several people. The Applicant's intention, when he entered that compound, was simple: to stop the party, which had infringed several rules.

32. The Applicant contends that the Respondent appears to have roundly dismissed his fears for the safety and security of his family within the context of the heightened anxiety and stress that the Covid-19 pandemic was causing everyone. The group that had assembled in his neighbour's compound was larger than was allowed, and they were gathered in violation of the national curfew regulations which were in force at the time.

33. The Applicant also insists that he did not seek to influence his neighbour's security incident report. The fact that he showed the investigators his messages with her is clear evidence that he was being truthful in his interpretation of events and intentions; that he had nothing to hide and was in no way trying to influence what she told the investigators.

34. Indeed, the neighbour in question testified before the Tribunal and told the court that she did not feel "influenced" by the Applicant's messages to her; and that nothing he said in his messages changed the tenor of her report to UNDSS. While she did not expressly ask the Applicant to keep an eye on her property while she was away, she appreciated the neighbourliness of his actions. The party that was being hosted at her house by the Airbnb guests she had sublet the property to were against an express contractual clause agreed between them.

35. The Respondent showed little interest in establishing what actually transpired, and little interest in the explanations proffered by the Applicant. The video recording was taken as a whole, and the sanction was meted out based on the footage in that video.

36. The Applicant vehemently submits that the facts have not been established to the required standard, and that the video was not clear and convincing evidence of the events that transpired that evening.

37. The Applicant also submits that his actions do not constitute misconduct *per* staff regulations 1.2(b) and 1.2(f) and 1.2(g).

38. The Applicant argues that the fact that he refrained from physically responding to being "pushed, beaten and injured" demonstrates that he was in fact behaving in a manner befitting his status as an international civil servant. This, despite the hostile and aggressive environment he found himself in. He regrets the language that he used and concedes that it was inappropriate but explains that he was scared and felt cornered.

39. All the witnesses called by the Applicant testified to his kind and stellar character. The witnesses corroborated each other in telling the Court that the Applicant was an exemplary neighbour and employer, and that they had not seen anything to suggest that he was aggressive or racist.

40. Conversely, the Complainant and those present at the party refused to participate in the investigative process. Having caused the video to go viral and made such allegations to the police and to UNICEF, as to the Applicant's conduct that evening, none of them would speak to the investigator. This must cast doubt on the credibility of their allegations and the Respondent's investigations.

41. The Applicant submits that the sanction, under the circumstances, was wholly disproportionate. It was in fact "arbitrary, unduly harsh and grossly disproportionate to the nature and gravity of his alleged misconduct."

42. The Applicant also contests the Respondent's adherence to due process in assessing the facts and determining the sanction.

43. The Respondent, he submits, had evidently decided that the Applicant was to be separated from service even before the investigation had begun, as it was the

easiest way to stop the public campaign against the Applicant which was involving the Organization's reputation too.

The Respondent's case.

44. The Respondent's position is that the disciplinary measure was meted out to the Applicant based on the clear and convincing evidence that he engaged in the conduct alleged. The video recordings of the incident clearly show the Applicant's actions, and the context in which they took place.

45. When interviewed by the investigator in September 2020, the Applicant did not question the accuracy of the footage in the recording of the incident. Indeed, OIAI took the Applicant through the video recordings in detail, asking for his comments on the events depicted, which process took over 70 minutes. At no point did the Applicant suggest that the videos were not an accurate depiction of the relevant events. Still later, in January 2021, when responding to the charge letter, the accuracy of the video recording was not questioned.

46. The contention that the video recording has been manipulated to suit a particular narrative requires proper evidential basis. Beyond the assertion that the recording has been, the Applicant had presented no evidence to suggest that the recording has been altered, tampered with, or manipulated in any way.

47. It is also pertinent to note that there is, in fact, no dispute that the contents of the recording are accurate, and that the Applicant did behave as shown in the footage. He also does not dispute that he said the things he was recorded as having said.

48. The Applicant had the option of calling for back up security to address the fears he claims to have been experiencing, but he did not.

49. Whether or not the group was breaching Kenyan law by holding a gathering, breaching the Airbnb agreement, or engaged in defamatory actions towards the Applicant after the incident, is not relevant to establishing if the Applicant engaged in the alleged conduct.

50. The Applicant caused the incident, and his conduct that evening clearly constitutes misconduct within the meaning of the staff regulations and rules.

51. His subsequent behaviour of attempting to induce a witness to provide a false account to United Nations security officials was a clear violation of staff rule 1.2(g).

52. International civil servants must be trusted to exercise the necessary judgment and conduct themselves in a manner befitting the position they hold. The Applicant's actions were not simply a single outburst or a momentary loss of temper. He initiated a confrontation and acted in a verbally and physically aggressive manner towards those at the party for over six minutes. The Applicant used foul and abusive language, made threats, screamed, and was physically violent. And there is no dispute that any of this happened.

53. The Applicant was afforded his due process rights during the investigative and disciplinary process. The facts alleged have been established to the required standard.

54. The sanction meted out to him was proper and proportionate under the circumstances.

Considerations

The scope of judicial review in disciplinary cases

55. The Appeals Tribunal has held that judicial review is focused on how the decision-maker reached the impugned decision (see *Sanwidi* 2010-UNAT-084 and *Santos* 2014-UNAT-415). The Appeals Tribunal has also determined what the role of this Tribunal is when reviewing disciplinary cases (see *Mahdi* 2010-UNAT-018 and *Haniya* 2010-UNAT-024).

56. In the case at hand, this Tribunal must examine the following issues:

a. Whether the facts on which the disciplinary measure was based have been established according to the applicable standard;

b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules;

c. Whether the disciplinary measure applied is proportionate to the offence; and

d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

57. In the case at hand, the Tribunal's examination of the above-mentioned issues focuses on two accusation counts leveled against the Applicant set forth in the contested decision: namely:

a. Having engaged in a verbal and physical altercation with members of the public, at a house in Nairobi, Kenya, on 12 September 2020; and

b. Having tried to influence Ms. AS, his neighbour, between 15 and 17 September 2020, on the content of her report to UNDSS requesting her to include content that he knew to be incorrect.

Have the facts on which the disciplinary measure was based been established?

58. Staff Regulations and Rules of the United Nations read as follows:

> Regulation 1.2
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> (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;
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> …
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> (f) While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may

> adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status;
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> Rule 1.2
>
> (g) Staff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization, including activity in connection with the administration of justice system, nor shall staff members threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions.

59. UNICEF Policy on the Disciplinary Process and Measures (POLICY/DHR/2020/001 v. 7 May 2020) considers misconduct:

> 5. A failure by a staff member to comply with his/her obligations and/or the standards of conduct set out in the Charter of the United Nations, the UN Staff Regulations and Rules, UNICEF's Financial Regulations and Rules, UNICEF's administrative issuances and the Standards of Conduct for the International Civil Service may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures (see UN Staff Rule 10.1).
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> 6. The following is a non-exhaustive list of specific acts and/or omissions that may amount to misconduct under UN Staff Rule 10.1 (a): […]
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> 6.14 acts or behaviour that would discredit UNICEF or the United Nations;
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> 6.15 breaches of the Standards of Conduct for the International Civil Service.

60. According to the jurisprudence of the United Nations Appeals Tribunal, when the disciplinary sanction results in separation from service, the alleged misconduct must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable (see *Molari* 2011-UNAT-164). Following *Negussie* 2020-UNAT-1033 para. 45, the standard of clear and convincing evidence of misconduct imports two high evidential standards: (i) that the evidence must be unequivocal and manifest and (ii) that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member.

61. The Tribunal will now assess whether the evidence collected by the Organization to establish the facts meets the applicable standard of proof.

62. In the assessment of the relevant facts, the Tribunal finds it relevant to recall preliminarily the findings and conclusions of the investigation on the incident, as contained in the report of 4 December 2020:

> 11. OIAI contacted the complainant, Ms. K, and identified and contacted two other guests. Although Ms. K had initially submitted a report to OIAI and engaged in some limited email correspondence with OIAI, she did not agree or respond to OIAI's requests to interview her. Another individual identified as a guest did not respond to OIAI's calls, while the third individual identified as a guest ceased communication with OIAI before he could be interviewed.
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> 12. OIAI conducted audio-recorded interviews and made follow-up inquires with Mr. van de Graaf and the following witnesses: (1) Mr. WA, a caretaker; (2) Ms. VA, the Applicant'spouse; (3) Mr. CNO, a security guard; (4) Ms. AS, Programme Management Officer, Human Settlements with UN-Habitat, who sublet her house through Airbnb to Ms. K, and (5) Mr. DK, Security Officer with UNICEF Kenya Country Office (KCO). [...]
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> 13. In addition, OIAI collected, reviewed, analyzed or transcribed evidence such as official UNICEF records, email correspondence, photographs, audio files, text and voice messages provided by the parties, including Mr. van de Graaf, as well as two video files which the investigation established were taken during the altercation between Mr. van de Graaf and participants of the social gathering at the material time.[1]
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> 115. OIAI's investigation found that:
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> i. Mr. van de Graaf's neighbor, Ms. S, sublet her residence to Ms. K, who organized a social gathering with more than ten guests in attendance on 12 September 2020;
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> ii. Mr. van de Graaf's spouse, Ms. A, informed Ms. S about the gathering, which was in violation of the house rules. In her voice messages to Ms. A, Ms. S said that she would engage Mr. A, that Mr. van de Graaf should not be involved and exposed, and in her last message at 8:57 PM, that the guests were leaving;
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> iii. Ms. A told OIAI that Mr. van de Graaf listened to Ms. S messages. Mr. van de Graaf said that he may have not been fully

[1] Reply, Annex R/1, page 3.

apprised of the substance of the conversation, but that he heard the message that the guests were leaving the compound, adding that he could see that "was not the case";

iv. At around 9:00 PM, Mr. van de Graaf interrupted the gathering. He entered Ms. S's property uninvited to ask the guests to respect the nationwide curfew and house rules. Thereafter, Mr. van de Graaf engaged in verbal and physical altercations with others, including by making physical contact with them and the camera, requesting to stop filming, raising his voice, and saying "I kill you" on two occasions and "Fuck you" on at least ten occasions;

v. The guests called Mr. van de Graaf "racist". Soon after, he had said, "fuck you" to them, showed the "middle finger" to the camera, and rapidly moved a woman's hand away from his chest. The guests called Mr. van de Graaf and his dog "racist" on at least seven occasions during the altercation;

vi. The guests pushed away Mr. van de Graaf only after he had made a physical contact with them (or the camera) or was moving towards them on four occasions during the altercation. On one of those occasions, Mr. van de Graaf appeared to fall and suffer a head injury;

vii. On at least four occasions, the guests requested Mr. van de Graaf either to "get out," or to "leave," to which he responded, "No, no, I am not leaving," and soon thereafter, "you think, I am afraid of you…I can kill you;"

viii. After being called by Mr. van de Graaf saying they were beating him, at 9:11 PM, Ms. A triggered the security alarm. Ms. A then helped her husband, together with the security guard, and escorted him back home;

ix. Ms. K provided two videos taken during the altercation, which showed Mr. van de Graaf's altercation with others;

x. Local police intervened on the same night after the altercation. No police report was released to UNICEF;

xi. By 15 September 2020, the reports about the matter were published in local and online media identifying Mr. van de Graaf as a UNICEF employee and emphasizing that he was a "racist." Thereafter, OIAI received several other third-party reports with reference to Mr. van de Graaf's conduct that was published in the media.

116. OIAI's investigation also found that before being interviewed as witnesses, Mr. van de Graaf and his spouse engaged in communication with Ms. S and Mr. A, including about the reported matter. For example, on 15 September 2020, Mr. van de Graaf proposed to Ms. S that she could include in her statement "that you were expecting from us a minimum of oversight in case something was going wrong." Both Ms. S and Mr. van de Graaf testified that

> there was no such expectation. While Ms. S did not include this in her statement, she claimed that overall, her perception of the facts was also influenced by what Mr. van de Graaf and his spouse had told her.[2]

63. The Applicant contests the evidentiary value of the allegations contained in the complaint because the Complainant and the other guests present at the party in question did not cooperate with the investigator. They were not interviewed by the Respondent as part of his investigation into the complaint, and subsequently did not respond to and/or declined to appear as witnesses before the Tribunal.

64. The Tribunal notes that the Complainant – like the other guests - was not subjected to the authority of the Secretary General and therefore could refuse to cooperate with the investigator and with the Tribunal too.

65. While the refusal to cooperate does not diminish the value of the complaint as such, it also provides room for the Applicant to challenge by any mean its veracity.

66. As it turns out, the Complainant in this case passed away in January 2022. Following news of her passing, the Applicant moved to strike-out the complaint and the any material provided by her. In this regard, the Tribunal recalls the Appeals Tribunal's pronouncement in *Majut* 2018-UNAT-862, para. 74, that

> Cross-examination is not an absolute right and it is not always necessary for a complainant to be present in court. Indeed, there are cases in which it is impossible, or inadvisable, for a witness to attend court. The attendance of a witness can be dispensed with so long as the Tribunal is satisfied that the staff member accused of misconduct is given a fair and legitimate opportunity to defend his position.

67. In *Applicant* 2013-UNAT-302, the Appeals Tribunal affirmed the principle that due process does not always require that a staff member defending a disciplinary action for summary dismissal has the right to confront and cross-examine his/her accusers. In that case, the UNICEF staff member contested the Administration's decision to summarily dismiss him based on allegations of sexual harassment made by five non-staff members who were employed as waiters and

[2] Ibid., page 24 – 25.

security guards at a residential camp in South Sudan, UNDT concluded that the sanction of summary dismissal was based on unsubstantiated charges and that the staff member's due process rights were violated when he could not cross-examine the complainants, who did not appear at the hearing before UNDT. UNAT vacated UNDT judgment and affirmed the decision to summarily dismiss the staff member, founding that the weight of the evidence in that case justified the decision taken by UNICEF. While acknowledging the importance of confrontation and cross-examination of witnesses, UNAT considered that due process did not always require that a staff member defending a disciplinary action for summary dismissal had the right to confront and cross-examine his/her accusers. Under certain circumstances, denial of this right did not necessarily fatally flaw the entire process, so long as it was established to UNAT's satisfaction that the accused was afforded fair and legitimate opportunities to defend his/her position. In that case, UNAT was satisfied that the key elements of the staff member's rights of due process were met: the applicant was fully informed of the charges against him and the identity of his accusers and their testimony. As such, he was able to mount a defence and to call into question the veracity of their statements.

68. This principle is applicable to the present case, where the Applicant is given a fair and legitimate opportunity to defend his position; therefore, the principle of equality of arms of the parties stays respected even considering the said evidence. The complaint and other evidence related to Ms. K remain as documents to be evaluated with other proofs.

69. From the evidence on the record, it appears that the investigation was based essentially on the two videos recorded by anonymous participants at the party and published on the website of Ms. K.

70. The Applicant's allegation that the videos were probably altered by the Complainant (who had specific technical competences, being a software engineer, as appears from the website she run) has no merit, given that the videos show the interaction between the Applicant and the guests in a clear and continuous way, with no appearing anomalies. The Applicant himself confirmed the veracity of the footage in the videos. While the Applicant disputes the interpretation that can be

attached to his actions as shown on the videos, he has never expressly alleged that the video itself is anything other than a true depiction of his actions.

71. The Applicant appears to challenge the accuracy of the video recordings based on a note from an OIAI investigator, who noted that the date of the creation of the files did not match the date of the incident and that there was potential discrepancy with the resolution of the video. However, neither of these issues provide any support for the suggestion that someone (the identity of whom is unknown) created a new video of the incident, and through unspecified digital manipulation techniques, fabricated the Applicant's words and actions, in such a convincing manner, and there is no basis to suggest that the videos recordings (probably subsequent copies of the originals) are not accurate.

72. The Tribunal is aware that the burden of proving the provenance and authenticity of the footage is on the Respondent. The Tribunal finds that the challenge as to the evidentiary value of the video can properly be dismissed, given the type of document (a video file), its content (a continuous show of people interacting with no discrepancies) and the comments on it by the Applicant (as mentioned); therefore, the Tribunal finds that a forensic examination of the files is not necessary and that the anonymity of the sources does not undermine its clear and objective content.

73. The video-recordings clearly show that the Applicant entered Ms. S' house without authorisation, scolded the guests for their gathering, engaged in very rude verbal attacks towards the guests at the house, raised his right hand with his index finger pointing up to the guests recording the incident, gesturing to them with the middle finger, shouting "fuck you", as they didn't stop the recording, and moving towards them, and even death threatening them ("I'll kill you") if they would have touched him.

74. Undoubtedly, the Applicant – although he was not the first cause of the events - initiated the incident, by entering into his neighbour's compound, raising his voice, making offensive gesture, saying inappropriate sentences and threats, and generally acting aggressively.

75. The Applicant could have call the security and the police, instead of acting as a law-enforcement sheriff; his behavior was not justified, especially considering he was in a foreign country; the alleged concern about the risk of COVID-19 could have been avoided, apart from using a facemask (which the Applicant didn't wear), staying at his own house (which was at a considerable distance); also the reaction toward people recording videos was disproportionate and unjustified, as those persons were entitled to capture images in their premises. The Applicant had several opportunities to walk away, even when the situation escalated, but did not (indeed, the footage shows him walking away and then retuning).

76. The Applicant challenges the decision also because based on a partial recollection of the events, for lack of hearing many witnesses he asked for (as investigator heard only four out of ten witnesses available).

77. The Tribunal found it necessary to hold a hearing in order to give the Applicant the chance to offer the evidence required and to defend his position to the utmost. In *Mbaigolmem* 2018-UNAT-819, UNAT recalled that,

> Article 16(2) of the UNDT Rules of Procedure provides that a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure. The reasons for that provision are obvious. Firstly, cases of alleged misconduct typically require determination of disputed factual issues. This is best done in an oral hearing involving an adversarial fact-finding process which tests the credibility, reliability and probabilities of the relevant testimony. Secondly, factual findings of misconduct are of far-reaching import. A judicial finding that a staff member has committed sexual harassment, fraud, theft or the like has life-altering consequences. Hence, the determination of misconduct should preferably be done in a judicial hearing by conventional adversarial methods.
>
> ..., there will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand. Should the evidence be insufficient in certain respects, it will be incumbent on the UNDT to direct the process to ensure that the missing evidence is adduced before it. 29. Thus, while there may be occasions where a review of an internal investigation may suffice,

> it often will be safer for the UNDT to determine the facts fully itself, which may require supplementing the undisputed facts and the resolution of contested facts and issues arising from the investigation. The UNDT ordinarily should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and convincing evidence has been discharged on the evidence adduced.

78. The Tribunal found it useful to have an oral hearing in the Nairobi courtroom, and not only on remote electronic connection system, because this is the normal way to administer justice according to the procedural rules, in the courtroom and in person, being the publicity of the hearing assured by the access of the public in the courtroom.

79. This is also consistent with UNAT case law, and in particular with *Abbassi* 2011-UNAT-110, para. 26, and *Al Othman* 2019-UNAT-972, where the Appeals Tribunal considered that

> some degree of deference should be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. The UNDT has the advantage of assessing the demeanour of witnesses while they are giving evidence and this is critical for assessing the credibility of the witnesses and the persuasiveness of their evidence.

80. In his testimony before the Tribunal, Mr. J stated that the investigation was based mainly on the videos, corroborated by some witnesses and by the Applicant himself; the investigator admitted that some facts in the complaint were not supported (like the accusation about the Applicant's racism, the fact that the dog was threatening, the Applicant's substance abuse); he acknowledged that the Complainant refused to cooperate and was not interviewed (and he commented that it is rare and strange that happens), that the other guests, included the authors of the videos, were not identified (except three), that there were no police records of the incident. He confirmed that Ms. S was only a potential witness when received the Applicant's messages; he stated that the Applicant was cooperative throughout the investigative process and was genuinely remorseful.

81. In his testimony before the Tribunal, which the Tribunal found to be consistent, credible and was corroborated by others who testified, the Applicant recalled that the party took place in a compound which is generally peaceful, with good neighbourly relationships and occupied houses not separated by barriers. The gathering was in Ms. S' house, about 40 meters from his house, rented through Airbnb; that while there are no rules of the owners of the houses in the compound about hosting meeting, in Airbnb's contract only (stipulated by Ms S and her guests) there was a contractual clause prohibiting parties and the gathering of many people in the house. He was afraid of Covid-19 and of the fact that, notwithstanding curfew time approaching, the guests (who were unknown to any of the residents in that compound) would have stayed overnight, remaining in the compound. He testified that he did not ask security to intervene as they allow people to get into the compound and they told him (falsely) that people were leaving before curfew (which was not the case, and that was why he decided to intervene). He added that the situation escalated almost as soon as he intervened. When cross-examined, the Applicant admitted that, as shown in the second video, he became more aggressive, following people onto the terrace and lunged at them, whereas he could have left the premises. The Applicant acknowledged that he was tired and a little tipsy and he lost his temper. He says he felt provoked because of being filmed, accused of racism, because the guests denied his right to complain about the party and opposed his requests to leave. He added that he was afraid because he was outnumbered by the group and that he was beaten twice by three/four people, and that he was scared, because he felt and was bleeding, he was constantly surrounded by many men, also drunken. The Applicant told the Tribunal that he was not interviewed by the local police (to whom he only made statements), no proceedings by local police ever started, he was not informed that he could not leave the country by the national authorities (but was requested by UNICEF to remain at the duty station). He further underlined that a media lynching campaign was launched against him, a lot of which was untrue, which damaged his reputation (the videos are still on YouTube) and is impeding his ability to seek employment. The Applicant also recalled the immense difficulties faced by him and his family as a result of this incident and consequent joblessness; difficulties in financing private education for his children in Belgium

(State schools have a two-year waitlist, which they could not circumvent) and being without any health insurance during a pandemic. The Applicant also stressed that he received no support from the Administration, who did not defend him on the media and instead asked him to keep a low profile (saying he would have lost immunity, if he would have hired a private lawyer to protect his interest) and even requested him to hand in his passport or leave the country.

82. In her testimony before the Tribunal, the Applicant's wife recalled that she intervened after she had heard a call for help from her husband, and that she saw her husband on the ground beaten up, that he did not fight back, and that she had never seen her husband so afraid.

83. In his testimony before the Tribunal, Mr. B stated that he felt uncomfortable that there were unknown people in the compound, for security reasons and for the Covid-19 situation too, that there was loud music, that he did not intervene to stop the party because he was himself unwell and recovering from Covid at the time. He testified that it was upsetting to see his neighbour crying with broken spectacles as his 13-year-old son watched.

84. He added that the video of the incident depicted only one side of the situation, as it did not show the guests threatening the Applicant. He also said that it was upsetting to see that the details of the incident (included the address of the location) were given to media in a defamation campaign, with false accusations of the Applicant being a racist and a colonialist.

85. He finally stated that he heard from his housekeeper Ms. E that the security guard, Mr. A. who had the responsibility to let the guests enter in the compound, was bribed by the guests after the accident, and offered a new job in exchange for testifying against the Applicant.

86. In her testimony before the Tribunal, Ms. D recalled that she had good relations with the neighbours, as they occupied a small compound, and stressed that after the incident her husband and she became closer to the Applicant's family, because they felt he was unfairly treated.

87. She stated that their housekeeper, Ms E told her and her husband that Mr. A, who was from the same tribe as the Complainant Ms. K, received money to let guests into the compound and to make statements against the Applicant after the incident; she also commented that one can obtain anything from Mr. A if he was paid.

88. She testified that after the incident a hate campaign was launched against the Applicant, depicted as a racist stranger who had to leave the country, a kind of a second "Black Lives Matter Movement", with many inconsistencies and untrue accusations, so that "people became violent only because van de Graaf said "hey, it's curfew."

89. Consequently, the Applicant did not leave his house for more than a month (because his address, name and car license plate number were published on the media in that hate campaign), being devastated, depressed and scared (Ms. D's husband tried to comfort him every afternoon).

90. These two witnesses, heard in person in the courtroom, were, in the view of the Tribunal, reliable: their testimony was logical and consistent, their body language and demeanour supported a finding of credibility.

91. In his testimony before the Tribunal, Mr. O recalled –arriving at the scene of the incident and seeing the Applicant bleeding and injured.

92. In her testimony before the Tribunal, Ms. M told the Tribunal that the Applicant and his family were not racist and were good people to her. She said that Mr. A told her that the guests wanted him to testify against the Applicant and that, as he refused, he was offered money.

93. In his testimony before the Tribunal, Mr. K confirmed that the Regional Director told him he was working to resolve the issue diplomatically and that he dissuaded the Applicant from hiring a Kenyan lawyer, as that would have made things more complicated.

94. In her testimony before the Tribunal, Ms. S recalled that the neighbours informed her and complained of the gathering. The witness confirmed that she only spoke to the Complainant after the incident, who told her that the Applicant punched someone in the face; and that Mr. A told her later it was not true. The witness also testified that the Complainant was difficult to get a hold of while the party was ongoing. The witness finally reported the incident and sought guidance from the Applicant (who suggested that she specify some facts on which she agreed).

95. Testimonies collected during the hearing provided only a partial confirmation of the findings and conclusions of the panel report, and instead added many other relevant elements.

96. Indeed, although not fake, the videos are only a partial representation of the events, and this at least for two reasons. First of all, we have two videos, the first showing the beginning of the intervention by the Applicant and the first exchanges with the guests, and the second showing different moments of the incident, without continuity with the first video; other following moments apparently have not been recorded or in any case were not given to the investigator nor in the judicial proceedings. From the videos themselves it appears that many people were recording the scene, although only some recordings were made available. OIAI acknowledged that more than one participant to the social gathering had been using his mobile phone during the altercation, taking pictures and videos, although, in the absence of their cooperation, only two videos were acquired.

97. In sum, we have only an approximately six-minute recording of the facts, out of many dozens of minutes of presence of the Applicant in the house, until the altercation ended and security and police arrived; the depiction was therefore incomplete, with many minutes missing and relevant gaps.

98. Furthermore, as the Applicant stressed, the content of the videos become even more suspicious as the authors did not testify and/or cooperate in the investigation.

99. Secondly, the videos are partial as they were shot by some of the guests, they present only some aspects, they show how the Applicant behaved but not what

other people were doing at the same time, how many of them were there, how they acted; in sum, large parts of the story was missing, as some of the witnesses highlighted.

100. The Tribunal finds that the videos do in fact raise questions as to what the Applicant might have seen in front of him and the surrounding circumstances. It called for a larger inquiry which was absent from the investigation.

101. Therefore, the videos, on which the investigation and the accusations are almost exclusively based, are only a partial and imperfect representation of the events. In sum, the investigation was inadequate.

102. If we dig in deep, also considering what emerged from the testimonies gathered at the hearing about the context of the incident, we can see the facts from a different perspective. Indeed, the perspective pleaded by the Applicant.

103. First, the context of time and space is important to assess the facts properly.

104. The events occurred in a gated community, a closed compound in a city where security concerns exist.

105. The gathering of many people in Ms. S' house contravened the customary rules of the compound (which was a gated community with specific security measures and a general exclusion of external unknown people), violated the specific prohibition in the Air BnB rental agreement and breached the national rules on curfew (as the guest were still in the house after 9 p.m.).

106. Apart from the Applicant, other neighbours also complained about the presence of many people and the ongoing party particularly because of concerns about the pandemic (Witness G, who informed Ms. S of the party, and witness B, at the hearing).

107. Some witnesses (Mss. A, D, M, Mr. B and the Applicant) testified that the guests bribed the security to let them in the compound, notwithstanding the said rules. Although direct evidence is missing and only a hearsay was available, the fact is plausible, being certain that a large group of person can enter a secured compound

only if the security personnel violates its specific professional duties and it is likely that it can happen with unknown people only in exchange of something (the person accused, Ms. A, appeared in Court to render his testimony and clarify). On this point, the Tribunal notes that the fact that this inducement was not known by the Applicant at the time of the incident, could be relevant to better understand the attitude of the people the Applicant faced and the circumstances surrounding what took place that evening.

108. There were 20 to 30 people, who refused to vacate the premises and continued to party regardless of the complaints by the neighbours and the expected intervention of Ms. S. This behaviour made the Applicant believe that the group would stay overnight.

109. Certainly, it was not for the Applicant to seek to enforce local curfew restrictions or to remedy to any breach of the Airbnb agreement with the tenant of the house. As above mentioned, he should not have intervened. However, it is relevant to have in mind also that the Applicant had requested the intervention by the tenant (Ms. S) and by the person responsible for the house (Mr. A.) to no avail, given that the party was going on.

110. The same videos show that the Applicant initially was not aggressive. It turned aggressive when the revellers confronted the Applicant as to what gave him the right to enter into 'their' compound and , didn't follow his invitation to stop the party and, instead of leaving, opposed a disrespectful resistance, recorded him against his will, called him racist and threatened him with deportation; then the Applicant attacked verbally and with gestures the guests; he became threatening only after he fell down, being attacked and having realized he was bleeding.

111. It is difficult to say that the Applicant was the first cause of the incident, when the events occurred owing to the unlawful gathering of many people in the compound (and the Applicant at the beginning was peacefully in his house with his family, relaxing and drinking beer in the evening). The Applicant may have triggered the altercation; he underestimated the situation, exercised poor judgment and lost his temper. However, it must be considered that the guests' behavior -

towards a person complaining for infringement of a plurality of rules- entailed a provocation.

112. The Applicant's attitude emerges from the witnesses' recollection, as he was almost crying (Ms. A, to the investigator), crying (Mr. O and Mr. B, at the hearing), afraid of the crowd surrounding him and threatening him ("don't touch him", one of the guest says at a certain point).

113. As the investigator also acknowledged, some facts in the complaint were not supported at all, like the accusation about the Applicant's racism, his threatening dog, the Applicant's substance abuse. In addition, the evidence collected shows clearly that also other accusations against the Applicant were false, such as the fact that he used objects to attack, he used his dog to threaten and that he punched some guests.

114. We can deduce from all the evidence collected that, facing a hostile and aggressive environment, the Applicant – whose temperament had not hitherto been remarkable or cause for concern - had a momentary loss of temper.

115. Finally, when the situation escalated, the Applicant, alone, in front of an angry crowd, became the biggest loser (pushed, beaten, his glasses broken in the scuffle, threaten of deportation and accused of racism).

116. From the testimonies, we know that the video of the incident depicted only one side of the situation, which was not corresponding to the reality as it didn't show the guests threatening the Applicant, as it was said people opposing resistance with the force of being a numerous group, becoming violent only because the Applicant recalled it was curfew time (witness B and A).

117. The guests did not leave when the Applicant recalled the rule they were infringing, reacted by filming the Applicant, surrounding him in a large number with a threatening behavior, pushed him, threatening even to make him leave the country.

118. The guests' provocative refusal - like the Complainant's approach as shown in the video - to try at the beginning to solve the problem caused by their gathering, later to mediate to be reconciled, and finally to cooperate with the investigator working on their complaint are clear indicator of their bad faith and conflicting attitude.

119. The Applicant was beaten in the grass by three people (witness A; it can be partially confirmed from the videos too), his spectacles were broken, he was forced to call his wife for help, his 13-year-old son was sent by the mother to call the security and later was concerned watching his father. The Applicant was in substance the victim of a physical assault and not in any way a perpetrator.

120. The incident had a huge impact on media which was really damaging for the Applicant too, tarnishing his reputation heavily and impacting his life (in particular, witness B referred to the consequences on the Applicant's private life, his fear and isolation).

121. Finally, the Applicant has been disciplined also for having sent messages to Ms. S, seeking to influence her report to UNDSS and requesting her to include content that he knew to be incorrect. There is no doubt that the messages were sent and what the content was (see paragraph 130 below).

Do the established facts amount to misconduct?

122. From the conclusion reached under the previous paragraphs, it is clear that the facts on which the disciplinary measure was based have been established according to the applicable standard, although - as to facts related to first count (see para. 24 charge letter) - many other relevant facts have been highlighted during the hearing, while facts under the second count (charge letter) have been fully confirmed.

123. As to count one, the Applicant's actions, established even beyond the applicable standard of proof, were in violation of the applicable legal framework, namely the facts do qualify as misconduct under the staff regulations 1.2(b) and (f).

124. The Tribunal, therefore, cannot but answer in the affirmative the above-mentioned question: the Applicant was not simply careless to have intervened with the aim to stop the party, but committed misconduct, for his totally impolite and unlawful behavior.

125. The damage to the UNICEF reputation following the echoes of the incidents on media is not attributable to the Applicant, and therefore the facts do not qualify as misconduct under the staff rule 1.2(g).

126. It has to be recalled on this point that the Complainant – who during the events did not respond to the landlady - later avoided any dialogue with the Applicant's wife and, as mentioned, was not available to the investigator - launched a defamatory campaign against the Applicant, depicted as a racist foreigner.

127. The Tribunal, at the outcome of the hearing and the above recollection of the events, is of the view that the campaign was based on untrue allegations (in particular, not on the vulgarity of the Applicant's behavior, of course, but specifically on the supposedly racist aspect of his actions) and a unilateral and inflated misrepresentation of the events on the media.

128. The media echo was totally out of the Applicant's will and control, and it was created by third parties in bad faith and maliciously. This campaign was to the detriment of the Applicant, making him as the scapegoat of unsolved issues in a country affected by colonialism in the past.

129. UNICEF was certainly dragged into this strong hate campaign, and its image - as well as the confidence and trust of the government and population of the countries in which UNICEF works - were certainly damaged by the incident (see Respondent's reply's Annex 12, with the letters to UNICEF to intervene after the videos of the incident went viral). This damage probably explains the lack of support by the Administration the Applicant complained of, but in the view of the Tribunal it cannot be charged to the Applicant, being a factor out of the ordinary cause and effect relationship and not attributable to the Applicant. Therefore, no relevance can be attributed to the media effects to UNICEF, and it cannot be considered as an aggravating factor.

130. As to count two, the Tribunal preliminarily recalled the messages at stake in the relevant part:

> Good to introduce why you have sub-rented the house with Airbnb during your stay at the coast
>
> - Explain that we are a peaceful compound, that you informed all the neighbours on the Airbnb guests coming for a week and that you were expecting from us a minimum of oversight in case something was going wrong. And this happened…
>
> Neighbours are the first line of security.

131. As to the assessment of these facts, this Tribunal has already expressed its doubts about the applicability of the rule concerning the duty to cooperate to staff member accused of actions that are criminal in substance, being necessary to give prevalence to the general principle of self-defence ("*nemo tenetur se detegere*": see *Applicant*, UNDT/2022/030, paras. 140 and following, and dissenting opinion, paras. 46 and following).

132. Apart from this general profile, the Tribunal highlights - with specific reference to the case at hand - that the messages sent by the Applicant to Ms. S about what to state were simply a suggestion to a person (who was not witness at that time, as the investigation was not opened at that moment, the Applicant was not under investigation and he did not even suspect that the incident could lead to an investigation) in order to clarify what happened in a better way, without any intention to cover any fault.

133. Moreover, Ms. S agreed with the suggestions, finding them evidently appropriate. The suggestion that was not entirely true is that Ms. S gave the Applicant the task of a generic surveillance on her property, a fact which is totally irrelevant (as the Applicant was not charged for having intervened, which is perfectly conceivable in good neighbourliness even when not specifically requested, but for the wrong modalities of his intervention).

134. The Tribunal therefore finds that count 2 was not properly established.

Was the disciplinary measure applied proportionate to the offences?

135. Limiting the following analysis to count one of the charges, as above limited, the Tribunal recalls that staff rule 10.2 (a) provides that disciplinary measures may take one or more of the following forms only:

> (i) Written censure;
>
> (ii) Loss of one or more steps in grade;
>
> (iii) Deferment, for a specified period, of eligibility for salary increment;
>
> (iv) Suspension without pay for a specified period;
>
> (v) Fine;
>
> (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
>
> (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
>
> (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
>
> (ix) Dismissal.

136. In the present case, the sanction imposed on the Applicant was separation from service, with compensation *in lieu* of notice, and without termination indemnity.

137. To properly determine the sanction, the Tribunal considers that not all misconduct must result in termination, and that a gradual assessment of the possible measures should be undertaken on a case-by-case basis.

138. The Secretary-General has broad discretion in determining the most appropriate disciplinary measure. UNAT has found that the Administration is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. The Dispute Tribunal's intervention is warranted only "where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" (*Ganbold* 2019-UNAT-976; *Nyawa* 2020-

UNAT-1024, para. 89, *Portillo Moya* 2015-UNAT-523, paras. 19-21, and *Toukolon* 2014-UNAT-407, para. 31).

139. The discretion of the Administration is not unfettered since it is bound to exercise its discretionary authority in a manner consistent with the due process principle and the principle of proportionality. In particular, staff rule 10.3, provides that

> Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

140. As UNAT has consistently held, the choice of the sanction to impose in the case must be guided by the general principle of proportionality in the disciplinary matter, principle set forth in staff rule 10.3(b), which provides that

> [A]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct. In determining the appropriate measure, each case is decided on its own merits, taking into account the particulars of the case, including aggravating and mitigating circumstances.

141. The principle was described by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084 (paras. 39-40 and 42) as follows:

> In the present case, we are concerned with the application of the principle of proportionality by the Dispute Tribunal. In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take. …. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant

> matters considered, and also examine whether the decision is absurd or perverse. But 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. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General. …. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision.

142. Further in *Samandarov* 2018-UNAT-859 (paras. 24-25), the Appeals Tribunal held that:

> [D]ue deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application. The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, 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. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

143. In essence, the Appeals Tribunal has consistently stated that the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result, and that the most important factors to be taken into account in assessing the proportionality of a sanction include the

seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee, and his past conduct, the context of the violation and employer consistency (*Applicant* 2013-UNAT-280, para. 120. See also, *Abu Hamda* 2010-UNAT-022, Sanwidi 2010-UNAT-084, para. 39. This principle was also confirmed in *Applicant* 2013-UNAT-280, para. 120; *Abu Jarbou* 2013-UNAT-292, para. 41; *Akello* 2013-UNAT-336, para. 41; *Samandarov* 2018-UNAT-859, para. 23; *Turkey* 2019-UNAT-955, para. 38. *Aqel* 2010-UNAT-040, para. 35; *Konate* 2013-UNAT-334, para. 21; *Shahatit* 2012-UNAT-195, para. 25; *Portillo Moya* 2015-UNAT-523, para. 22. *Rajan* 2017-UNAT-781, para. 48; *Negussie* 2016-UNAT-700, para. 28; *Ogorodnikov* 2015-UNAT-549, paras. 30-35. 928.)

144. As to the evaluation of proportionality in UNAT case law, in *Rajan* 2017-UNAT-781, the Appeals Tribunal stated that dismissal is justified only if the facts determined the loss of trust by the Administration in the staff member (and this is not the case under scrutiny here). When the disciplinary measure involves termination, the question to be answered in the final analysis is whether the staff member's conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable.

145. Similarly, in *Conteh* 2021-UNAT-1171, para. 51, the Appeals Tribunal recalled that the facts must "render the continuation of the employment relationship intolerable".

146. Applying the said principles to the case at hand, the Tribunal notes that the incident in this case carried no substantial effect towards the victims apart from being a nuisance; it did not impact the trust by the employer in the staff member and his future performance and respect of the international civil servants' duties, and it did not render intolerable the continuation of the employment relationship.

147. Coming to the aggravating and mitigating factors, it has to be noted that the Administration failed to consider many exculpatory or mitigating circumstances: in particular, health and security breaches, the unlawful resistance and the provocation

by the guests, the threats by a numerous group of angry men, the place and time of the incident and the general context of it (the fact that it happened in a private life sphere, with no connection with the working relationship, in a calm compound of a gated community, in the evening and outside working hours), with the security missing its duties; the numerous years of the Applicant's unblemished carrier with a history of consistent good performance (including some outstanding achievements performances), with no prior allegations of misconduct being made against him; the attitude of the Applicant who expressed regret and cooperated in a transparent manner with the investigation and kept a low profile as requested by the Administration (in substance avoiding to defend himself in the host country); the incident occurred during the Covid-19 pandemic for which a national curfew was in place and during which emotions and tensions were generally heightened; it was single outburst and a momentary loss of temper.

148. The Applicant plausibly argues that the sensationalized and biased media involvement caused pre-judgment of the case and that the case probably would not have led to a separation if the media had not been involved.

149. The Administration indicated that the fact that the Applicant felt aggrieved by the video and online defamation, together with commentary by the Complainant after the incident was not relevant to its consideration. However, the Tribunal is of the view that the features of the campaign, with information manipulated and tones artificially inflated, confirm the strong conflictual attitude of the guests in the house, contributed to redefining the events against the Applicant and their concurring responsibility for the altercation that ensued.

150. The Applicant relies on the 2021 Mid-Year UNICEF Report on Disciplinary Measures for the proposition that in a more serious case, a staff member in a senior position made comments and gestures of a sexual nature to a supervisee, shouted at and threatened the supervisee and another colleague, engaged in verbal altercation with another staff member and made racist and disparaging comments to the other staff member, and the staff member received the same sanction as the Applicant of separation from service with compensation in lieu of notice and with termination indemnity. In comparison with the case at hand, the conduct was more serious in

that case, owing to the authority of the accused person towards the victim, who was a supervisee.

151. The Applicant also recalls:

a. *Ouriques* 2017-UNAT-745, a more serious case where a staff member repeatedly punched another staff member in the head, the Administration gave the same sanction as the Applicant of separation with compensation *in lieu* of notice and with termination indemnity, and UNAT found the measure lawful by majority; it is worth noting that in that case, the UNDT had found the sanction disproportionate, and that the assessment was shared by the presiding judge of UNAT, who wrote her dissenting opinion.

b. *Ali Halidou* 2020-UNAT-1070, where a staff member slapped a non-United Nations staff member, causing an earache in the left ear and a perforated eardrum which led to being placed on temporary incapacity for 60 days, the Administration applied separation with compensation *in lieu* of notice and with termination indemnity;

- c. *Majut* 2018-UNAT-862, for the proposition that in a more serious case where a staff member hit a staff member in the face with hands, the Administration gave the staff member the sanction of separation with compensation *in lieu* of notice without termination indemnity;

- d. *Nsengiyumva* 2020-UNAT-1057, where a staff member, security officer, under the influence of alcohol, provoked a confrontation, initially verbal but then physical, the Administration gave the staff the sanction of separation with compensation *in lieu* of notice and without termination indemnity.

- e. *Samandarov* 2018-UNAT-859, where the applicant was disciplined for having – during an altercation - threatened to break the complainant's phone if she had taken a photo of him, UNAT upheld the UNDT judgment which had held that the cumulative imposition of two sanctions, namely a

> written censure and the loss of two steps in grade, imposed on Mr. Samandarov was disproportionate to the level of misconduct (considering, in particular, that his threat had exclusively been directed against an object and not the physical integrity of the complainant and that the threat had not materialized) and that the sanctions were particularly excessive in light of Mr. Samandarov's circumstances, which should have been considered as mitigating factors.

152. In the final closing submissions, the Respondent recalled the recent judgment *Lishchynski* UNDT/2021/116, where the sanction of separation from service with compensation *in lieu* of notice and with termination indemnity was found proportionate to discipline a staff member who engaged in a verbal and physical altercation with a Kenyan police officer, damaging her umbrella. Apart from any diverging consideration about the objective proportionality of the sanction in that incident, that case is different from this one, which does not involve a police officer and therefore deserves a milder sanction.

153. This case instead is closer in similarity to *Applicant*, 2013-UNAT-381, involving a male UNICEF staff member engaged in physical altercation against a woman, also a staff member, where the Administration sanctioned the staff member with demotion by one level with two years deferment. UNDT and UNAT found the measure proportionate.

154. Therefore, the sanction applied by the Administration on the facts before me is unduly harsh and grossly disproportionate to the nature and gravity of his alleged misconduct and is therefore in breach of art. 10.3(b) of the staff rules, which requires the Administration to ensure that any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of the misconduct.

155. The Appeals Tribunal recognizes the jurisdiction of this Tribunal in replacing the disciplinary sanction (after an assessment of its unlawfulness) with a different one, more adequate to the real gravity of the offense (*Abu Hamda* 2010-UNAT-022; see also *Yisma* UNDT/2011/061).

156. The Tribunal finds that in the present case the sanction imposed should be replaced by the disciplinary measure of demotion by one level with two years deferment of eligibility for consideration for promotion.

157. What the above implies is that the staff member must be reinstated, with his benefits and entitlements, included education grant, but at the level one below his current grade. The two years' deferment must be counted, of course, from the time the previous sanction was applied.

158. The Tribunal, given the finding of misconduct, is instead of the view that the economic damage or moral harm suffered by the Applicant cannot be compensated. The damage to his reputation arising from the defamation campaign was not caused by nor could it be prevented by the Administration.

159. In accordance with art. 10.5(a) of its Statute, the Tribunal shall also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission as the contested decision concerns termination.

160. It is clear from art. 10.5(a) of the Dispute Tribunal's Statute, as consistently interpreted by the Appeals Tribunal, that compensation *in lieu* is not compensatory damages based on economic loss, but only the amount the Administration may decide to pay as an alternative to rescinding the challenged decision or execution of the ordered specific performance (see, for instance, *Eissa* 2014-UNAT-469).

161. As to the amount of the compensation *in lieu*, the above recalled article of the Dispute Tribunal's Statute sets a general framework for its determination, stating that, apart from exceptional circumstances, it "shall normally not exceed the equivalent of two years' net base salary of the applicant" (see *Mushema* 2012-UNAT-247; *Liyanarachchige* 2010-UNAT-087; *Cohen* 2011-UNAT-131; *Harding* 2011-UNAT-188). The Appeals Tribunal found that the amount of *in lieu* compensation will essentially depend on the circumstances of the case (*Mwamsaku* 2012-UNAT-246) and that "due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach" (*Ashour* 2019-UNAT-899, para. 21).

162. Having in mind the above-mentioned criteria and applying them to the specific case at hand (and so having considered the seniority of the Applicant, the type of contract held, and the facts), the Tribunal sets the amount of the compensation *in lieu* at two year's net-base salary based on the Applicant's salary on the date of his separation from service.

Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

163. The Tribunal is satisfied that the key elements of the Applicant's due process rights were respected as per staff rule 10.3(a).The process was fair. There was no substantial irregularity occurred and the facts forming the basis of the dispute was largely conceded by the Applicant.

164. The Tribunal is aware that the investigator heard only four out of ten witnesses requested by the Applicant (while those testimonies could have been relevant to assess the personality of the Complainant and of the guests and their reliability, and to explain the context, which was essential to evaluate the Applicant's conduct).

165. In the case, having strong evidence of the facts (the videos and the general acknowledgement by the Applicant on the core of the incident), the investigator concluded the assessment and got to a conclusion. This does however not render the process unfair or irregular. Indeed, the failure of widening the collection of evidence, especially when limited to secondary facts, does not vitiate the process, which remains valid, but only makes the disciplinary decision possibly weaker.

Conclusion

166. In view of the foregoing, the Tribunal DECIDES:

a. The contested decision is hereby rescinded and replaced with a measure of demotion by one level with two years deferment of eligibility for consideration for promotion;

b. The Applicant is to be reinstated, with all his benefits and entitlement, included the education grant, from the date of separation, but at a level one below;

c. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, the Applicant shall be paid a sum equivalent to two years' net base salary, based on his salary at the time of his separation;

d. The aforementioned sums shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)
Judge Francesco Buffa
Dated this 22nd day of April 2022

Entered in the Register on this 22nd day of April 2022
(Signed)
Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi