UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/059
Judgment No.: UNDT/2023/059
Date: 21 June 2023
Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ANTOINE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Sétondji Roland Adjovi, *Etudes Vihodé*
Charles A. Adeogun-Phillips*, Charles Anthony* LLP.

Counsel for the Respondent:
Jacob B. van de Velden, DAS/ALD/OHR, UN Secretariat
Andrea Ernst, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Administrative Officer at the FS-6 level, in the Office of the Deputy Chief Mission Support, in the United Nations Truce Supervision Organization ("UNTSO"), based in Jerusalem, Israel, filed an application with the United Nations Dispute Tribunal ("UNDT/the Tribunal") in Nairobi to contest the decision to impose on him a disciplinary measure of dismissal, in accordance with staff rule 10.2(a)(ix).[1]

Facts

2. On 24 June 2020, the Office of Internal Oversight Services ("OIOS") received a report of possible unsatisfactory conduct implicating staff members at UNTSO in Jerusalem. Evidence submitted in support of the report included a video-clip ("the clip") showing two male individuals and a female individual driving through a busy street in a clearly marked United Nations vehicle. The male individual seen in the back seat and the female were allegedly engaging in an act of a sexual nature as the vehicle was driven along a heavily trafficked street.[2]

3. Upon receipt of the information, the OIOS conducted formal investigations.[3] The Applicant was interviewed on 30 June 2020.[4]

4. On 1 July 2020, the Applicant was placed on Administrative Leave Without Pay ("ALWOP"), which was subsequently changed to Administrative Leave with Pay ("ALWP") effective 9 September 2020.[5]

5. On 19 May 2021, the OIOS transmitted its investigation report to the Office of Human Resources for appropriate action.[6]

[1] Reply, annex 5 (Sanction letter).
[2] *Ibid.,* at annex 1.
[3] *Ibid.*
[4] *Ibid,* at para. 8.
[5] *Ibid.,* at annex 1 (Doc 270 and DOC 508).
[6] *Ibid.,* at annex 3.

6. By a letter dated 12 August 2021, the Assistant Secretary-General, Office of Human Resources ("ASG/OHR"), charged the Applicant with misconduct.[7] The Applicant was allowed a period of one month to provide comments to the charges.[8]The Applicant submitted his comments on 11 October 2021.[9]

7. The contested decision was conveyed to the Applicant by a letter dated 11 April 2022.[10]

8. Regarding the factual background of the contested decision, the ASG/OHR indicated that based on the memorandum of allegations, the Applicant had:

a. On 21 May 2020, while in a United Nations vehicle clearly visible from a public street in Tel Aviv, Israel, held a female individual closely to his body while she was seated on his lap facing him and gyrating in a sexually suggestive manner. These events were captured in an 18-second video-clip, which was widely disseminated, bringing the Organization into disrepute; and

b. Between June 2020 and March 2021, the Applicant failed to cooperate with the OIOS investigation into his conduct, by:

   i. refusing to provide OIOS with the contact details of a material witness; and

   ii. deleting data from a mobile phone which he had submitted to the investigators or submitting to OIOS a different mobile phone from that used on 21 May 2020 and/or deleting data from a United Nations issued SIM card, which he had submitted to the investigators.[11]

[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.,* at annex 4.
[10] *Ibid.*
[11] *Ibid.,* at annex 4, para. 2.

Framework of disputes arising from the same facts and procedural history of this case.

9. The facts relevant for this case relate to other applications by the same Applicant and of the following judgments and orders. In particular:

a. On 31 August 2020, the Applicant filed an application challenging two decisions: (i) the 1 July 2020 decision to place him on ALWOP; (ii) the 30 June 2020 decision to seize his personal smartphone for purposes of an investigation. By Judgment No. *Antoine* UNDT/2021/151, the application was dismissed.

b. By an application filed on 14 July 2020, the Applicant sought the suspension, pending management evaluation, of two decisions ("the impugned decisions"): (i) the 1 July 2020 decision to place him on ALWOP from 1 July 2020 for a period of three months, or until the completion of an investigation and any disciplinary process, whichever is earlier; (ii) the 30 June 2020 decision by OIOS to seize his personal smartphone for the purposes of the OIOS investigation of the Applicant. By Order No. 139 (NBI/2020), the Tribunal dismissed the application.

c. By a motion dated 20 July 2020, the Applicant requested the Judge President of this Tribunal to order that the Dispute Tribunal Judge assigned to the above-mentioned cases, namely Judge Sikwese, be recused from adjudicating them. The Applicant contended that Judge Sikwese was biased against him and/or his Counsel. By email of 21 July 2020 and Order No.:143 (NBI/2020), the Judge President denied that motion for recusal.

d. On 2 September 2020, the Applicant filed an application for suspension of the said contested decisions pursuant to art. 10.2 of the Statute and art. 14.1 of the Rules of Procedure of the Tribunal. By Order No.172 (NBI/2020), the application was granted in part, in that implementation of the impugned decision was suspended with respect to placing the Applicant on ALWOP; in the remaining part, the application was dismissed.

e. On 13 August 2021, the Applicant filed an application contesting the 9 June 2021 decision by the Acting Head of Mission, UNTSO, to extend his placement on ALWP for another three months or until the completion of an investigation and any disciplinary process, whichever earlier. By Judgement No. *Antoine* UNDT/2021/144, the application was dismissed.

f. Both judgments, which had been appealed by the Applicant, were affirmed by the United Nations Appeals Tribunal ("UNAT') in *Antoine* 2023-UNAT-1328.

10. In this framework of disputes, on 11 July 2022, the Applicant filed the application mentioned in para. 1.

11. The Respondent filed a reply on 5 September 2022 and requests the Tribunal to reject the application.

12. In his reply, at paragraphs 5, 6 and 7, the Respondent, recalling art. 18 of the UNDT Rules of Procedure, requests the Tribunal to not admit documents already found inadmissible in one of the Applicant's other cases as directed in *Antoine* UNDT/2021/151. He further requests the Tribunal to hold the Applicant and his Counsel in contempt of the Court.

13. In paragraph 33 of his application, the Applicant requests for an oral hearing. In paragraph 35, he requests the Tribunal to direct the Respondent to produce the 11 April 2022 sanction letter issued to one Mr. Juan C. Cunillera.

14. By Order No. 041 (NBI/2023), issued on 16 February 2023, the Tribunal observed that in the UNDT's Rules of Procedure, there is no prohibition to admit and use in trial documents allegedly confidential and allegedly unlawfully acquired (without prejudice to the possible responsibility, in different proceedings, of the person who acquired them); the Tribunal found it useful to admit the documents referred to in para. 6 of the Respondent's reply, whose evidentiary value would be evaluated with the other collected evidence. The Respondent's motion on this matter was, therefore, dismissed.

15. As to the Applicant's request for a hearing, by the same Order N0. 041 (NBI/2023), the Tribunal stated that, on the one hand, the Applicant did not specify the reasons for hearing the witnesses he asked for and that the hearing cannot be a way to allow fishing expeditions on purported due process violations or unspecified facts. It further considered on the other hand that, for example, Mr. Benjamin Swanson, the then Director, Investigations Division, OIOS, already testified on the same issues and matters were determined in *Antoine* UNDT/2021/151 (between the same parties) and his evidence is already on the record (Reply, annex 7). Accordingly, it was not necessary to hear him again. The Tribunal also observed that the Applicant proposed to call F01's lawyer (F01, the lady alleged to have been with the Applicant in the car). The Tribunal took therefore, the view that it was improper to hear from a lawyer of a completely unidentified person not directly called in the proceedings. Finally, the Tribunal was of the view that it is not useful to call for testimonies of persons not directly informed on the material facts at stake. These include staff members and other persons listed in para. 33 of the application.

16. Regarding the Applicant's request to direct the Respondent to produce the 11 April 2022 sanction letter issued to one Mr. Cunillera; the Tribunal granted the request. It observed that the sanction issued to Mr. Cunillera, if any, may be relevant for the adjudication of the present case. The Tribunal, accordingly, ordered the Respondent to produce a copy of the said sanction letter by 28 February 2023.The Respondent complied and filed a copy of the sanction letter on 27 February 2023.

17. On 1 March 2023, the Tribunal issued Order No. 058 (NBI/2023), and, among others, decided that no additional documents or motions shall be accepted in this case.

18. On 31 March 2023, together with his closing submissions, the Applicant filed documents numbered annexes 57-60. On the same day, the Respondent filed a motion requesting the Tribunal to strike from the record the documents filed by the Applicant numbered as annexes 57-60 on the ground that they were filed in violation of para. 8 of Order No. 058 (NBI/2023).

19. On 1 April 2023, the Applicant requested leave to respond to the Respondent's motion to strike. He indicated that he did not contest the motion; however, he requested to be heard on this matter and to be granted leave to file a response before the Tribunal issued its ruling.

20. Similarly, on 2 April 2023, the Applicant filed a motion to strike para. 5 of the Respondent's closing submissions filed on 31 March 2023. In para. 5 of his submissions, the Respondent submits that UNAT in its Fortieth Session from 13 to 24 March 2023, dismissed both of the Applicant's appeals in cases 2022-1660 and 2022-1663 against judgments UNDT/2021/144 and UNDT/2021/151.

21. On his part, the Applicant contended that there were no published UNAT judgments for cases 2022-1660 and 2022-1663 for the Applicant. The Respondent provided no UNAT judgments supporting his claims in para. 5 of his closing submissions. Accordingly, the Applicant requested the Tribunal to strike para. 5 of the Respondent's closing submissions and to consider referring Counsel for the Respondent to the Secretary-General for the enforcement of accountability under art. 10(8) of the Dispute Tribunal's Statute.

22. As to this group of documents numbered annexes 57-60 to the Applicant's closing submission, the Tribunal notes that the documents were filed in violation of the Tribunal's Order No. 058 (NBI/2023), which stated at its para. 8, that "no additional documents or motions shall be accepted in this case" and that the Applicant gave no reason for his late filing (also considering the date of the documents which had been available to the Applicant for a long time); being the evidence inadmissible, as contrary to an ordinate and expeditious judicial proceedings, the Tribunal orders these documents to be struck from the record.

23. As to the hearing, having reviewed the parties' submissions, the Tribunal already held that the relevant facts were clear and there was no need to conduct a hearing on the merits as the matter could be determined based on the record. The Tribunal thus directed the parties to submit closing submissions on or before 31 March 2023.

24. In his subsequent motion, the Applicant invited again the Tribunal to call F01's lawyer to testify on the veracity of the fact he shared with OIOS his contact details.

25. The Tribunal considers that the Applicant did not provide the name of F01 nor ask for her testimony and that the testimony of F01's lawyer, a person who was not present to the facts and involved only for his/her professional role as a lawyer, cannot provide a testimony in the place of his/her (unidentified) client and cannot provide the proceeding with useful facts. Therefore, the motion for his testimony is dismissed.

26. On 5 April 2023, the Applicant filed a motion to strike documents provided by the Respondent, an in particular, on one side the additional cases (619, 610, 609 551 and 554) included in footnote 37 of the Respondent's closing submissions and, on the other side, the UNAT judgments not yet published.

27. The Tribunal is of the view that reference to additional cases can be admitted, being only an argument for discussion, also reference to a UNAT judgment is admissible, as related to judgment, although not published, but already assumed by the panel and whose synopsis has been delivered in a public UNAT session.

28. On 19 April 2023, the Applicant filed a motion requesting the Tribunal to take judicial notice of the UNAT Judgment in *Philip van de Graaf* 2023-UNAT-1325. He specifically invited the Tribunal to consider the UNAT's holding that:

> In terms of damage to the UNICEF reputation, the false and defamatory online media coverage could not be attributable to Mr. Van de Graaf and as such, cannot be considered as an aggravating factor.

29. The Tribunal will deal with this issue at para. 85.

Standard of review and burden of proof.

30. The Appeals Tribunal's jurisprudence establishes the following principles; 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 examine

whether the decision is absurd or perverse.[12]

31. 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". In this regard, "the Tribunal is not conducting a merit-based review, but a judicial review" explaining that a "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".[13]

32. In disciplinary cases, the Dispute Tribunal examines the following elements:

a. Whether facts were established by clear and convincing evidence;

b. Whether the facts amount to misconduct;

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

d. Whether the sanction is proportionate to the gravity of the offence.[14]

33. The Administration bears the burden of establishing that the misconduct has occurred,[15] and the misconduct must be established by clear and convincing evidence.[16] This has been interpreted to mean that the truth of the facts asserted is highly probable.[17]

Whether the facts on which the disciplinary measure was based were established by clear and convincing evidence.

34. The Applicant is charged with two different counts of accusations:

a. for having, on 21 May 2020, while in a United Nations vehicle clearly

[12] *Sanwidi* 2010-UNAT-084; *Santos* 2014-UNAT-415, para. 30.
[13] *Sanwidi, op. cit.,* para. 42.
[14] *Miyzed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024.
[15] *Diabagate* 2014-UNAT-403.
[16] *Molari* 2011-UNAT-164.
[17] *Appellant* 2013-UNAT-302.

visible from a public street in Tel Aviv, Israel, held a female individual closely to his body while she was seated on his lap facing him and gyrating in a sexually suggestive manner; these events were captured in an 18-second video-clip, which was widely disseminated, bringing the Organization into disrepute (count one);

b. for failure to cooperate with the OIOS investigations by refusing to provide OIOS with the contact details of a material witness and deleting data from his phone (count two).

a. Gyrating in a sexually suggestive manner

Applicant's submissions

35. The Applicant admits that he was the occupant of the rear passenger's seat. He further concedes that he was with a female passenger ("F01") who was not authorized to be in the vehicle. The Applicant however, disputes that the actions showed in the clip were sexually suggestive. He explains that F01 hopped on his lap and she was dancing in Caribbean style.[18]

36. The Applicant seeks to draw an analogy and questions that had he been filmed in the United Nations vehicle watching videos on YouTube of the ilk that he is accused of, which also have people dancing in the same manner, would he have been charged and sanctioned? He further avers that such dancing styles are common in parties held on the United Nations premises and in mission compounds. If those doing so were videoed and those videos were released to the public, would all those in attendance be charged and sanctioned in the same way? The Applicant opines that this element of the sanction has been driven based on the publicity rather than his actual actions.[19]

37. The Applicant contends that the only thing which has been established is that F01 was an unauthorized passenger not wearing a seat belt. Based on the relevant legal

[18] Application, section VIII, para. 12 and at annex 23, para. 53.
[19] *Ibid.,* at section VIII, paras. 13 and 14.

framework,[20] the appropriate sanction for the first violation of "transportation of non-authorized persons in the United Nations vehicles" is withdrawal of driving permit for 30 days. On the other hand, the Applicant submits that the responsibility for ensuring that all staff members wear seat belts and that no non-United Nations staff members are transported in the United Nations vehicle rests with the driver, not the other passengers. Clearly, he was not the driver. In this regard, therefore, there is no possibility that this charge could be considered to lead to a sanction that was imposed on him.[21]

Respondent's submissions

38. The Respondent's position is that there is clear and convincing evidence that on 21 May 2020 the Applicant engaged in sexually suggestive behaviour in a United Nations vehicle in a public street in Tel Aviv, Israel. He was filmed holding on his lap a female individual, in a red dress, reportedly a prostitute who faced the Applicant and gyrated on him, while the Applicant held her with his hand(s) on her buttocks and while he pulled her genital area closer to his crotch. The 18-second video-clip of the Applicant's behaviour speaks for itself.[22]

39. The Respondent seeks to reply on the Applicant's admissions; where he confirms that he is the male in the clip and that F01 was not an authorised passenger in the United Nations vehicle. The Respondent contends that the inappropriateness of the Applicant's behaviour is not in dispute. It is further not in dispute that the Applicant's behaviour captured in the clip was widely viewed, at a minimum, as sexually suggestive. Accordingly, the Applicant by his conduct brought the Organization into disrepute. Moreover, around 23 and 24 June 2020, the clip of the Applicant was widely disseminated online, including by news outlets, thus increasing the reputational harm to the Organization. The incident caused tensions with Israel, UNTSO's Host Member

[20] *Ibid.,* ICF-000261 (COS Directive on procedures applicable to the operation of UNTSO vehicles and related matters, section 10).
[21] *Ibid.,* at annex 23, para. 56.
[22] Reply, section D, paras. 11 and 12.

State, and potential backlashes against United Nations staff.[23]

40. Regarding the Applicant's contention that the only thing which has been established was that F01 was an unauthorized passenger not wearing a seat belt, the Respondent states that this assertion is erroneous. The Applicant totally disregards his physical interaction with F01, and his active role in it. Again, the clip speaks for itself, as does the public's reasonable reaction to it. In fact, the Applicant in his interview of 30 June 2020, when asked to describe the behaviour in the clip, he confirmed that "*the male seemed to be reciprocating or participating*".[24]

41. Further, the Respondent refutes the Applicant's assertion that his physical interaction with F01 in the United Nations vehicle as captured in the clip cannot be seen as "sexually suggestive". This assertion also fails. The Applicant has admitted the contrary; he conceded that the acts shown in the clip "may be construed as inappropriate".

Considerations

42. As to the first count, facts are clearly demonstrated by the 18-second video-clip of the Applicant's behaviour, which, in the Tribunal's assessment, speaks for itself.

43. The Applicant was filmed in the United Nations vehicle stopped at a traffic-lights in HaYarkon Street in Tel-Aviv, holding on his lap a female individual, reportedly a prostitute, who faced the Applicant and gyrated on him, while the Applicant held her with his hands on her buttocks and while he pulled her genital area closed to his crotch. The vehicle was a typical white United Nations vehicle, with identifiable letters "UN" inscribed on right front door, hood, and bonnet.

44. The Applicant was correctly identified by photographic evidence owing to the chain and bracelet he usually wore and the identical T-shirt he owned, data which were corroborated by the statement of his two colleagues present in the same car. In any

[23] *Ibid.*, paras. 14 and 15.
[24] *Ibid.*, para. 17.

case, it is now undisputed that the person depicted in the video is the Applicant.

45. Indeed, the video clip, the equivocal concession (later to become an unequivocal admission) and the identification evidence alone were sufficient to establish the facts (see also *Antoine* 2023-UNAT-1328, para. 34).

46. The acts depicted have a clear sexual connotation, and cannot be compared with the Caribbean dances, as the Applicant would; indeed, apart from the considerations that it is at least original to say that that lambada (or other Caribbean dance) can be danced in a car by persons occupying the same seat and such dances do not contemplate a tight and persistent contacts (that probably lasted for long) and "a straddle of a man", to use the wording by the Applicant (Antoine ARI transcript, line 309- 604, doc. 184 of the Investigation report), the Tribunal finds that it was not a dance which happened but an activity of sexual nature (although not a sexual act itself).

47. The acts were indeed perceived as sexual by all people who saw the video on the web and commented on it. Finally, the sexual nature of the activity is also confirmed by *Millan* 2023-UNAT-1330, para. 68.

48. The Respondent raised a suspicion of sexual activity with prostitutes, recalling on the one hand that the car was filmed in a place known as prostitution area in Tel Aviv, and on the other hand that the Carlog locator, the Global Positioning System ("GPS") registered that the car soon after the moment depicted in the video, moved to a hotel parking, where it remained stationary for more than three hours (precisely from from 9.48 p.m. to 1.14 a.m. of the following day), certainly not for official reasons and in any case without the Applicant and his fellows gave any reasonable explication of that.

49. The Tribunal notes that in the record two emails on 23 and 24 June 2020from the address Barmitza7@protonmail.com referred to OIOS the details of the events, specifying the plate number of the vehicle of UNTSO, the names of the people on board (and the objective way to identify them), of the place (specifying it was a prostitution area) and of the transported woman (defined as a local prostitute), also expressing

disagreement for the behaviour in public space and for the frequency of this kind of events too.

50. None of the parties questioned the existence and veracity of the emails, although his/her author has not been identified (or revealed), which has the evidentiary value of a document. Moreover, many of the details of the facts denounced in the emails have been confirmed by the following investigation: the Tribunal, therefore, finds that the emails are reliable in their full content.

51. In the said circumstances, Mr. Millan's statements to investigators that two other females had joined the group before (Millan transcript, line 336-585, doc. 468 of the investigation report), the details indicated in the above recalled emails, the long stop in the hotel parking area resulting from the Carlog system, all this can raise the heavy suspicion that the real scope of the trip out of business hours in that area of Tel-Aviv (a trip that lasted after midnight with no given reason could be other than a simple lift to F01 (as it was said to investigators). However, the Tribunal will assess only the sanction letter and the facts specifically indicated in it, which solely have to be verified in these proceedings.

52. In any case, the Tribunal considers that the said facts corroborate the assessment of the nature of the activity depicted in the video as sexual.

53. While it results from the record that (see email on 24 June 2020 by Mr. David Rajkumar, Chief of UNTSO Special Investigations Unit, on record) the video clip surfaced from a United Nations staff in Iraq, it is undisputed that the video spread on the web, attracting many negative comments from the public (see documents annexed to the Reply). In particular, it is worth recalling the article in The New Humanitarian, United Nations launches sexual misconduct probe after incriminating car video emerges, on 25 June 2020; the article by Matthew Russell Lee on 28 June 2020 in Inner City Press, Scoop on United Nations prostitution video (and others by the same author). The attention to the event remains for long, as demonstrated by the article, "The UNTSO Sex Video investigation" by Peter Gallo on 11 October 2020, and by the article on 3 June 2021by Maurizio Guerrero, "A year later, a sex-video inquiry tied to the UN

Mission in Israel remains a mystery", on Pass Blue, Independent coverage of the United Nations.

54. The video and the mass media attention which followed, undoubtedly pushed the Organization into disrepute and caused a huge damage to its image, confirming at the same time the importance of the recalled press in its role of watchdog, even for an important international Organization like the United Nations.

55. In particular, the Tribunal notes that the United Nations logo which was written out or the white car immediately created a connection between the activity of the Organization and the activity with sexual connotations performed inside the car.

56. The video clip, which was widely disseminated, undermined the reputation, credibility and integrity of the Organization, within a difficult conflict affected area of the world (see also Mr. Swanson's statements to the investigators about the adverse reputational impact that the clip had on the Organization, including in causing tensions between the United Nations and Israel, the host Member State).

57. The Tribunal observes that, by engaging in sexual nature activities in slow moving traffic in a public and well-illuminated street, in a clearly marked United Nations vehicle, the Applicant accepted the risk that passersby from the public may witness his activity, with an inevitable adverse reputational impact on the Organization. The Applicant, being responsible for the facts at the origin of the Organization's disrepute, he took responsibility of all consequences, foreseen or not foreseen, of his conduct. He was certainly unlucky that the events were caught in a clip, recorded and then disseminated, but if it was not for his misconduct, the harm to the Organization would not have occurred, and therefore, he remains responsible for that (see *Kennedy* 2021 UNAT-1184, para. 69(c), on the relevance of this damage in the assessment of the disciplinary responsibility of a staff member).

58. It is clear to this Tribunal that if the event would have happened in a car different from a clearly marked United Nations vehicle, the fact would have been different, and also the disciplinary sanction would have been milder (or also none, for

private life facts); in other terms, the Applicant was (or should have been) aware of being in a United Nations vehicle clearly marked with the United Nations logo outside, and therefore, of the possibility to involve the United Nations in the activity performed in the car, notably when the conduct was not proper and exposed to the public in a public street.

59. In other terms, the core of misconduct in the case turns around the improper use of the car (for an activity with sexual connotations) and the damage to the reputation of the Administration connected. It is not the activity, which is relevant, but the place where it took place which brings into disrepute the Organization, whose initials were clearly shown in the exterior of the car.

Failure to cooperate with the OIOS investigations by refusing to provide OIOS with the contact details of a material witness and deleting data from the phone.

i. Refusal to provide OIOS with the contact details of a material witness.

Applicant's submissions

60. The Applicant denies the charge that he failed to cooperate with the investigation by failing to provide F01's contact details to the investigators. He submits that, to the contrary, he shared with OIOS the contact details of F01's lawyer. The Applicant invites the Tribunal to call F01's lawyer to testify on the veracity of his averment. The Applicant contends that this element of the charges and the sanction is completely without any merit. The Applicant rather faults the OIOS. He argues, the fact that OIOS was unable to independently identify F01, in Israel, where cameras are everywhere, speaks more on the competence of the OIOS investigators rather than any failure on his part to co-operate with OIOS.[25]

ii. Deleting data from the phone

61. The Applicant explains that he had a United Nations SIM card but connected

[25] *Ibid.,* para. 77.

to his personal phone.[26] Accordingly, the Organization was only entitled to be provided with the SIM card, but not to seize his personal phone or analyse its contents.[27]That aside, he handed over his phone to OIOS, thus he cooperated with the investigation.

62. The Applicant denies having deleted any data from the phone. He rather faults OIOS. He submits that if OIOS was not able to find any data they wanted, that should not be proof of any misconduct on his part. It instead shows lack of professionalism on the side of OIOS.[28]

63. The Applicant elaborates that he owned an iPhone 6 that utilizes a Nano-SIM (which debuted in 2012). While a Nano-SIM can store some small amount of data, iPhones do not store any information on the Nano-SIM Card. The iPhone's Nano-SIM is only used to store customer data, phone number and billing information. The SIM on the iPhone cannot be used to store contacts or other user data. Data cannot be backed up or read from the iPhone's SIM. All data is stored in the iPhone's main storage (or in iCloud), along with music, pictures, apps, and other data. This fact has been confirmed by Apple Technical Support. Therefore, there was no data on the UNTSO SIM card that he could have deleted even if he had wanted to, since nothing relevant was stored there anyway.[29]

Respondent's submissions

64. On the count of the Applicant's failure to cooperate with OIOS investigations, the Respondent submits that on 13 July 2020, OIOS requested the Applicant to provide OIOS with the name and contact details of F01. F01 was a material witness, who possessed information that was pertinent to the investigation, in particular F01's interview could be used to verify the Applicant's account regarding his behaviour captured in the clip. The same day, OIOS reiterated the request and its urgency. On 24 July 2020, OIOS repeated the request a third time, following several exchanges on any

[26] Application, annex 23, para. 89.
[27] *Ibid.,* para. 101.
[28] *Ibid.,* para. 103.
[29] *Ibid.,* para. 106.

concerns regarding confidentiality.[30]

65. Despite three clear requests by OIOS and the evident urgency and the assurances given, the Applicant failed to provide OIOS the crucial information regarding F01's identity and contact details, even though the Applicant clearly possessed the information and was in contact with F01. On 26 July 2020, the Applicant communicated his definitive refusal, indicating that he would not provide OIOS the requested information on F01. The Applicant asserted that he had forwarded the contact details of the OIOS investigator to F01 and her purported lawyer, who he also failed to identify, and stated that he would "*leave it to them to initiate the contact*," adding that the matter was "*out of* [his] *control*" and "*there* [was] *nothing else* [he] *could do*."[31]

66. The Respondent maintains that this assertion was obviously wrong, the OIOS had requested the information on F01's identity and contact details and the Applicant could have provided them. Moreover, the Applicant's response was disingenuous, as OIOS had assuaged any confidentiality concerns. Furthermore, the Applicant failed to provide any evidence, such as an email or other communication with F01 and or F01's lawyer that he indeed gave F01 and her lawyer OIOS's contact details and or that F01 had expressed any concerns regarding her anonymity.

67. Regarding the second count of deleting the data from the phone, the Respondent submits that during the Applicant's interview on 30 June 2020, the Applicant submitted a mobile phone and United Nations issued SIM card to the investigators. The Applicant presented this mobile phone to OIOS as the mobile phone he had been using with the official United Nations issued SIM card.[32] OIOS analysed UNTSO's central telephone records (call logs) involving the Applicant, Mr. Ray Steven Millan and Mr. Juan Carlos Cunillera between 1 March 2020 through 30 June 2020. OIOS established that there was communication among them between those dates, including on the date of the incident captured in the clip and around the time of the clip's circulation *i.e.,* 23 and 24 June 2020, using their official United Nations telephone numbers and United Nations

[30] Reply, section D, para. 26-28.
[31] *Ibid.*, at paras. 29-30.
[32] *Ibid.*, at section D, para. 37 and at annex 1, para. 38.

issued SIM cards.

68. In view of UNTSO's central telephone records, which confirmed communication among the Applicant, Mr. Millan and Mr. Cunillera using their official United Nations telephone numbers, the forensic analysis of the mobile phone and United Nations issued SIM card that the Applicant submitted to OIOS on 30 June 2020 should have detected user activities on the Applicant's mobile phone. Subsequently, the forensics by OIOS, reported on 28 July 2020, found no user activity whatsoever in the period between 8 February 2019 and 30 June 2020 on the mobile phone that the Applicant submitted to OIOS on 30 June 2020. Furthermore, the forensics found no iCloud account information whatsoever for the mobile phone that the Applicant submitted to OIOS.[33]

69. In view of the above, the Respondent, submits that it is highly probable that the Applicant either removed this information from the mobile phone he submitted to OIOS on 30 June 2020 or that he submitted to OIOS a different mobile phone from that used on 21 May 2020, and or that he deleted data from his United Nations issued SIM card. Either way, the Applicant interfered with the investigation.

70. In response to the Applicant's assertion that technically he could not have deleted information from the United Nations issued SIM card; the Respondent opines that the Applicant's assertion is wrong. The Applicant himself admitted that the SIM card does store certain data that can be deleted (*e.g.,* "*customer data, phone number and billing information*") and that should therefore, have been present but was not. Moreover, the assertion merely diverts attention and does not affect the compelling evidence that the Applicant interfered with the investigation by either deleting information from the mobile phone that he submitted to OIOS or that he submitted a different mobile phone to OIOS. The Applicant's assertion regarding the United Nations issued SIM card clearly does not affect in any way this evidence or the resulting conclusion that the Applicant interfered with the investigation.

[33] *Ibid.*

Considerations

71. The Tribunal notes that the Applicant failed to provide OIOS the information regarding F01's identity and contact details and did not justify the refusal out of a generic need (which could not be denied to OIOS) to protect the privacy of the person involved. As the justification is not proper (because an investigation is normally surrounded by all cautioning in protecting confidentiality), the following alternative come into play for the Applicant: the Applicant did not provide the name and contact details of F01 simply because he did not know them (although this does not exonerate him from liability, corroborating instead the suspect of exploitation of a prostitute) or, if he knows them, there was no reason to conceal them.

72. As to the alleged deletion of data from his cell phone, instead, the Tribunal, which already assessed the legitimacy of the seizure of the phone (See *Antoine UNDT/*2021/151) notes that there is no evidence of the alleged deletion of data from the device, which was a personal one (as only the SIM was the United Nations property) and that, in particular, the Respondent did not indicate the kind of data he was looking for, and the relevance of it for the present case (on this point see *AAE* 2023/UNAT/1332, para. 141, where UNAT did not find misconduct with respect to the Appellant's deletion of the WhatsApp messages on his private phone).

Whether the established facts amount to misconduct.

Applicant's submissions

73. The Applicant submits that his rights were violated, and the allegations have not been established with clear and convincing evidence. The only established fact is that the Applicant was in the back passenger seat of a United Nations vehicle where an unauthorized female passenger danced on his lap for a short period of time. The established facts cannot sustain the charges of misconduct, nor the sanction imposed on him.

Respondent's submissions

74. The Respondent contends that through his conduct, the Applicant acted in violation of staff regulations 1.2(b), 1.2(f), 1.2(q) and 1.2(r), and staff rules 1.2(c) and 1.2(g). With his two acts of misconduct, each separately as well as together, constitute serious misconduct.

75. By his conduct shown in the clip and by failing to cooperate with the OIOS investigation, the Applicant failed, by each act and together, to uphold the highest standards of efficiency, competence and integrity required under staff regulation 1.2(b), and he failed, by each act and together, to conduct himself at all times in a manner befitting his status as an international civil servant, in violation of staff regulation 1.2(f).

76. By his conduct shown in the clip in a United Nations vehicle, the Applicant failed to use the property of the Organization i.e., the United Nations vehicle, only for official purposes and failed to exercise reasonable care when utilizing that property, the Applicant acted in violation of staff regulation 1.2(q).

77. By failing to cooperate with the OIOS investigation, in particular his refusal to identify F01, the Applicant failed to respond fully to requests for information from officials authorized to investigate the possible misuse of funds, waste or abuse, in the instant case, the United Nations vehicle featured in the clip, in violation of staff regulation 1.2(r).

78. By failing to cooperate and interfering with the OIOS investigation, the Applicant acted in violation of staff rule 1.2(c). Further, by failing to cooperate and interfering with the OIOS investigation, the Applicant disrupted or otherwise interfered with an official activity of the Organization, including the Organization's official activity in connection with the administration of justice system, in violation of staff rule 1.2(g).

79. In light of the above, the Respondent submits that the Applicant's conduct, in each instance, constitutes misconduct under Chapter X of the staff rules, which, each

separately and together, is serious.

Considerations

80. The relevant provisions of the revised staff regulations (applicable to this case) stipulated as follows:

> 1.2 (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;
>
> 1.2 (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;
>
> 1.2 (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;
>
> 1.2 (r) Staff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate the possible misuse of funds, waste or abuse.

81. The Tribunal preliminarily notes that the use of the property and the assets of the Organization is allowed only for official purposes and that in the case the Applicant failed to exercise reasonable care when utilizing such property and assets, in violation of staff regulation 1.2(q).

82. By his activity performed in the United Nations car with big blue United Nations letters marked on the exterior of the car, exposed to the public view (and also to unfortunate recording), the Applicant behaved in a manner that, not only put the Organization into disrepute and caused a huge damage to its image, but is contrary to the standard of integrity required to an international official, also in violation of staff

regulation 1.2(b).

83. In these circumstances, there was undoubtedly a preponderance of evidence that the Applicant had committed serious misconduct not befitting an international civil servant (see *Antoine* 2023-UNAT-1328, para. 34).

84. The Applicant objects that he had nothing to do with the wide dissemination of the video, which he could not control and recalled *Van de Graaf* 2023-UNAT-1325.

85. The Tribunal already noted that the Applicant could have prevented the reputational damage to the Organization by behaving in compliance with the rules, while he acted without caring that it was possible to see through the windows of the car and by anyone from the streets the car was passing by, what was happening inside, and that the actions were definitely unrelated to United Nations functions in the area. The case is different from *Van de Graaf* because there the video depicted a situation which was different from reality, and whose evidence was contrasted by some testimonies, who revealed that the publication of the video was unpredictable by the staff member as it was deliberately orchestrated in bad faith and maliciously by the same people involved in the facts and facts were inflated with the aim to damage Mr. Van de Graaf (see in particular paras. 127 and 128 of the UNDT judgment, *Van de Graaf*, UNDT/2022/037). Here, the reputational damage to the Organization was only an objective consequence of the Applicant behavior, which, given the circumstances, he could have foreseen and avoided**.** As to facts contained in the second count, as indicated above, the Tribunal observes that by failing to cooperate with the OIOS investigation, in particular his refusal to identify F01, the Applicant did not violate staff regulation 1.2(r), as this provision is not applicable to the author of misconduct assessed in the same proceeding.

86. This Tribunal, as to the failure by the Applicant to provide OIOS the information stored in his phone, recalls what UNAT stated in *AAE*2023/UNAT/1332, para. 140 (see also what was already expressed in *Applicant UNDT*/2022/030, dissenting opinion), finding it necessary to distinguish the behaviour of the staff member who actively hampers and misleads the investigation and the behaviour which

is purely passive.

87. The obligations set in the Staff Regulations and Rules to cooperate with the investigation, answer questions, provide documentary evidence in his/her possession or which should reasonably be expected to be in his/her possession cannot be applied to the subjects of the investigation, being applicable only to other staff members. Indeed, while a purely passive behaviour can be an expression of the right of self-defence, sanctioning the said behaviour would mean that every misconduct would be punished twice, one following the prohibition of the material conduct, and a second time simply because its authors do not confess the misconduct to the investigators or do not help them in finding evidence at charge; in other terms, a detrimental treatment (a kind of "*double peine*") will be following an act of exercise of the right to self-defence.

88. The said protection can be extended to the right not to be prosecuted for not confessing or for denying his/her own misconduct and, in general, for any form of lack of cooperation (including one that, in a passive way only or with a generic verbal conduct only, has the effect of obstructing the investigation).

89. Instead, the obligation not to interfere with any investigation, and, in particular, not to withhold, destroy or tamper with evidence, and not to influence or intimidate the complainant and/or potential witnesses is applicable to all staff members, including the subject of an investigation.

90. Applying this principle to the case at hand, a disciplinary sanction for not cooperating has to be excluded with reference to the staff member who committed a misconduct sanctioned in the same proceedings.

91. Owing to the said reasons, the accusations under count two fall.

92. In any case the Tribunal highlights that misconduct occurred in relation to count one only.

Whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

Applicant's submissions

93. The Applicant raises three grounds in arguing that his due process rights were violated: (i) the participation of Mr. Rajkumar as an investigator was a serious conflict of interest; (ii) the Organization and OIOS had already improperly concluded that the Applicant was guilty of the misconduct before the investigation was started and even before he was charged; and (iii) violation of the Applicant's presumption of innocence.

Participation of Mr. Rajkumar as an investigator.

94. The Applicant submits that Mr. Swanson assigned Mr. Rajkumar to investigate this matter under the remote management of Ms. Margaret Gichanga-Jensen, OIOS Chief Investigator at the United Nations Office in Vienna.[34] The Applicant thus notes that since Mr. Rajkumar was not an OIOS investigator, the investigation in this case was not "operationally independent" as required for misconduct cases under category 1 and as defined in section 1.3.1 of the OIOS Investigations Manual.[35] The Applicant, therefore, opines that the involvement of Mr. Rajkumar on the investigation team is a serious violation of his due process rights.

95. The Applicant notes that the e-referral document did not comply with the requirements of a "Class C referral", which refers the responsibility to conduct an investigation to another office.[36] Further, Mr. Swanson had no authority to delegate OIOS tasks to Mr. Rajkumar as an OIOS-tasked investigator. The Chief Mission Support of UNTSO was not consulted.[37] The failure to explain how Mr. Rajkumar became part of the investigation team was, thus, a violation of his due process rights.

96. The Applicant also indicates the Mr. Rajkumar unlawfully physically seized his

[34] Application, annex B, para. 1.
[35] *Ibid.*, para. 3.
[36] *Ibid.,* para. 4.
[37] *Ibid.*

personal cell phone in violation of ST/SGB/2004/15 (Use of information and communication technology resources and data) and the OIOS protocol 5b-PROT-042015 for ICT retrievals.[38] The Applicant maintains that Mr. Rajkumar unlawfully participated in the investigation because he was not an OIOS staff. As such, he was not authorised to seize information, communication and technology ("ICT") resources, nor did he work with the assistance of an authorised ICT officer. This act specifically violated paragraphs 7 and 14 of the OIOS's own retrieval protocol making the seizure of his phone unlawful.[39]

97. The Applicant further submits that Mr. Rajkumar had a serious conflict of interest and should never have been allowed to act as an investigator in this case. Not only was Mr. Rajkumar an agent of the Administration and therefore, not a staff of an independent body, but he knew the Applicant, was friends with him on Facebook and worked with him. He was assigned as an Area Security Officer in Tiberias, Israel, while the Applicant was Administrative Officer for the Mission.

98. In addition, it is clear from para. 10 of the 30 June 2020 communication to Ms. Catherine Pollard, Under Secretary-General, Department of Management Strategy, Policy and Compliance ("USG/DMSPC") by Mr. Swanson, that Mr. Rajkumar also gave evidence, helping to identify the Applicant.[40] Further, on 24 June 2020, Mr. Rajkumar acting in his personal capacity as a staff member, submitted a report about the alleged incident to OIOS, less than 12 hours after the clip initially was provided to the OIOS hotline on 23 June 2020.[41] In this regard, as a staff member submitting a report of possible misconduct, Mr. Rajkumar's only involvement in the case should have been as a witness, but not as an investigator. Just 24 hours after Mr. Rajkumar submitted a report to the OIOS hotline, he was engaged with OIOS as an investigator. By doing so, Mr. Rajkumar placed himself in a position of conflict and thereby violated the Applicant's due process rights.[42]

[38] *Ibid.,*para. 8.
[39] *Ibid.*
[40] *Ibid.,* para. 9.
[41] Application, para. 10; Application, annex ICF-000019.
[42] *Ibid.*, at annex B, para. 18.

99. The Applicant maintains that even if Mr. Rajkumar was to be appointed as an OIOS tasked investigator, he should have complied with all the requirements of being an OIOS investigator, including declaring a possible conflict of interest in accordance with the OIOS protocol.[43]

Conclusion by the Organization and OIOS that the Applicant was guilty of misconduct before the investigation and being charged by the Administration.

100. The Applicant submits that on 2 July 2020, Mr. Stéphane Dujarric, the Spokesperson for the Secretary-General, issued a press release,[44] followed by another issued on 3 July 2020 by UNTSO.[45] Both press releases falsely misrepresented that the staff member(s) had "been identified as having engaged in misconduct, including conduct of a sexual nature", which publicly defamed the staff member(s) whose names had already been released by the Inner City Press on 28 June 2020.[46]This was before the investigation was even a week old. At the time of these press releases, UNTSO and Mr. Dujarric knew that the Applicant had been placed on ALWOP on 2 July 2020, which is supposedly not a disciplinary measure and is certainly not proof that the Applicant had been found to have engaged in any misconduct.

101. The Applicant contends that the public statements made by UNTSO and Mr. Dujarric were outrageous abuses of authority and a further violation of the Applicant's due process rights. These false public statements created a public perception that the Applicant was guilty without having been given proper and fair due process. It is clear that the pressure to be seen to be doing something in response to the widespread dissemination of the video resulted in not well thought out accusations being levelled in undue haste and actions taken without due regard for the provisions and protections assured to the Applicant in ST/AI/2017/1(Unsatisfactory conduct, investigations and the disciplinary process) and Chapter X of the staff rules and regulations. [47]

[43] *Ibid.*,at annex B, paras. 14 and 19,
[44] *Ibid.*,at annex entitled RESP-4.
[45] *Ibid.*, at annex entitled RESP-5.
[46] *Ibid.*, at annex entitled, RESP-10.
[47] *Ibid.*, at annex B, para. 31.

Violation of the Applicant's presumption of innocence.

102. The Applicant seeks to challenge the credibility of OIOS while conducting the investigations in his case. He contends that OIOS was not operationally independent. He also submits that OIOS influenced the decision maker. He cites a recommendation contained in Mr. Swanson's memorandum dated 30 June 2020[48] to the USG/DMSPC as to whether or not to place the Applicant on ALWOP or ALWP. The Applicant states that the responsibility to place a staff member on ALWOP or ALWP rests solely with the USG/DMSPC. OIOS' responsibilities do not include to influence or advise whatever administrative decision the USG/DMSPC may make as a result of the OIOS report. Therefore, OIOS's predetermined conclusions overtly influenced the decision maker and thus violated his due process rights to be considered innocent until proven guilty. Accordingly, the investigation report is unreliable and should be disregarded.[49]

Respondent's submissions

103. The Respondent's position is that the Applicant's procedural fairness rights were respected throughout the investigation and the disciplinary process. The Applicant was interviewed by OIOS about all material aspects of the matter, and he presented an additional written statement. He was provided with all supporting documentation along with the Allegations Memorandum, was informed of his right to seek the assistance of counsel and was given the opportunity to comment on the allegations against him.[50]

104. The Respondent seeks to rely on *Antoine*,[51] where the Tribunal already rejected the Applicant's claim of violation of his due process rights in this matter, including, regarding Mr. Rajkumar's involvement as an investigator and the Organization's press releases.

105. In specific response to the Applicant's claims against Mr. Rajkumar, the

[48] *Ibid.*, at annex entitled RESP-2, paras 16-19.
[49] *Ibid.*, at annex B, para. 50.
[50] Reply, para. 72.
[51] UNDT/2021/151.

Respondent submits that the Applicant's assertions are irrelevant; the Applicant does not allege or substantiate that the OIOS investigation report was biased. Furthermore, the Applicant provides no legal basis for his contention that Mr. Rajkumar should not have been involved in the investigation. In this regard, it should be recalled that Mr. Rajkumar was involved by OIOS because he was on-site in a situation of urgency due to the publication of the clip and the immediate action required while there were serious travel restrictions due to the Covid-19 pandemic. The Applicant's assertion that his interview by OIOS was not conducted independently because Mr. Rajkumar was not "*operationally independent*," fails. There is no evidence of a lack of independence of Mr. Rajkumar. Moreover, Mr. Rajkumar was acting under the management of Ms. Gichanga-Jensen, OIOS Investigator in Vienna, who asked most of the questions during the interview of the Applicant, while Mr. Rajkumar assisted her in displaying the evidence, including the clip of the Applicant's behaviour.

106. The Respondent also refutes the Applicant's contention that the investigator unlawfully physically seized his cell phone. The Applicant's rights were not violated and the OIOS investigator's request for submission of the Applicant's phone is lawful.[52] The Respondent highlights that the mobile phone the Applicant submitted to OIOS was operational through a United Nations issued SIM card and was used for official purposes, in the sense of section 1(d) of ST/SGB/2004/15. The mobile phone, including the United Nations issued SIM card, was thereby an ICT resource in the sense of section 1(b) of ST/SGB/2004/15, *i.e.*, a tangible asset capable of generating, transmitting, receiving, processing, or representing data in electronic form used by the United Nations. As noted, OIOS had authority to access that ICT resource under section 9 of ST/SGB/2004/15, even remotely and without prior written request. Accordingly, there was no violation of any procedures set out in ST/SGB/2004/15 by the Applicant submitting a United Nations issued SIM card operated phone to OIOS.[53]

107. The Applicant's assertion that Mr. Rajkumar should not have been involved due to an apparent "*conflict of interest*" because he was an "*agent of the*

[52] Reply, para. 75.
[53] *Ibid.,* para. 78.

Administration," "*he knew the Applicant*" or a "*witness*", since he had recognized the Applicant in the clip, is erroneous. There was sufficient photographic evidence that served to identify the Applicant as the passenger in the back seat of the United Nations vehicle featured in the clip. Moreover, the mere fact that Mr. Rajkumar knew the Applicant by virtue of serving in the same mission, and therefore, could identify him in the clip, does not create a conflict of interest. In what capacity Mr. Rajkumar recognized the Applicant in the clip and made a report is really not to the point.

108. Regarding the Applicant's contention on press releases, the Respondent maintains that the Organization did not violate the confidentiality of the investigation, create the publicity of this case, or violate the Applicant's presumption of innocence. The Organization abided by the confidentiality of the investigation, notwithstanding that transparency, accountability and good governance are the overarching principles of the Organization. Accordingly, the press releases and briefings issued in relation to the clip contained no names.

109. On the Applicant's claim on the violation of the presumption of innocence principle, the Respondent submits that OIOS respected his due process rights. The Applicant's assertions that OIOS failed to act with "*operational independence*" and attempted to "*improperly influence*" the decisions of the USG/DMSPC, are unsubstantiated and not born out by the record. OIOS did not make any "*recommendations*" to the USG/DMSPC as to whether the Applicant should be placed on ALWOP or not. These contentions are therefore, without basis. Moreover, the contentions are irrelevant for the disciplinary process as they pertain to the Applicant's placement on ALWOP, which is a separate administrative decision.

Considerations

110. The Tribunal is of the view that the Applicant's procedural fairness rights were respected throughout the investigation and the disciplinary process. In particular, the Applicant was provided with all supporting documentation, interviewed, informed of his right to seek the assistance of counsel and, in sum, he was given the opportunity to comment on the allegations against him and to contradict them.

111. The Tribunal notes that the same issues were raised by the Applicant in a previous proceeding on the same events, and that the Tribunal found them unfounded.[54]

112. UNAT stated that that a party, in order to be successful on appeal, not only has to assert and show that the Dispute Tribunal committed an error in procedure but also that this error affected the decision in the case (*Millan* 2023-UNAT-1330, para. 83; see also *Nimer* 2018-UNAT-879, para. 33, citing *Nadeau* 2017-UNAT-733/Corr.1, para. 31).

113. In any case, even assuming that the irregularities complained of by the Applicant occurred, they are related to side aspects of the proceedings which interfere in no way with the evidence, essentially resulting from the video and the Carlog system, and they are irrelevant to the outcome of the investigations and with no influence on the assessment of the facts and on their occurrence (as reflected above in para. 92).

114. In the case, the Applicant failed to demonstrate in what way the alleged violations of his due process rights prejudiced him within the context of the case and impacted the outcome of his case.

Whether the sanction is proportionate to the gravity of the offence

Applicant's submissions

115. The Applicant contends he was wrongfully dismissed based on a biased, flawed and vindictive investigation designed from the outset to find him guilty where the presumption of innocence was not respected. The worst sanction could have been an administrative measure for being in a United Nations vehicle with an unauthorized passenger and loss of his driving permit for 30 days. The Applicant submits that he has been a hard worker in difficult conditions with outstanding performance for a long time and this sanction was disproportionate and punitive simply because of the publicity associated with this case.

[54] *Antoine* UNDT/2021/151.

116. The Applicant further submits that the disciplinary process has had a toll on his health from the start, largely due to the extensive misinformation in the public domain, including from the organization. In support of this averment, he submits two documents *ex parte*; medical reports dated August 2020[55] and March 2022.[56]

117. By way of remedies, the Applicant requests the Tribunal to: (i) rescind the contested decision; (ii) award him compensation for harm for the damage to his career, self-respect and his health; and (iii) if the Tribunal considers that the sanction was appropriate, to change the sanction to separation from service with compensation *in lieu* of notice with termination indemnity, in accordance with staff rule 10.2(a)(viii).

Respondent's submissions

118. The Respondent's position is that the sanction imposed on the Applicant is proportionate to the offence. The Applicant engaged in serious misconduct under Chapter X of the staff rules. His misconduct captured in the clip is serious and justifies, in and of itself, a disciplinary measure at the severest end of the spectrum. The Applicant's conduct displayed a serious lapse of integrity and stands in stark contrast with the conduct befitting an international civil servant, such that continuation of his employment relationship with the Organization, which requires mutual trust and confidence, could not be tolerated. The Applicant's conduct went against the core values of the Organization and reflects badly on it. His conduct entailed an obvious risk of harm to the Organization's reputation, as well as risks of tension in the relationship between Israel, as the Mission's Host Member State, and the United Nations, as well as to Mission and other United Nations personnel in Israel resulting from any backlash against such personnel.

119. The Respondent submits that, equally, the Applicant's lack of cooperation and interference with the duly authorized OIOS investigation into his misconduct amounts to serious misconduct, which, in and of itself, justified a disciplinary measure at the severest end of the spectrum. His failure to cooperate and interference with the

[55] Application, annex 35.
[56] *Ibid.,* annex 36.

investigation displayed a serious lack of integrity and warranted a firm sanction and message that such conduct will not be tolerated. It means that also for this serious misconduct the employment relationship between the Applicant and the Organization, which is based on mutual trust and confidence, is so seriously damaged as to render its continuation untenable.

120. The Respondent further contends that in determining the appropriate sanction, all relevant circumstances were taken into account. The Sanction Letter indicated that, in determining the appropriate disciplinary measure, the past practice of the Organization in matters of comparable misconduct was considered. Accordingly, the disciplinary measure imposed on the Applicant accords with the practice of the Secretary-General in similar cases.

Considerations

121. The Tribunal finds that the Applicant displayed a lapse of integrity and competence and stands in stark contrast with the conduct befitting an international civil servant, such that continuation of his employment relationship with the Organization cannot be tolerated, since this requires mutual trust and confidence. His conduct went against the core values of the Organization and reflects badly on it.

122. The Applicant's conduct was deliberate, so the consideration of the self awareness of the conduct and of the severity and substantive nature of the misconduct which impacted the Organization heavily, lead this Tribunal to find the sanction fully justified and proportionate.

123. The Tribunal, considering the dissemination of the video and damage to the Organization's reputation, finds that the case is, for the effects objectively connected with the staff member behaviour, unprecedented.

124. The Respondent makes reference to case no. 345 in the Compendium of disciplinary cases, where a staff member performed a sexual act at the workplace in the presence of employees of a contractor, and in a second instance, performed a sexual act in public view. In the case, where mitigating factors included the staff member's

long service in mission settings, separation from service, with compensation *in lieu* of notice and with termination indemnity, was applied as the disciplinary sanction.

125. But the present case is different for the scandal derived in the public opinion, as the Applicant avers. Undoubtedly the sanction meted out to the Applicant was driven by the publicity, but this publicity was a direct effect of the Applicant's behaviour itself, and therefore, has to be considered on the assessment of the gravity of the facts.

126. The Tribunal cannot, therefore, see that the exercise of the Respondent's discretionary power in the choice of the disciplinary sanction led to a disproportionate or illegal sanction.

127. Considering only count one, the sanction is adequate. *Antoine* 2023-UNAT-1328, para. 35, confirms this evaluation, stating that:

> the misconduct was grave enough for the Administration to contemplate separation or dismissal, as it was irremediably damaging to the trust relationship between the staff member and the Organization.

128. The Applicant claims that the sanction was disproportionate in comparison to other cases and in particular to the sanction applied to Mr. Cunillera.

129. As to the first concern, the Tribunal notes that cases recalled by the Applicant are related to driving of a vehicle, transportation of unauthorized passengers, car crash, driving in a drunken state, or to minor route violation, and that in those cases minor sanctions were applied, and notably the censure. The facts there committed, however, are different from the one at stake in the present case, where obligations violated are not related at all to vehicle circulation discipline but to the integrity of international officials and to damage caused to the Organization.

130. As to the second issue, Mr. Cunillera, who drove the car in the same event of the Applicant, was disciplined only by a written censure, with loss of two steps and deferment, for a period of two years of eligibility for salary increment, in accordance with staff rule 10.2(a)(i), (ii) and (iii).

131. The Tribunal is of the view that the imposition on Mr. Cunillera of a less severe

sanction is justified by the fact that his role in the events was fundamentally different; the United Nations vehicle was not assigned to him and in his care when F01 was allowed to travel in it, and Mr. Cunillera tried to stop the event as inappropriate, while the Applicant was, as simply put by the Respondent, the main actor in the affair, as clearly shown in the video-clip.

132. Finally, the Tribunal notes that the Applicant claims for a remedy under two heads of damage: (i). "damage to his career and self-respect," which, according to him, "started with the information put in the public domain by the press team of the Organization at various stages of the investigations up to the sanction letter" ("Publication Damage"); and (ii) damage due to being "shocked, dismayed and depressed under the care of doctors without employment needing to explain to his family and friends that he is now considered by the United Nations to be a deviant." This damage, according to the Applicant, resulted from being "returned to the United States of America" ("Dismissal Damage").

133. The first claim is ill-founded. Indeed, as regards the alleged dismissal damage, the contested decision was lawful and therefore the issue of remedies in that regard does not arise.

134. As regards the second claim, related to publication damage, apart from any consideration that the press release contained no names, that it is irrelevant that names appeared elsewhere by non-official sources whose effects cannot be attributed to the Organization (see also Order No. 174 (NBI/2020), and *Antoine* UNDT/2021/151, both *inter partes*), the Tribunal observed that the Organization did not violate the confidentiality of the investigation or gave undue publicity to the case, being instead called to a transparent accountable position on the events.

135. In any case, the claim is inadmissible because the Applicant has not directly challenged in these proceedings any act of the spokesperson for the United Nations Secretary-General (solely recalling it for an alleged violation of the due process in the disciplinary process).

136. In conclusion, as the Tribunal does not find unlawful the disciplinary sanction chosen and applied by the Organization, the application is dismissed in its entirety.

Conclusion

137. In light of the foregoing, the application fails.

(Signed)
Judge Francesco Buffa
Dated this 21st day of June 2023

Entered in the Register on this 21st day of June 2023

(Signed)
Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi