| UNITED NATIONS DISPUTE TRIBUNAL | Case No.: | UNDT/GVA/2022/040 |
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| | Judgment No.: | UNDT/2023/124 |
| | Date: | 7 November 2023 |
| | Original: | English |

**Before:** Judge Sun Xiangzhuang

**Registry:** Geneva

**Registrar:** René M. Vargas M.

ARNOLD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

**Counsel for Applicant:**
George Irving

**Counsel for Respondent:**
Miryoung An, DAS/ALD/OHR, UN Secretariat

## Introduction

1. By application filed on 10 November 2022, the Applicant, a staff member of the United Nations Mission in Kosovo ("UNMIK"), contests the decision to impose on her the disciplinary measure of written censure, in accordance with staff rule 10.2(a)(i), together with the managerial action of managerial coaching for one year.

2. For the reasons set forth below, the application is rejected on its merits.

## Facts and procedural history

3. On 5 May 2009, the Applicant began her service with the United Nations. Since then, she has served at 12 duty stations. On 3 February 2017, the Applicant was appointed as the Chief of Mission Support with UNMIK at the D-1 level.

4. On 21 October 2019, the Office of Internal Oversight Services ("OIOS") received a report of possible unsatisfactory conduct by the Applicant.

5. On 4 September 2020, OIOS informed the Applicant that she was the subject of an investigation concerning a report of possible unsatisfactory conduct.

6. On 18 and 22 September 2020, and 8 October 2020, the Applicant was interviewed by OIOS investigators and subsequently sent a detailed response to clarify her answers.

7. On 29 December 2021, OIOS completed its investigation of the Applicant's case and transmitted the investigation report to the Office of Human Resources ("OHR") for appropriate action.

8. Following a review of the investigation report, and by memorandum dated 4 April 2022, the Applicant was informed of formal allegations of misconduct.

9. On 18 May 2022, the Applicant submitted comments on the allegations of misconduct.

10. By letter dated 25 August 2022 (hereafter, "Sanction Letter"), the Applicant was informed of the decision of the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/DMSPC") to impose on her the contested decision based on the fact that the Applicant:

a. Gifted a sex toy to Ms. L. A., Chief of Human Resources, UNMIK;

b. Bullied and harassed Ms. L. A., swearing at her over the printing of a document;

c. Inappropriately published training results of staff; and

d. Referred to staff using inappropriate nicknames.

11. On 10 November 2022, the Applicant filed the present application where she *inter alia* requested anonymity in the publication of any Orders or judgments.

12. On 9 December 2022, the Respondent filed his reply. In his reply, the Respondent requested leave to exceed the page limit indicated in the Tribunal's Practice Direction No. 4, due to the factual complexity of the case and the need to cite relevant evidence.

13. By e-mail of 5 September 2023, following assignment of the case to the undersigned Judge, the Tribunal instructed the Applicant to further substantiate her request for anonymity by demonstrating how the interest of anonymity outweighs the principle of transparency, and invited the Respondent to provide his comments on the Applicant's submission.

14. On 7 September 2023, the Applicant filed her submission on anonymity pursuant to the Tribunal's instructions.

15. On 12 September 2023, the Respondent filed his comments on the Applicant's above-mentioned submission.

16. By Order No. 122 (GVA/2023) of 18 September 2023, the Tribunal:

a. Rejected the Applicant's request for anonymity;

b. Granted the Respondent's request to exceed the page limit in his reply; and

c. Convoked the parties to a case management discussion ("CMD") on 20 September 2023.

17. On 20 September 2023, the CMD took place, as scheduled, virtually through Microsoft Teams, with Counsel for each party present. At the CMD, the Applicant requested the Tribunal to hold a hearing.

18. By Order No. 126 (GVA/2023) of 21 September 2023, the Tribunal ordered:

a. The Applicant to file by 2 October 2023 a submission elaborating on the reasons for her request for an oral hearing, and indicating what witnesses and issues are envisaged;

b. The Respondent to file his comments on the Applicant's above-mentioned submissions; and

c. The parties to explore resolving the dispute amicably and revert to it in this respect by 10 October 2023.

19. On 2 October 2023, the Applicant, in response to Order No. 126 (GVA/2023), filed a submission indicating her reconsideration of her request for an oral hearing and requesting, instead, leave to submit a rejoinder to the reply.

20. By a filing of 3 October 2023, the Respondent responded to the Applicant's filing dated 2 October 2023, requesting that the Applicant's motion be denied or, alternatively, to be given a fair opportunity to submit his response to the Applicant's rejoinder.

21. By Order No. 131 (GVA/2023) of 4 October 2023, the Tribunal took note of the Applicant's withdrawal of her request for a hearing and decided to determine the present case based on the written pleadings on record.

22. By the same Order, the Tribunal granted the Applicant's motion for leave to file a rejoinder. The Tribunal instructed her to file it by 10 October 2023, and invited

the Respondent to file his comments on the Applicant's rejoinder by 17 October 2023.

23. On 9 October 2023, the parties informed the Tribunal that they had explored resolving the dispute amicably but that no agreement had been reached.

24. On 10 October 2023, the Applicant filed her rejoinder.

25. On 17 October 2023, the Respondent filed his response to the Applicant's rejoinder.

26. By Order No. 139 (GVA/2023) of 24 October 2023, the Tribunal informed the parties that pleadings in this matter were closed, and that it would proceed to adjudicate the matter and deliver its judgment based on the papers before it.

**Consideration**

*Scope and standard of judicial review*

27. In the present case, the measures imposed on the Applicant entailed:

a. The disciplinary measure of written censure; and

b. The managerial action of managerial coaching for one year.

28. While the Applicant identified as the contested decision the decision to impose on her both a written censure and managerial coaching as a whole, she explicitly clarifies in her application that she does not formally contest the managerial coaching because it is not a disciplinary measure. Furthermore, even though the Applicant is not satisfied with the effectiveness of the managerial coaching, she is of the view that performance management or coaching could be an appropriate measure to address her behaviours at issue.

29. It follows that the managerial coaching is not the subject of the dispute. Accordingly, the Tribunal will limit its scope of judicial review to the disciplinary measure.

30. As per well-settled case law of the internal justice system, judicial review of a disciplinary case requires the Tribunal to consider the evidence adduced and the procedures utilized during the course of an investigation by the Administration (see, e.g., *Applicant* 2013-UNAT-302, para. 29). In this context, the consistent jurisprudence of the United Nations Appeals Tribunal (hereafter, "Appeals Tribunal") (see, e.g., *Haniya* 2010-UNAT-024, para. 31; *Wishah* 2015-UNAT-537, para. 20; *Ladu* 2019-UNAT-956, para. 15; *Nyawa* 2020-UNAT-1024, para. 48) requires the Dispute Tribunal to ascertain in this case:

a. Whether the facts on which the disciplinary measure was based have been established;

b. Whether the established facts legally amount to misconduct;

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

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

31. The Tribunal will address below these issues in turn.

*Whether the facts on which the disciplinary measure was based have been established*

32. The disciplinary measure in the case at hand is a written censure. It is well-settled law that the standard of proof applicable to a case where disciplinary measures do not result in separation or dismissal is that of preponderance of evidence, i.e., more likely than not that the facts and circumstances underlying the misconduct exist or have occurred (see sec. 9.1(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process); see also *Suleiman* 2020- UNAT-1006, para. 10).

33. Moreover, in determining whether the standard of proof has been met, the Tribunal "is not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the

Secretary-General". Thus, it will "only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based" (see *Nadasan* 2019-UNAT-918, para. 40).

34. Considering the above and noting the Administration's finding that the inappropriate publication of training results of staff by the Applicant does not amount to misconduct, the Tribunal does not find it necessary to examine whether such fact has been established to the requisite standard. Indeed, what matters is whether the facts on which the disciplinary measure was based have been established to the requisite standard.

35. In the present case, the facts on which the disciplinary measure were based are that the Applicant:

a. Gifted a sex toy to Ms. L. A.;

b. Bullied Ms. L. A., swearing at her over the printing of a document; and

c. Referred to staff using inappropriate nicknames.

36. The Applicant submits that while there is no dispute that the incidents cited in the Sanction Letter did occur, there is a considerable difference in their interpretation.

37. The Respondent contends that the undisputed facts are unambiguous and leave little room for different interpretations.

38. The Tribunal will examine the specific incidents in turn below.

Gifting a sex toy to Ms. L. A.

39. The Annex to the Sanction Letter states in its relevant part that:

> In or around summer 2017, [the Applicant] travelled to New York, where [she] purchased a sex toy and, on [her] return to UNMIK, gifted the sex toy to Ms. [L. A.] at her home.

40. While the Applicant acknowledges that she did gift an adult toy to Ms. L. A., she argues that the factual account of the Respondent omits the evidence that the purchase was made at Ms. L. A.'s request along with other items brought back from another country. She also contends that little attention has been paid to the fact that "this was a private exchange which took place outside of work".

41. The Tribunal finds that the Applicant misinterprets the Administration's factual findings in this respect. In fact, as shown by the Annex to the Sanction Letter, having noted that the parties disputed whether the purchase of the sex toy was pursuant to Mr. L. A.'s request, the Administration concluded, based on the evidence on record, that the Applicant obtained a sex toy for Ms. L. A. on Ms. L. A.'s request. Furthermore, contrary to the Applicant's assertion, the Administration explicitly considered the undisputed fact that the Applicant gave the sex toy to Ms. L. A. at the latter's home.

Bullying of Ms. L. A.

42. The Administration finds that the Applicant bullied Ms. L. A., swearing at her over the printing of a document.

43. While the Applicant admits that she used expletives in the presence of other staff members concerning the printing of a policy document, she argues that her expletives were directed at a copying machine but within the hearing distance of some staff. The Applicant further contends that she apologised for it later the same day.

44. With respect to the Applicant's assertion that her expletives were directed at a copying machine, the Tribunal finds that it is contradicted by the evidence from other witnesses.

45. Indeed, before the investigation panel, witness Ms. L. A. provided a detailed and coherent account of the incident in question and the circumstances leading to it. Specifically, on 5 July 2018, the Applicant requested that a policy document be printed for her in advance of a meeting with the Special Representative for the Secretary-General. The Applicant became upset when the document was not printed in its entirety and shouted at Ms. L. A. telling her "Will you f[***]ing print the policy itself". When the Applicant was not satisfied with the second printing, she threw it at Ms. L. A. and shouted again. Ms. L. A. told the Applicant that there was no need to shout, and that they would print the policy as requested. In response, the Applicant repeatedly stated words to the effect of "f[**]k you, f[**]k off" and "go f[**]k yourself".

46. Witness Ms. L. A.'s account of the incident was corroborated by the evidence of witness Ms. D. M., Human Resources Assistant, UNMIK, and witness Mr. A. A., Human Resources Officer, UNMIK.

47. Accordingly, the Tribunal finds no merit in the Applicant's assertion that her usage of expletives was directed at a copying machine instead of Ms. L. A.

48. Turning to the Applicant's argument that she apologised for her conduct in question on the same day, the Tribunal notes that it is well-settled jurisprudence that an apology does not invalidate or undo the misconduct (see, e.g., *Applicant* UNDT/2022/135, para. 39; *Mdoe* UNDT/2021/065, para. 80). Likewise, the Applicant's apology did not undo her yelling at her subordinates over a printed document and her repeated usage of the expletives. As such, the Applicant's apology has no bearing on the determination of whether the facts in question have been established to the requisite standard.

<u>Using inappropriate nicknames</u>

49. As per the Annex to the Sanction Letter, the Administration found that the Applicant gave nicknames to her colleagues such as "Choo Choo" and "Ju Ju Eyes", and that she called her colleagues names of the places they were from, e.g., "Berlin", "Helsinki", "Finland", "Frenchy", "girl in the office" or "Vushtri".

50. The Applicant, while admitting to having a practice of using nicknames in the workplace, claims that no one ever expressed any concerns over this or suggested that it was unwelcome.

51. The Tribunal finds clear and convincing evidence that the Applicant called her colleagues nicknames that are associated with their physical characteristics or national origins. Indeed, several witnesses testified before the investigation panel that the Applicant used "Choo Choo" for "everyone" and "Ju Ju Eyes" for Ms. L. B. and that the Applicant gave colleagues nicknames that had national references. For example, she called a colleague from Germany "Berlin", a colleague from Sweden "Helsinki", a colleague from Finland "Finland", another colleague "Vushtri" and Ms. L. A., who is French, "Frenchy". Furthermore, the Applicant acknowledges her practice of using nicknames in the workplace. As such, the facts in relation to this incident are not in dispute.

52. The Tribunal further finds no merit in the Applicant's submission that no one ever expressed any concerns over her use of nicknames or suggested that it was unwelcome.

53. The Tribunal is of the view that, under the circumstances, the power position of the Applicant vis-à-vis her staff was a deterrent to express their concerns. Nevertheless, the evidence on record shows that several witnesses came forward before the investigation panel over the Applicant's use of nicknames. For example, witness Ms. D. F. considered the use of the nickname "Choo Choo" disrespectful. Both witness Mr. A. A. and witness Ms. L. A. deemed her practice of calling her colleagues by nicknames inappropriate.

54. Also, assigning nicknames to colleagues based on their physical characteristics or national origins is inappropriate in a multilateral working environment regardless of whether the addressees welcome them or not. The fact that the Applicant was not made aware of the negative impact of her practice has no relevance for determining whether the facts on which the disciplinary measure was based have been established to the requisite standard.

55. Considering the above, the Tribunal is satisfied that the Administration has established the facts underlying the disciplinary measure in question by a preponderance of evidence.

*Whether the established facts legally amount to misconduct*

56. The judicial review of decisions of whether misconduct has been established dictates that due deference be given to the Secretary-General in the exercise of its rule-making discretion. "The Administration is best placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements" (see *AAD* 2022-UNAT-1267, para. 62; *Nadasan*, para. 41).

57. In this respect, the Tribunal recalls that staff rule 10.1(a) provides that:

> Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

58. In the Sanction Letter, the USG/DMSPC concluded that while the Applicant's actions in question did not constitute harassment, they amounted to misconduct in violation of staff regulations 1.2(a) and 1.2(f). Further, the Administration found that the Applicant's behaviour fell below the standards expected of a senior leader, as reflected in secs. 16 and 17 of the Standards of Conduct for the International Civil Service ("ICSC Standards") (2013).

59. The Applicant submits that no reasonable decision-maker would have considered that her behaviour rises to the level of misconduct. Specifically, the Applicant argues that the incidents in question were: (i) isolated; (ii) caused no offence; and (iii) are consistent with the Organization's commendation of all her managerial competencies in her performance management as a senior official. She further contends that the contested decision is vague, ambiguous, and unconvincing

as to why, if the actions in question do not amount to harassment, they nevertheless constitute misconduct.

60. The Respondent submits that the agreed facts indicate a series of failings on the part of the Applicant to conduct herself to the standards expected of a senior manager at the D-1 level.

61. The Tribunal notes that on basic rights and obligations of staff (including outside working hours), staff regulations 1.2(a) and (f) establish that:

> **Regulation 1.2**
> **Basic rights and obligations of staff**
>
> **Core values**
>
> (a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;
>
> …
>
> **General rights and obligations**
>
> (f) [Staff members] 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.

62. Secs. 16 and 17 of the ICSC Standards set forth the standards expected of a senior leader as follows:

> 16. Managers and supervisors are in positions of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect; they should be open to all views and opinions and make sure that the merits of staff are properly recognized. They need to provide support to them; this is particularly important when staff are subject to criticism arising from the performance of their duties. Managers are also responsible for guiding and motivating their staff and promoting their development.
>
> 17. Managers and supervisors serve as role models and they have therefore a special obligation to uphold the highest standards of

> conduct. It is quite improper for them to solicit favours, gifts or loans from their staff; they must act impartially, without favouritism and intimidation. In matters relating to the appointment or career of others, international civil servants should not try to influence colleagues for personal reasons.

63. Applying the above-mentioned standards to the present case, the Tribunal finds no merit in the Applicant's above submissions.

64. Specifically speaking, first, contrary to the Applicant's assertion, the case is not about isolated incidents. Indeed, the Applicant using expletives towards her subordinates and widely addressing her colleagues by nicknames in the workplace were compounded by her ignoring personal and professional boundaries by gifting a sex toy to one of her subordinates. These actions, taken together, cause concern to the Organization and undermine its confidence placed in the Applicant as a D-1 level senior manager and thus cannot be tolerated or accepted as "objectionable management style", as suggested by the Applicant herself.

65. Second, the Tribunal finds irrelevant whether the Applicant's conduct caused offence to a particular individual. In fact, a violation of staff regulations 1.2(a) and 1.2(f) does not require causing offence. Furthermore, the Applicant's contention that her conduct in question did not cause offence is not supported by the facts. The evidence on record shows that witnesses Ms. L. A., Ms. D. M. and Mr. A. A. testified that they were offended and humiliated by the Applicant's yelling and using of expletives in front of them.

66. Third, while the Tribunal regrets that the Applicant's behaviour in question was not timely addressed in her performance evaluation, any positive performance evaluation could not have undermined the Organization's authority in finding misconduct based on the undisputed facts.

67. Finally, the Administration did not err in finding that the Applicant's actions in question that were not harassment were nevertheless misconduct. As clarified by the Appeals Tribunal, "misconduct" is a much broader concept than "harassment", because "the former includes any failure of the staff to comply with their obligations under the United Nations' legal framework for the conduct of international civil

servants" (see *Egian* 2023-UNAT-1333, para. 89). As such, the Tribunal finds no incongruity in not finding harassment under ST/SGB/2019/8, while finding misconduct in violation of staff regulations 1.2(a), 1.2(f) and the ICSC Standards.

68. Turning to the Administration's findings, the Tribunal is satisfied that the Applicant's conduct in question violates staff regulations 1.2(a) and 1.2(f) and fell below the standards expected of a senior leader as reflected in secs. 16 and 17 of the ICSC Standards. The Tribunal will examine the specific incidents in question in turn below.

<u>Gifting a sex toy to Ms. L. A.</u>

69. The Applicant claims that gifting a personal item requested by Ms. L. A. is a private conduct outside the office and does not touch upon the ICSC Standards. To support her claim, the Applicant specifically relied upon para. 40 of *Conteh* UNDT/2020/189, stating that "[a]s a general principle of the work relationship, facts of private life of the worker are purely their own concern and are not relevant for the imposition of a disciplinary measure".

70. The Tribunal finds no merit in the Applicant's claim. First, the Tribunal agrees with the Administration that it was inappropriate for the Applicant to transgress the boundary between the professional and personal life of her subordinate. By interjecting herself into one of the most intimate aspects of her subordinate's private life, the Applicant violated staff regulation 1.2(f), which explicitly requires staff members to conduct themselves "at all times" in a manner befitting their status as international civil servants.

71. Second, the Applicant erroneously relied on *Conteh*. Indeed, the Appeals Tribunal vacated that Judgment and affirmed the Organization's disciplinary authority over the events that took place outside of the work environment, particularly when the misconduct concerned people whom the staff member had met in his or her professional capacity and had supervisory responsibilities over (see *Conteh* 2021-UNAT-1171, paras. 45, 46). As in *Conteh*, the incident in question took place in or around the UNMIK Compound and concerned the

Applicant's supervisee at work. As such, the Organization has disciplinary authority over it.

72. Finally, while sec. 42 of the ICSC Standards recognizes that the private life of international civil servants is their own concern, it explicitly cautions them that "their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organizations". As a senior manager, gifting a sex toy to her subordinate by the Applicant, regardless of whether it was solicited or not, could negatively impact the image and interests of the Organization, thereby contravening sec. 42 of the ICSC Standards.

Bullying of Ms. L. A.

73. The Applicant submits that the isolated case of using an expletive within hearing distance by some staff and for which she apologised is not an act of misconduct. She specifically argues that the expletive used was directed at a copying machine, not Ms. L. A. or anyone else.

74. The Tribunal is not persuaded by the Applicant's submissions. First, contrary to the Applicant's assertion, the Tribunal found in para. 44 above that the expletive used was directed at Ms. L. A., not at the copying machine.

75. Moreover, the Applicant's use of an expletive towards her subordinate, no matter how frustrated or angry she was, violated the bare minimum level of civility expected in the workplace. In doing so, the Applicant failed to uphold and respect the dignity of a human person as required by staff regulation 1.2(a) and did not befit her status as a senior international civil servant in accordance with staff regulation 1.2(f) and secs. 16 and 17 of the ICSC Standards.

76. Finally, the Applicant's yelling at her subordinate, and repeatedly using an expletive cannot be mended by an apology. Indeed, as discussed in para. 48 above, the Applicant's apology does not void the inappropriateness of the incident in question. While an apology could be considered in the proportionality analysis, as it was the case, it does not have a bearing on the Administration's finding of misconduct based on the undisputed facts.

Using inappropriate nicknames

77. The Applicant claims that using nicknames for herself and others to foster team spirit and to which there is no evidence of any objection is not an act of misconduct. In her view, the Administration's suggestion that the use of nicknames is somehow racially motivated is perverse.

78. The Applicant's claim is unfounded. First, the Tribunal is concerned by the Applicant's wide use of informal nicknames in the workplace, which reduces the identities of those concerned to their national origin or physical features. As the Administration correctly pointed out, this carries a significant risk of dividing staff on national origin, being construed as racial slurs, and failing to respect their dignity. It is inherent in the dignity of international civil servants that staff should not be known or referenced by their national or physical characteristics but respected as individuals.

79. Second, contrary to the Applicant's contention, evidence of objection by the addressees is not required for her using nicknames to constitute an act of misconduct. In a multicultural work environment, it is not appropriate for a staff member to call his/her colleagues nicknames, regardless of whether it is mutual or welcomed, particularly when they are associated with their physical characteristics or national origins.

80. Third, the Tribunal is not convinced by the Applicant's claim that she intended to foster team spirit by using nicknames. Specifically, she argues that she applied this practice to those with whom she had already a familiar relationship or she favoured at the time. The Tribunal fails to see how the selective use of nicknames for those she favoured would foster a respectful or civil work environment. Instead, this carries a risk of undermining an inclusive and harmonious working environment.

81. Accordingly, by widely using nicknames in the workplace that are associated with physical characteristics or national origins, the Applicant, as a D-1 level official of the United Nations, failed to act in a manner befitting her status as an

international civil servant pursuant to staff regulation 1.2(f) and secs. 16 and 17 of the ICSC Standards.

82. Considering the above, the Tribunal finds that by engaging in the actions in question, the Applicant violated staff regulations 1.2(a) and 1.2(f) as well as sec. 42 of the ICSC Standards, and contravened the standards expected of a senior leader reflected therein. As such, the established facts legally amount to misconduct.

*Whether the disciplinary measure applied was proportionate to the offence*

83. Staff rule 10.3(b) provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". The Tribunal must therefore verify whether the staff member's right to a proportionate sanction is respected and whether the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct.

84. In this respect, the Tribunal is mindful that "the matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate to the circumstances of the case and for the actions and conduct of the staff member involved." As such, the Tribunal "will only interfere and rescind or modify a sanction imposed by the Administration 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" (see, e.g., *Iram* 2023-UNAT-1340, para. 86; *Appellant* 2022-UNAT-1216, para. 45).

85. Moreover, "due deference must be shown to the Secretary-General's decision on sanction because Article 101(3) of the United Nations Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard" (see, e.g., *Beda* 2022-UNAT-1260, para. 57).

86. In the case at hand, the Applicant submits that the disciplinary measure in question is excessive, unjust, as well as demotivating, and fails the test of being balanced and proportional. Specifically, she argues that the Administration failed

to: (i) explain why a disciplinary measure as opposed to an administrative action was appropriate; (ii) cite comparable cases relating to "unbecoming behaviour" to support its decision; and (iii) put forward a compelling argument for the chosen penalty.

87. The Respondent contends that the disciplinary measure of written censure is proportionate.

88. The Tribunal finds no merit in the Applicant's submissions for the following reasons.

89. First, it is well-settled law 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" (see, e.g., *Iram*, para. 87; *Conteh* 2021-UNAT-1171, para. 50).

90. The Tribunal, however, finds no legal basis requiring the Administration to explain how other available measures such as an administrative measure and managerial action in lieu of a disciplinary measure had been explored. As such, contrary to the Applicant's claim, the Organization has no obligation to explain in its decision why it adopts a disciplinary measure instead of an administrative measure. It is thus also irrelevant to ask why the Applicant's behaviour in question was not addressed through a reprimand or in the context of performance management with the provision of appropriate training.

91. Second, in relation to the alleged failure on the part of the Administration to cite comparable cases relating to "unbecoming behaviour" to support its decision, the Tribunal notes that the Administration had regard to the past practice of the Organization in matters of comparable misconduct. While there is a limited number of past cases concerning unbecoming behaviour, the Tribunal recalls that the disciplinary action is a dynamic tool that may evolve over time according to policy changes, evolving jurisprudence and deterrence needs (see, e.g., *Appellant* 2022- UNAT-1216, para. 59; *Mihyar* UNDT/2023/040, para. 44).

92. Finally, contrary to the Applicant's assertion, the Administration put forward compelling arguments for the chosen disciplinary measure. The Sanction Letter and its Annex show that in imposing the written censure, the Administration gave due consideration to the entire circumstances of the case, including the nature and gravity of the Applicant's misconduct as well as all aggravating and mitigating factors.

93. The Appeals Tribunal has consistently held that the Secretary-General "has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose" (see, e.g., *Nyawa*, para. 89; *Ladu*, para. 40).

94. While the Administration determined that there was no aggravating factor in the case at hand, it properly considered the following mitigating factors:

a. The established conduct took place in 2017 and 2018, approximately two or three years before it was reported;

b. The Applicant exhibited a certain degree of self-awareness of the inappropriate conduct. In one of the established incidents, she apologised to those staff members present during her using expletives;

c. Regarding other established conduct, the record contains no evidence that she was put on notice by colleagues, including her supervisors, that her action was inappropriate or offensive;

d. The Applicant was forthcoming in acknowledging the facts of the established conduct during the investigation; and

e. The Applicant has more than 13 years of positive service with the Organization, including in difficult field mission areas, with no prior disciplinary record.

95. Accordingly, the Administration imposed on the Applicant the most lenient disciplinary measure available, i.e., a written censure.

96. Considering the above, and having weighed all factors involved, the Tribunal cannot but conclude that the written censure was neither unlawful nor arbitrary, and fell within the range of reasonable disciplinary options.

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

97. Staff rule 10.3, setting forth rules governing due process in the disciplinary process, provides in its relevant part that:

> (a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense;
>
> (b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

98. The Tribunal is satisfied that the key elements of the Applicant's right to due process in the disciplinary process were respected in the present case. Indeed, the evidence on record shows that the Applicant was fully informed of the charges against her, was given the opportunity to respond to the allegations, and was informed of the right to seek the assistance of Counsel in her defence. The Applicant does not claim that these key elements were not respected either. Also, the Tribunal finds that the disciplinary measure imposed on her is proportionate to the nature and gravity of her misconduct.

99. Nevertheless, the Applicant claims that the Organization did not respect her due process rights in the investigation process. Specifically, she argues that only five out of the 26 witnesses she had proposed were interviewed, and that the investigation largely solicited negative opinions from a group of disgruntled staff and ignored the extensive evidence she produced refuting the charges.

100. The Respondent submits that the Applicant's procedural fairness rights were respected throughout the investigation and disciplinary proceedings.

101. In this respect, the Tribunal wishes to point out that not every violation of an applicant's rights would render the disciplinary sanction unlawful. It is well-settled case law that "only substantial procedural irregularities will render a disciplinary measure unlawful" (see *Sall* 2018-UNAT-889, para. 33; see also *Abu Osba* 2020-UNAT-1061, para. 66; *Muindi* 2017-UNAT-782, para. 48). The Appeals Tribunal added in *Sall*, at para. 33, that:

> Even a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of grave misconduct, especially if the misconduct consists of a physical or sexual assault.

102. The onus is on an applicant to provide proof of the lack of due process and how it negatively impacted the outcome of the investigation and/or the disciplinary process (see, e.g., *KC* UNDT/2021/127, para. 70; *Williams* UNDT/2023/066, para. 93).

103. The Tribunal finds that the Applicant failed to demonstrate how the alleged procedural irregularities could have negatively impacted the outcome of the investigation and disciplinary proceedings.

104. Moreover, even if established, the irregularities identified by the Applicant are of no consequence on the establishment of the facts relevant to the determination of proportionality given the kind and amount of evidence proving the Applicant's misconduct. As the Appeals Tribunal stated in *Michaud* 2017-UNAT-761, para. 60:

> This is also one of those cases where the so-called "no difference" principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct.

105. Accordingly, the Tribunal finds that the Applicant failed to substantiate her claim that her rights to due process during the investigation and disciplinary proceedings were violated.

106. In light of the above, the Tribunal upholds the disciplinary measure imposed on the Applicant.

*Whether the Applicant is entitled to any remedies*

107. In her application, the Applicant requests accountability action to inquire into and prevent the further defamatory information. She further seeks rescission of the contested decision and appropriate and meaningful compensation for the harm to her personal and professional reputation.

108. While noting that the Applicant's request for accountability action does not fall within the scope of the present matter, having upheld the disciplinary measure, the Tribunal finds no basis for the remedies pleaded for in the application. Accordingly, the Tribunal rejects the Applicant's request for remedies.

**Conclusion**

109. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(*Signed*)
Judge Sun Xiangzhuang
Dated this 7th day of November 2023

Entered in the Register on this 7th day of November 2023
(*Signed*)
René M. Vargas M., Registrar, Geneva