UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/086
Judgment No.: UNDT/2023/140
Date: 20 December 2023
Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: René M. Vargas M., Officer-in-Charge

MARUSCHAK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Jacob van de Velden, DAS/ALD/OHR, UN Secretariat
Isavella Vasilogeorgi, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Field Security Officer with the United Nations Interim Force in Lebanon ("UNIFIL") is challenging his separation from service for misconduct, with compensation in lieu of notice and without termination indemnity ("the contested decision"). For the reasons set out below the application is partly allowed.

Facts and Procedural Background

2. On 24 October 2017, the Applicant had an informal meeting in his office with three colleagues where alcohol was consumed. Between 10.34 p.m. and 10.45 p.m., the Applicant was driving his privately owned motor vehicle ("POV") from his office headquarters to his home when he hit a United Nations Armoured Vehicle ("UNAV") from behind.

3. Following an investigation by the UNIFIL Special Investigation Unit ("SIU"), the Applicant was sent a letter by the Officer-in-Charge of the Office of Human Resources Management detailing allegations of misconduct against him, specifically that he:

a. Operated his POV without a driver's license and without authorization during nighttime hours;

b. Drove his POV after having consumed alcohol; and

c. Caused his POV to collide with an Italian contingents' UNAV causing damage to the UNAV estimated at USD9,374.

4. The Applicant responded to the allegations on 8 October 2018 and on 9 January 2019.

5. By letter dated 21 March 2019, the Applicant was informed that the allegation that he operated his POV without a driver's license and without authorization during nighttime hours had been dropped but that after a thorough review of the entire dossier including his comments, the

> Under-Secretary-General for Management Strategy, Policy and Compliance ha[d] concluded that the established conduct constituted serious misconduct in violation of Staff Regulations 1.2(f) and (q); Staff Rules 1.2(a) and 1.7; and paragraphs 5 and 9 of UNIFIL AI/2011/007 of 3 February 2011.
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> In determining the appropriate sanction, the Under-Secretary-General for Management Strategy, Policy and Compliance ha[d] considered the nature of [his] actions, the past practice of the Organization in matters of comparable misconduct, as well as whether any mitigating or aggravating factors appl[ied] to [his] case.
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> The Under-Secretary-General for Management Strategy, Policy and Compliance considered as an aggravating factor [the Applicant's] special duty of care and responsibility as a Security - Officer at the P-3 level. She concluded that there were no mitigating circumstances.
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> On the basis of the foregoing considerations, the Under-Secretary-General for Management Strategy, Policy and Compliance ha[d] decided to impose on [the Applicant] the disciplinary sanction of separation from service, with compensation in lieu of notice and without termination indemnity, in accordance with Staff Rule 10.2(a)(viii). In addition, she ha[d] decided to recover the estimated cost of repairs to the UN armoured vehicle of $9,374,00 USD, in accordance with Staff Rule 10.1(b).

6. On 24 June 2019, the Applicant filed this application challenging the contested decision.

7. The Respondent filed his reply on 26 July 2019.

8. Pursuant to Order No. 178 (NBI/2020), the Respondent filed an amended reply on 30 September 2020.

9. On 19 January 2021, pursuant to Order No. 14 (NBI/2021), the Applicant filed a response to the amended reply requesting: (a) disclosure of additional evidence; (b) an oral hearing; and (c) leave to amend the relief originally requested in his application.

10. A case management discussion ("CMD") took place on 26 February 2021.

11. On 15 March 2021, the Applicant filed a motion seeking leave to amend his application regarding the remedies sought. The remedies the Applicant sought due to his improper separation were:

a. Rescission of the contested decision and reinstatement, or the award of two years' net base salary as compensation in lieu of rescission;

b. Substitution of the imposed sanction with a lesser appropriate one; and

c. Compensation for economic loss and moral damages.

12. On 6 May 2021, the Applicant filed a further submission on remedies sought accompanied by additional documentation on a medical procedure that he underwent.

13. On 2 June 2021, the Counsel acting for the Applicant informed the Tribunal, by an *ex parte* filing, that they were withdrawing as Counsel for the Applicant.

14. On 8 June 2021, the Applicant withdrew his 15 March 2021 motion for amended remedies.

15. After Counsel's withdrawal, between 9 June and 3 August 2021, the parties filed miscellaneous motions. On 9 June 2021, the Respondent filed a motion for summary dismissal and cost award for the Applicant's manifest abuse of process by forgery, which the Respondent accompanied with an *ex parte* filing of evidence of alleged manifest abuse of process to which the Applicant responded to on 26 July 2021.

16. On 3 August 2021, the Respondent filed a motion in response to the Applicant's 26 July 2021 submission and reiterated the same arguments in a subsequent motion filed on 31 August 2021 providing justification for why the application should be dismissed summarily.

17. On 26 August 2021, the Tribunal issued Order No. 174 (NBI/2021) in which it ruled on various motions filed by the parties. In that Order, the Tribunal also ordered the expungement from the case record of the Applicant's submissions on an amended remedy of 15 March 2021 and 6 May 2021 and the attached Annexes 22-27.

18. On 15 September 2021, the Tribunal issued Order No. 186 (NBI/2021) in which the Respondent's 9 June 2021 motion to dismiss the application and to award him costs was denied. In said Order, the Tribunal proposed to the parties to call experts to testify at an oral hearing. In response to the Order, Counsel for the Respondent addressed an email to the Director of the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH") requesting an expert medical opinion. The pertinent parts of the email (with the responses of DHMOSH in parenthesis or at the end of the questions) are reproduced below.

> The case relates to [the Applicant]
>
> 1. On 24 October 2017, two breathalyzer tests were administered on [the Applicant], indicating Breath Alcohol Level (BrAL) of 0.63 mg/l (equals 0.126-0.144 % BAC) and BrAL of 0.61 mg/l (equals 0.122 -0.139% BAC). Kindly convert to Blood Alcohol Concentration (BAC) see above. Kindly explain if a person with such BrAL and BAC readings is intoxicated (Intoxication starts where the alcohol affects the functioning, this is individual in each [person]. I have no knowledge of his functioning at the time in question) and/or under the influence of alcohol (with these levels he was under the influence of alcohol).
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> 2. Is it medically advisable for a person with such BrAL and BAC readings to drive? It is never medically advisable to drive with any positive level of alcohol.

> 3. From a medical point of view, which is the BrAL and BAC thre[]shold for a person to be considered under the influence of alc[o]hol? Any measurable level. Obviously, legally allowed levels are a different topic.
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> 4. Can pancreatitis be caused by gall bladder stones? Yes.
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> 5. Does pancreatitis produce false BrAL or BAC readings? We did not find any evidence for a causal link.
>
> 6. In August 2017, [the Applicant] was diagnosed with acute pancreatitis. Does his diagnosis justify his BrAL and BAC readings on 24 October 2017? We did not find any evidence for this causal link.

19. By an email to the Registry dated 16 October 2021, the Respondent informed the Tribunal that he had appealed Order No. 174 (NBI/2021). The Respondent further informed the Tribunal that if the United Nations Appeals Tribunal ("UNAT") ruled in his favour in the appeal, it would make the adjudication on the merits of the case at the UNDT level moot and therefore he requested the Tribunal to suspend the proceedings pending the outcome of the appeal.

20. The Applicant filed a response to the Respondent's request for suspension of proceedings on 8 February 2022 urging the Tribunal to dismiss the motion.

21. The Respondent filed a submission in response to the Applicant's objection to stay the UNDT proceedings on 11 February 2022.

22. On 16 February 2022, pursuant to Order No. 19 (NBI/2022), the proceedings were suspended pending the Respondent's appeal to UNAT of Order No. 174 (NBI/2021).

23. UNAT issued Judgment *Maruschak* 2022-UNAT-1282 on 28 October 2022 in which the Respondent's appeal was granted in part. The matter was remanded to the Tribunal for reconsideration.

18 January 2023 CMD

24. On 18 January 2023, pursuant to the UNAT Judgment, the Tribunal called for a CMD where the parties discussed their understanding of the UNAT decision and its implications on the further conduct of the proceedings. Following the CMD, the Tribunal issued Order No. 23 (NBI/2023). Pursuant to this Order, the Tribunal:

a. Denied the Respondent's motion to summarily dismiss the application for a manifest abuse of process;

b. Decided to have an oral hearing of the application on its merits;

c. Decided that it would determine the issues relating to evidence during the proceedings in accordance with the UNDT Rules of Procedure; and

d. Decided to convene another CMD on 9 February 2023 to agree on the further conduct of the application.

9 February 2023 CMD

25. Following the 9 February 2023 CMD, the Tribunal issued Order No. 32 (NBI/2023) in which, *inter alia*: the Respondent was to confirm the availability of three witnesses for the hearing by 17 February 2023; and the Registry was directed to communicate to four of the Applicant's witnesses and require their attendance at the hearing.

26. The Tribunal heard the case from 13-14 March 2023, during which oral evidence was adduced from: the Applicant; from SS, who at the times material to this case was the Officer-in-Charge of the Security Information and Operations Centre ("SIOC/OPS") of UNIFIL; and from AK then Duty Officer, at SIOC/OPS, UNIFIL.

27. The Respondent and the Applicant filed their respective closing submission on 28 March 2023 and 4 April 2023 respectively.

Evidence adduced at the hearing

The Applicant

28. The Applicant, was self-represented, testified on his own behalf and was cross-examined by Counsel for the Respondent as summarized below. The Applicant was also granted an opportunity to clarify his response in re-examination:

a. The SIU investigation on which the contested decision was based was done improperly, violated his rights as a United Nations staff member and "twisted" some of the facts of the case;

b. It was alleged that he had caused approximately USD10,000 in damages yet it was proved that no damage was done to the United Nations property and the money was refunded to him by the Organization;

c. The case was wrongly presented as being one of a road traffic accident ("RTA") involving two United Nations vehicles. However, it involved one UNAV and his privately owned vehicle with a diplomatic number plate. The diplomatic number plate is provided by the Ministry of Foreign Affairs of Lebanon for private vehicles owned by United Nations staff to indicate that these vehicles were purchased duty free in the country;

d. The whole investigation was based on the fact that the breathalyzer test applied to him indicated some elevated alcohol reading but the units in which the exact readings were presented were not really confirmed and are technically different units or readings:

i. According to paragraph 9(b) of UNIFIL AI/2011/007 (Compliance with Lebanese traffic regulations by owners and drivers of privately-owned vehicles (POV) bearing UNP or CD registration plates), only UNIFIL Security Officers may conduct breathalyzer tests on operators of a privately owned vehicle bearing United Nations plates. However, a United Nations

Military Police ("UNMP") Officer, FM, performed the breathalyzer test in his case;

ii. An SIU investigator, DV, authorized FM to administer the breathalyzer test on him using military equipment which was not certified and properly checked and even though FM did not have proper training to do so. DV did not apply the UNIFIL Security Section's breathalyzer because she "was out of certification" for use of said breathalyzer;

iii. FM only had generic training on the use of the breathalyzer in question which was certified for use for only 12 months. In UNIFIL, civilian breathalyzers are only certified for six months. Even considering the 12 months of factory certification, the breathalyzer administered on him was out of certification;

iv. According to the manual for the breathalyzer model Lifeloc, which was the breathalyzer used in his case, its use by an untrained person could result in invalid results or incorrect interpretation of results; and

v. Another violation of procedure was the fact that two different breathalyzer tests were administered on him in different locations, the second one being administered one and a half hours after the accident. In the intervening period, he drunk some liquid vitamins containing alcohol which he obtained from the trunk of his car.

e. The three witnesses who were present during the meeting in his office on 24 October 2017 confirmed that they did not see him drinking any alcoholic beverages during the meeting;

f. He admits full responsibility for the accident which was caused by fatigue and not by alcohol consumption; and

g. A military Medical Officer, who had arrived by ambulance, stated that he could not discern that he had consumed alcohol. The day after the accident, he also visited a Lebanese police laboratory located 100 kilometres from the UNIFIL base and took a blood test which proved that he had no alcohol in his blood.

The Applicant's cross-examination

29. The Applicant's testimony during cross-examination is summarized below:

a. He confirmed that he consented to the breathalyzer test and the reading of the first breathalyzer test administered at 11.49 p.m. and showed a BrAC of 0.63 milligrams per litre;

b. Within seven minutes of the first breathalyzer test, he was administered a second test which recorded a BrAC reading of 0.61 milligrams per litre;

c. The figures in the breathalyzer tests are correct but the units in which the results were measured are incorrect;

d. He signed a Breathalyzer Confirmation Form and opted not to request a blood sample by a United Nations Medical Officer in an appropriate hygienic facility because he was in shock when he signed it. The handwriting in the form was not his, the information placed inside the form is not what he inputted and the tick in the box was not what he selected;

e. Paragraphs 100, 103 and 111 of HOM POL 16-17 do not apply to him because his was a POV and not a United Nations vehicle;

f. He was unaware of whether the damage to the UNAV was paid by the United Nations out of its own insurance;

g. FM's certificate of training proves nothing because it does not show what type of equipment it was issued for, and it was not given by the firm which provides official training for Lifeloc breathalyzers;

h. He was not sure whether his medical condition at the material time affected his breathalyzer results. He agrees with the United Nations medical expert's opinion that his medical state did not affect his breathalyzer results and that, from a medical point of view, a person with such BrAC or BAC readings should not have driven that night;

i. He would usually take one teaspoon of his vitamin supplement but, under the stress of the collision and after the punch of the airbag, he mistook it for water and drunk the whole bottle and that is what most likely caused the high alcohol readings on the breathalyzer test; and

j. He denied undergoing any medical procedures on 17 October and 21 November 2020 and that he submitted documents pertaining to him as a patient to the Tribunal in this regard by mistake.

SS' evidence

30. SS adopted the statement dated 15 September 2021 that he had prepared for the Tribunal in anticipation of this case. SS testified as follows upon examination by the Applicant and cross examination by Counsel for the Respondent:

a. He has known the Applicant for over 10 years. During the periods he worked with him, he had never seen the Applicant under the influence of alcohol, smelling of alcohol or consuming alcohol. He, however, did not socialise with the Applicant during that period so he would not know what the Applicant did in his free time outside of the office;

b. He arrived at the scene of the RTA in question in this case at about 10.45 p.m. and stayed there until 1 a.m. to 1.30 a.m. the following day. He arrived at the scene of the accident at around the same time as DV, the SIU Investigator;

c. The Applicant appeared normal at the scene of the accident and did not seem to have consumed alcohol. He communicated consciously;

d. The airbag of the Applicant's car had deployed during the RTA and DV told him that the seatbelt was retracted which meant that it had not been used by the driver;

e. He did not notice any brake traces before the point of collision. The area where the UNAV was stationed was well lit and well visible;

f. In his earlier statement to the SIU investigators on 27 October 2017, he had stated that he was not sure if the Applicant was in his right mind and that he smelt something on the Applicant but could not confirm if it was alcohol or what the Applicant ate before;

g. In his second statement to the SIU investigators on 3 November 2017, he had stated that he spoke to the Applicant after the RTA and that he had smelt on the Applicant's breath what could be alcohol or some fermented food; and

h. He was only aware of the Applicant being tested once with a breathalyzer on the day of the road traffic accident. He was, however, not sure whether the military police had been trained to administer the test properly or whether the equipment used had been calibrated correctly.

AK's evidence

31. AK testified that on the material day, he was on duty working as a Security Officer at SIOC and received a call, after hours, from the Applicant. The Applicant informed him that he had a minor injury following a minor RTA. He then conveyed the message to the response team. When they spoke on the phone, the Applicant communicated logically and professionally. He was normal.

Parties' submissions relevant to the issue

The Applicant

32. The Applicant's case is summarized below:

a. The decision to impose the contested decision should be rescinded because the fact that he consumed alcohol before driving was not established by clear and convincing evidence:

i. Improper Administration of the Breathalyzer Test. UNIFIL AI/2011/007 of 3 February 2011 is instructive. Whereas section 9(a) states that both UNIFIL Security Officers and UNIFIL Military Police can conduct speed checks and report compliance with regard to POV's, section 9(b) explicitly limits the administration of the breathalyzer test to UNIFIL Security Officers and for avoidance of doubt uses the word 'only' to emphasize who should administer the test to a POV driver;

ii. Despite this explicit instruction and despite a UNIFIL Security Officer being present at the scene, a UNMP Officer administered the breathalyzer test - UNMPs who were not formally trained on the use of the device but had only been inducted into its use. In so doing, the SIU relied on personnel whose qualifications to administer the test they could not ascertain, and on equipment whose calibration they could not attest to. This led to inaccurate readings;

iii. Three reliable witnesses confirmed that he did not consume any alcohol at least four to five hours before driving. Before the meeting with his colleagues, he was in an official meeting with the UNIFIL Force Commander on behalf of the Chief Security Officer which excluded the possibility of consuming any alcohol before;

iv. The Sri Lankan Military Guard Force Officers who professionally checked him and the vehicle at the exit gate permitted him to drive out of the UNIFIL compound without any remarks. However, the investigators did not request interviews with the officers as well as did not request the CCTV record from the Exit Gate cameras;

v. The CCTV video from the UNIFIL office building shows that he left his office normally, locked the office door and left the building in a normal way. However, the investigation did not request CCTV records from the parking lot cameras to show how he approached his private car and started driving;

vi. He did not consume any alcohol before driving and the road traffic accident happened because of drowsy driving. He drank a whole bottle of alcohol-based medication after the accident, and this was confirmed by two witnesses from the Italian military;

vii. If he had been truly over the limit, there would have been further objective evidence of his intoxication in addition to the smell of alcohol, as described by the military police serviceman and the investigator. No witness provided evidence that he vomited, had slurred speech, glassy eyes, sleepiness, incontinence or disorientation: clinical signs which may indicated severe intoxication. If he had been under the influence of alcohol, he would not have been discharged so easily from the UNIFIL ambulance; and

viii. Key exculpatory information was not considered during the investigation and in deciding to institute disciplinary action him.

Sanction

b. The sanction was disproportionate to the alleged act of misconduct considering that he has never been charged with any misconduct before, he was not driving a United Nations vehicle after consuming alcohol, and his actions did not cause any financial loss to the Organization. Any measure to be imposed, if at all, should be an administrative measure not exceeding withdrawal of the United Nations driving permit for a period not exceeding 60 days as per UNIFIL HOM POL 16-17 (Vehicle Fleet Management and Operations).

Reliefs

c. The Applicant seeks rescission of the sanction, reinstatement and substitution of the sanction with a lesser sanction. In his amended application he sought damages for moral harm. To support the claim for moral harm, he filed documentation, which became the subject of manifest abuse of process.

The Respondent's submissions

33. The relevant Respondent's submissions are summarized below:

a. The decision to impose the disciplinary measure on the Applicant should be upheld. The four elements in the judicial review of decisions relating to the imposition of a disciplinary measure have been satisfied in the present case;

b. The facts have been established by clear and convincing evidence:

i. The record contains the following clear and convincing evidence: (i) CCTV footage showing the Applicant directly colliding with the clearly visible UNAV in an open stretch of road under clear weather conditions; (ii) three witness statements who all confirmed that the Applicant smelled of alcohol; (iii) the witness statement of SS who stated that the Applicant smelled of something that could be alcohol; (iv) two breathalyzer result receipts, showing that the Applicant's BrAC was 0.63mg/l and 0.61mg/l, both signed by the Applicant, and also showing

that the breathalyzer was last calibrated on 18 September 2017, and passed a calibration check on 19 September 2017; (v) a Breathalyzer Confirmation Form, recording the breathalyzer results, and showing that Applicant both consented to the breathalyzer and confirmed the accurateness of the results; (vi) the calibration records of the Lifeloc breathalyzer used on the Applicant; and (vii) FM's Certificate of having been trained by his national contingent to use the breathalyzers available to them, i.e., the Lifeloc type breathalyzer; and

ii. The Applicant has claimed that the Lifeloc breathalyzer was not calibrated. The record contradicts him. As regards his consumption of alcohol, the Applicant has made contradictory statements each time he is confronted with inculpatory evidence. The Applicant has claimed that he had not consumed alcohol, that he was not able to consume alcohol due to a medical condition, that he had consumed alcohol in the form of a vitamin supplement, and that he suffered from acute pancreatitis which affected the breathalyzer results. During the oral hearing, the Applicant recanted on his assertion regarding his pancreatic condition. The Applicant also confirmed he is not a medical professional. Essentially, the Applicant's arguments are based on speculation on medical issues and constitute adjustments to his account. UNAT has held that such adjustments of one's account are a falsehood, tendered conscious of the incriminating nature of the truth.

c. The Applicant's conduct and resulting breaches of the Staff Regulations and Rules constitute serious misconduct. Driving after having consumed alcohol is a serious lapse of the conduct expected of international civil servants; it recklessly endangers others and potentially harms the United Nation's reputation and ability to deliver on its peacekeeping mandate. The Applicant's position as a Security Officer at the P-3 level, Chief of SIOC/OPS and a supervisor with considerable responsibility, further aggravates the seriousness of his misconduct.

Consideration

34. Two issues arise in this matter. The principal issue arising from the application for consideration is whether the Respondent has discharged his onus of proof in the claim alleging misconduct. The second issue is whether the Tribunal should award costs against the Applicant for manifest abuse of process.

Allegations of misconduct

35. The Respondent's only objective and reliable means of proving the Applicant's culpability has been challenged as having been obtained unlawfully. The Tribunal recalls UNAT jurisprudence on improperly acquired evidence to be as follows:

> Where evidence has been obtained in an improper or unfair manner it may still be admitted if its admission is in the interests of the proper administration of justice. It is only evidence gravely prejudicial, the admissibility of which is unconvincing, or whose probative value in relation to the principal issue is inconsequential, that should be excluded on the grounds of fairness.[1]

36. The Applicant was separated from service for driving his POV, after having consumed alcohol, and causing the vehicle to crash into a United Nations vehicle. The major element of the misconduct for which the Applicant was dismissed being the consumption of alcohol.

37. The Respondent's Regulations and Rules provided that a breathalyzer test or blood test may be conducted on a driver of a motor vehicle suspected of driving under the influence of alcohol. In the Tribunal's view, suspicion of alcohol consumption may arise from several factors, for instance, smell of alcohol on breath, or loss of self-control resulting in speech or walk or mental impairment. For purposes of the misconduct regulations of UNIFIL, the suspicion itself is not proof of alcohol consumption. It must be confirmed by either a blood test or breathalyzer conducted by authorized officials. It follows therefore, in this judgment that, the fact that witnesses

[1] *Asghar* 2020-UNAT-982, para. 43.

said the Applicant smelled alcohol or had impaired movements or had caused an accident on a straight line is not proof that the Applicant had consumed alcohol without a lawfully obtained blood or breathalyzer test. For this reason, although the Respondent took time to show through various means that the Applicant had caused an accident while under the influence of alcohol, only the breathalyzer or blood test is admissible and only relied upon if lawfully obtained. All other evidence relating to a suspicion is not relevant for determining whether the Respondent has discharged his burden of proof by clear and convincing evidence that the alleged act took place and that it constituted misconduct.

38. Although the Respondent introduced a breathalyzer test result which confirmed that the Applicant had consumed alcohol, the same was challenged for having been obtained illegally.

39. After consulting the Staff Regulations and Rules and the Respondent's submissions, the Tribunal has found nothing to contradict the Applicant that the breathalyzer test was conducted illegally. Therefore, its results ought not to be used against him. The applicable UNIFIL administrative instruction (AI/2011/007) provides as follows in its relevant part:

> 9. UNIFIL Security Officers and UNIFIL Military Police. In view of the Mission's responsibilities and agreements with the Host Government in respect to the operation of POV bearing UNP or CD registration plates,
>
> > a. UNIFIL Security Officers and UNIFIL Military Police are entitled, on behalf of the mission, to conduct speed checks and report on the compliance in this regard, of owners and operators (includes spouses and recognized dependents who are authorized to drive such vehicles in accordance with applicable policy) of POV bearing UNP or CD registration plates; and
> >
> > b. UNIFIL Security Officers (only), on behalf of the mission, may on reasonable suspicion that an operator of a POV bearing UNP or CD registration plates is driving under the influence of alcohol, conduct breathalyzer tests and report

> compliance in this regard. If an operator is found to have exceeded the permissible Blood Alcohol Level (in excess of 0.04 or 40 milligrams per 100 milliliters of blood), the operator will not be permitted to continue driving and an alternative driver will have to be arranged.

40. Pursuant to the *Asghar* case referred to above, the Tribunal may admit the evidence of the breathalyzer test and give it weight where such reliance on the evidence is not prejudicial or unfair to the Applicant. It may also rely on the evidence if it is in the interests of proper administration of justice.

41. The question in this matter is whether the Tribunal ought to accept evidence obtained in violation of the Staff Regulations and Rules. The answer is in the negative. The Appeals Tribunal has held that

> United Nations procedures exist to facilitate fair and transparent substantive decisions, and the failure to abide by required procedures is no mere "technicality", but instead undermines substantive fairness.[2]

Legal framework – Sanction letter

42. In the sanction letter, the Under-Secretary-General for Management Strategy, Policy and Compliance concluded that the established facts constituted serious misconduct in violation of the Staff Regulations and Rules as follows:[3]

> a. Staff Regulation 1.2(f), because driving after having consumed alcohol is unbefitting of [the Applicant's] status as [an] international civil servant as [he] put the UN's property, [his] own life and the life and property of others at risk by doing so, adversely impacting the reputation of UNIFIL and the Organization.
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> b. Staff Regulation 1.2(q) and Staff Rule 1.7, because [the Applicant's] conduct revealed that [he] did not exercise reasonable care toward UN personnel or property. By driving in a reckless manner, [the Applicant] caused extensive damage to the

[2] *Almasri* 2023-UNAT-1377, para. 80.

[3] Application, annex 5.

armoured vehicle, and caused an injury to Italian military personnel.

c. Staff Rule 1.2(a), because [the Applicant] failed to follow instructions properly issued on behalf of the Secretary-General relating to driving and road safety as communicated to all UNIFIL staff members. As a staff member of the Organization, and, in particular, as a professional Security Officer, [the Applicant was] required to follow these instructions.

d. UNIFIL AI/2011/007 of 3 February 2011 ("Compliance with Lebanese traffic regulations by owners and drivers of privately-owned vehicles (POV) bearing UNP or CD registration plates"), paragraph 5, which provides that all UNIFIL staff members are under a duty to respect local laws, and paragraph 9 which prohibits operating a vehicle with a blood alcohol level in excess of 40 mg/per 100ml of blood.

e. [The Applicant's] conduct is serious, because as Chief of SIOC OPS, and a supervisor, [he was] custodian of several of the relevant policies that [he] violated. Indeed, Inter-Office Memorandum on Use of Alcohol by UNIFIL and UNTSO OGL Personnel dated 26 November 2015, states that supervisors are *required* to take positive steps within their area of responsibility where a "zero-alcohol policy" is required, and enforce appropriate instructions (emphasis in original; footnote omitted).

Whether the facts are established and constitute misconduct

43. The Applicant argued that although he took responsibility for causing the RTA, he had however not consumed alcohol prior to driving his POV and the RTA was not a result of a willful, reckless or negligent act on his part. In light of this, and contrary to the Administration's erroneous conclusion, the facts could therefore not have constituted misconduct.[4]

[4] Application, para. 42.

44. The Respondent averred that paragraph 102 of UNIFIL HOM POL 16-17 provides that the acceptance of a UNIFIL driving permit implies that the driver consents to have samples of their breath/blood taken when requested to do so by United Nations Security, United Nations Military Police, or a Medical Officer, as appropriate. Paragraph 103 provides that the result of a breathalyzer test shall be deemed as being sufficient proof of alcohol concentration, and if the driver disagrees with the breathalyzer test, he/she can request to have a blood sample. It further specifies that United Nations Security and/or United Nations Military Police shall administer a breathalyzer test when: "(b) The UNIFIL or other UN vehicle is involved in an accident or incident resulting in […] significant damage to the vehicle, or any third-party property; (c) The UNIFIL or other UN vehicle is involved in any accident between 2100 and 0700 hours". Both conditions applied in this case.

45. The Tribunal observed that the Respondent's cited framework does not address the contentious substantive issue being that according to paragraph 9 of UNIFIL AI/2011/007, only United Nations Security Officers had authority to conduct breathalyzer tests on the Applicant. Therefore, the submission in the above paragraph is not relevant for the determination of the matter.

46. The Applicant alleged that he, on his own volition took a blood test the day after the RTA. According to him the results came out negative. This fact is also not relevant to this case because according to the regulations a blood sample was supposed to be taken by the Organization's Medical Officer in an appropriate hygienic facility. He did not have his blood test conducted by the Organization's Medical Officer.[5]

47. Noting that the contentious issue was the positive breathalyzer result for alcohol, the Tribunal invoked art.17.1 of its Rules of Procedure to request the parties to secure the opinion of a scientific expert to translate the findings of the breathalyzer results (see para. 18 above). Counsel for the Respondent addressed an email to the Director/DHMOSH seeking clarification among others whether pancreatitis may cause

[5] Pages 14 and 33 of the Trial bundle.

false BrAL or BAC readings. The response was that there was no finding of a "causal link".[6]

48. The Director/DHMOSH did not participate in the proceedings in person. His record of opinion was neither signed nor authenticated. It was not made under oath. It did not have any authorities or explanatory notes. In short, his written briefs are not cogent, lack credibility and have no probative value for purposes of resolving the issue.

49. The Respondent also filed a letter with subject matter: "Case of Mr. Maruschak". It was written by Dr. Mike Rowell, Senior Medical Officer, DHMOSH addressed to Mr. Matthias Schuster, Administrative Law Unit, Office of Human Resources, Department of Management Strategy, Policy and Compliance. In this signed letter, the general view of the author was that "it is unlikely that [the Applicant's] prior pancreatic condition could be responsible for ketosis and a falsely elevated BAC.[7]

50. At paragraph four of the letter, the author offered to be contacted "if I can be of further assistance".[8] The memorandum is dated 22 July 2019. The Applicant did not contradict the views of this author, nor did he call him or obtain his statement on the matter. The Tribunal admits this medical opinion into evidence and finds it reliable in as far as it purports to explain the link between the pancreatic condition of the Applicant which the author had knowledge of and its effect on the Applicant's BAC readings. The Applicant did not impeach this opinion evidence.

51. Furthermore, the parties filed various documents, photographs and videos, for instance, "*Investigation Report and Select Supporting Documents"*[9] comprising of: SIU Report;[10] RTA Report;[11] witness statements obtained by SIU during its

6 Page 179 of 335, Trial bundle.
7 Paragraph 3, page 180 of 335, Trial bundle.
8 *Ibid.*
9 *Ibid.,* at pages 181-220 of 335.
10 *Ibid.,* at pages 181-208 of 335.
11 *Ibid.,* at pages 209-210 of 335.

investigations;[12] SIU Note to case;[13] photographs and videos of RTA, print-outs of calibration log book for military police;[14] a copy of Lifeloc breathalyzer operations manual;[15] Certificate of Training (For successful completion of the Induction Training on Investigation, Traffic Control, Map and GPS, Communication Skills, Police Duties, Conduct and Discipline, Introduction to Computer and Sketch drawing and MP Equipment (Breathalyzer, Speed gun, Camera, Button stick, MP Note book and Weapon) at Force Military Police Unit From 13 to 30 March 2017)[16] and witness statements compiled by the Applicant. None of these materials address the principal issue of whether the breathalyzer or blood test results adduced in this matter were lawfully acquired.

52. The Respondent did not call any witness but relied on evidence from the SIU report, for instance, on the effect of calibration check of the breathalyzer, that the collision occurred on a straight section of the highway in dry and clear weather conditions and therefore the Applicant must have been driving under the influence of alcohol, that the Applicant showed signs of visible impairment of movement therefore he must have been drunk, that immediately after the collision, the Applicant drank a whole bottle of water that he carried in the trunk, and requested a second from UNAV military personnel and then walked to the side of the road and urinated, therefore he must have consumed alcohol. These are opinions of individuals which are irrelevant in as far as the legal issue is concerned.

53. The Tribunal reminds itself that this being a disciplinary matter concerning dismissal, the Respondent must prove by clear and convincing evidence that the facts on which the sanction was based are established, that the facts constitute misconduct,

[12] *Ibid.,* at pages 211-218 of 335.
[13] *Ibid.,* at pages 219-220 of 335.
[14] *Ibid.,* at pages 54-57 of 335.
[15] *Ibid.,* at pages 58-86 of 335.
[16] *Ibid.,* at page 87 of 335.

that the Applicant's due process rights were respected and that the sanction is proportionate.

54. The UNDT must consider the evidence adduced and the procedures utilized during the investigation by the Administration. In this context, the UNDT is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct under the Staff Regulations and Rules, whether due processes rights were respected and whether the sanction is proportionate to the offence.[17]

55. The Tribunal finds that the Respondent has failed to discharge his burden of proof to show by clear and convincing evidence that the Applicant drove his vehicle after consuming alcohol.

56. The evidence is clear that the Respondent's argument that a Military Officer was authorized to conduct a breathalyzer test on the Applicant is not correct. The Respondent violated paragraph 9(b) of UNIFIL AI/2011/007.

57. The evidence of a breathalyzer test relied upon to make a finding of misconduct was not just improperly obtained, as was the case in *Asghar*, but it was illegally obtained hence unlawful.

58. The failure to observe the policy is a substantial procedural irregularity that goes to the root of the impugned decision.

59. In relation to the statements that the Applicant had a smell of alcohol or that he was impaired, or that the accident happened on a straight line, the Tribunal finds them subjective and speculative in view of the contradictory statements in the SIU report obtained from witnesses at the scene of the accident, none of which were verified through an objective means of a lawful breathalyzer or blood test.

[17] *Turkey* 2019-UNAT-955, para. 32, citing to *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164.

Financial loss

60. There was no evidence that the Applicant damaged the Organization's property leading to financial loss. Through the Respondent's additional submissions on recovery of damage, filed on 2 October 2019, the Respondent submitted that "[b]ased on further information received from the Mission, the damage caused by the Applicant to the Italian Contingent armoured vehicle #UNIFIL 12893 did not result in financial loss to the Organization."[18]

61. The provisions cited by the Respondent required a factual finding that the Applicant had used property and assets of the Organization for unofficial purposes and that he failed to exercise reasonable care when utilizing such property and assets;[19] and that he failed to exercise reasonable care in any matter affecting the financial interests of the Organization, its physical and human resources, property and assets.[20] The Respondent did not adduce any evidence in this Tribunal to support these findings.

Proportionality and assessment of the mitigating factors

62. Pursuant to a finding that the facts on which the impugned decision was made are not established, it would be for academic purposes only and not in the interests of judicial economy to embark on a discussion of whether the sanction was proportionate.

Reliefs

63. Article 10.5(a) of the UNDT Statute stipulates that (emphasis added)

> [a]s part of its judgment, the Dispute Tribunal **may** only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect

[18] Respondent's additional submissions on recovery of damage, bullet point 1, page 255 of 335, Trial Bundle.

[19] Staff regulation 1.2(q) of ST/SGB/2017/1 (30 December 2016) applicable to issues in this application

[20] *Ibid.*, staff rule 1.7.

> to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph.

64. The Tribunal's Statute uses "may", in the above provision. The Tribunal is permitted to exercise its discretion based on the circumstances of the case whether to grant a rescission as claimed by the Applicant (see generally *Maruschak* 2022-UNAT-1282). Where rescission is denied, the Applicant is not entitled to compensation in lieu.

65. The Applicant prayed for the relief of rescission of the administrative decision and an order of reinstatement. For the reasons set out below, the Applicant's prayer is declined.

Abuse of process

Respondent's submissions

66. In paragraph 24 of Judgment *Maruschak* 2022-UNAT-1282, UNAT held that it is the role of the UNDT to determine the Secretary-General's allegations of the Applicant's abuse of process. The Respondent submits that he is entitled to a reasoned judgment from the UNDT on this issue, as a matter of law on the following grounds:

a. The Applicant's Annexes 22-27 comprise false statements and forgeries. The Applicant failed to provide any credible explanation as to how and why he was in possession of these false documents;

b. During the oral hearing, the Applicant admitted that he had never undergone surgery in Freiburg University Hospital. When asked why he possessed an official-looking document purporting otherwise, he answered: "For private reasons." This answer is not satisfactory. Nobody would possess a signed document detailing an operation performed on them, when no such operation has ever taken place. No hospital would issue a medical report for a person who has not been a patient at that hospital, or an invoice for services that the hospital never provided;

c. The only reason for the existence of these documents was to support the Applicant's request for damages before the Tribunal in the context of the present litigation. The only means for these documents to exist is that the Applicant, or someone on the Applicant's behalf, forged them;

d. UNAT has made it clear that in case of false submissions, intent to defraud is implied, subject to countervailing evidence which the Applicant has failed and refused to provide;

e. The Applicant's insistence that he independently discovered his error and voluntarily withdrew the fake documents is a continuation of his effort to mislead the Tribunal. The Applicant has repeatedly certified in writing in various motions and has asserted under oath during the oral hearing that he filed the documents by mistake and withdrew them upon so realizing on his own. This is a lie because the Applicant was alerted by his former Counsel of the Respondent's discoveries;

f. After reviewing some of the Respondent's evidence, the Applicant's former Counsel withdrew from representing the Applicant. The Applicant's withdrawal of his request for amended remedies and his purported evidence, once he was left without legal representation, is the result of the Respondent's discoveries which were communicated to the Applicant, and not a voluntary action correcting an innocent mistake; and

g. The Respondent requests that the Tribunal review all the evidence submitted by the Respondent in his 9 June 2021 motions, as well as in his 31 August 2021 motion, and find that Applicant filed fraudulent documents which comprise forgeries and misrepresentations. The Respondent further requests that the Tribunal find that such filings compromise the Applicant's credibility and constitute an abuse of process, which warrants the award of costs against the Applicant.

67. The Respondent requests the Tribunal to dismiss the application and, in conformity with *Maruschak* 2022-UNAT-1282, to determine whether the Applicant's Annexes 22-27 constitute forgeries and misrepresentations. The Tribunal should find that the Applicant has submitted forgeries and misrepresentations, and that doing so constitutes an abuse of process, which warrants the award of costs against the Applicant.

Applicant's submissions

68. The Applicant filed the following submissions in response:

a. All medical documents, related to the period of his service with the United Nations, were officially requested and obtained from the United Nations Medical Services Division and were then presented to the Tribunal. The Medical Documents are available in the United Nations Medical Services Division and on EarthMed, the United Nations Medical Filing System and before downloading were carefully checked by United Nations medical officials;

b. Any documents, not related to his service with the United Nations and dated after the Applicant was separated from the service of the United Nations are not subject of the present case and should not be a point for discussion as irrelevant;

c. Annex 24 was officially withdrawn from the legal process on 13 July 2021 by the Tribunal's Order No. 136 (NBI/2021) and cannot be a subject of any discussion;

d. The document "RS-1 - Dr. Taras Kliofa genuine signature", presented by the Respondent is moot by its nature and has no relation either to the real Dr. Taras Klofa or to the genuine signature of Dr. Taras Klofa. The Respondent presented RS-1 without any official translation of the text to the English language;

e. Dr. Taras Klofa is the Head of the Medical Unit responsible for signing official medical documents on behalf of the Military Hospital. That information does not contradict any information previously presented by the Applicant;

f. The Respondent should use official channels of obtaining information about a non-United Nations staff member. The use of unofficial sources for the purpose of obtaining personal information about any person, especially non-United Nations staff, is illegal;

g. Confidentiality laws protect patient health information. This includes any medical information created by a health care provider or a health plan that identifies the individual and relates to the past, present or future health or health care of the individual. Patient confidentiality is enshrined in law – the National Health Act 2003 makes it an offence to disclose patients' information without their consent; and

h. All of the documents, mentioned in the Respondent's motion on the Applicant's further forged documents are not related to the nature of the application and are other attempts by the Respondent to create the most possible negative image of the Applicant in the eyes of the Tribunal.

Examination of the allegation of abuse of process

69. In cases alleging fraud, the Tribunal reiterates the safeguards provided in UNAT jurisprudence that:

> 35. A finding of fraud against a staff member of the Organization is a serious matter. Such a finding will have grave implications for the staff member's reputation, standing and future employment prospects. For that reason, the UNDT generally should reach a finding of fraud only on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that each element of fraud (the making of a misrepresentation, the intent to deceive and prejudice) has been established in accordance with the standard of clear and convincing evidence. In other words, the

> commission of fraud must be shown by the evidence to have been highly probable.
>
> 36. Fraud consists in the unlawful making, with the intent to defraud or deceive, of a misrepresentation which causes actual prejudice, or which is potentially prejudicial, to another.[21]

70. Further, the Tribunal recalls that legal representatives and litigants in person shall maintain the highest standards of integrity and shall at all times act honestly, candidly, fairly, courteously, in good faith and without regard to external pressures or extraneous considerations.[22] Further, that the Tribunal may issue orders, rulings or directions in order to implement the provisions of the "Code of conduct for legal representatives and litigants in person".

71. In Order No. 23 (NBI/2023), para. 28, issued in connection with this case, the Tribunal held that the penalty for a manifest abuse of process before the Dispute Tribunal can only be invoked after the Tribunal has decided that the Applicant has manifestly abused the process. The remedy is costs awarded against the party found to have manifestly abused the process. This remedy is provided in art.10(6) of the Statute of the United Nations Dispute Tribunal, and it states:

> [w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

72. The Tribunal further held in Order No. 23 (NBI/2023), that the jurisdiction of a Tribunal to award costs is narrowly restricted by statute to cases in which it determines that a party has manifestly abused the proceedings before it.[23] The threshold is high for a finding of manifest abuse of process

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[21] *Asghar* 2018-UNAT-982.

[22] Article 4.1 of the "Code of conduct for legal representatives and litigants in person".

[23] At para. 25 citing to *Machanguana* 2014-UNAT-476, para. 12, citing to *Bi Bea* 2013-UNAT-370; *Wasserstrom* 2014-UNAT-457; *Tadonki* 2014-UNAT-400; *Gehr* 2013-UNAT-328; *Gehr* 2013-UNAT-333; *Balogun* 2012-UNAT-278; *Mezoui* 2012-UNAT-220; *Kamunyi* 2012-UNAT-194; *Ishak* 2011-UNAT-152; *Andati-Amwayi* 2010-UNAT-058.

> for an applicant party to attain and recent case law illustrates that such an order will be rarely made, and usually after the party has been fairly warned of that consequence if the party's abuse of process continues.[24]

73. In *Chhikara,*[25] UNAT held that if a party provides the Tribunal with decisive information that is wrong and misleading, this amounts to a manifest abuse of process of very serious nature. Such action puts the entire integrity of the judicial system at risk. It may not only lead to undue and costly delays, but also lead to straightforwardly incorrect decisions.

74. The Applicant attempted to use these proceedings to abuse the system by acting dishonestly. He filed fake documents to support his claim for an award of moral damages. The false documents showed that he had used out of pocket money obtained from mortgaging his house to pay for heart surgery which he never had.

75. The fact that he withdrew the exhibits is not relevant because the Tribunal is convinced that he withdrew the motion, not out of remorse or respect for the internal justice system, but because his dishonesty was uncovered by the Respondent. He withdrew the amended application for remedies and its exhibits through a motion filed on 8 June 2021, six days after his Counsel had withdrawn from representing him in the proceedings, and 14 days after the Respondent had confronted the Applicant through his Counsel on alleged forgeries.[26]

76. The Tribunal finds that the documents were false. In so finding, the Tribunal does not agree with the Respondent that fraud was committed. A finding of fraud requires sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that each element of fraud (the making of a

[24] *Abu Rabei*, 2020-UNAT-1060, para. 30 and also see *Nouinou* UNAT Order No. 353 (2019), para. 3 citing to *Nouinou* Order No. 348 (2019), para. 7.

[25] *Chhikara* 2020-UNAT-1014, para. 30, citing to *Chhikara* UNDT/2019/150, para. 46.

[26] Motion on forged documents filed by the Applicant in support of the Application, filed by the Respondent on 31 August 2021.

misrepresentation, the intent to deceive and prejudice) has been established in accordance with the standard of clear and convincing evidence.

77. Such sufficient and cogent evidence was not adduced in this matter. The various documents pulled from the internet, excerpts from files and email correspondence without witnesses to attest under oath as to their accuracy or veracity may not be deemed clear and convincing evidence substantiating an allegation of fraud. It is, however, sufficient to prove a case of abuse of process.

78. The nature of the abuse is so serious that if undetected would have brought the integrity of the United Nations internal justice system into disrepute. The plot to misrepresent facts was planned and calculated. The motive was an attempt to mislead the Tribunal to award him money for pecuniary loss in excess of EUR78,000.

Finding on the allegation of abuse of process

79. The Tribunal is empowered to make orders against a litigant who violates the "Code of conduct for legal representatives and litigants in person" appearing before it. It is also mandated by its Statute under art. 10(6) to order costs against a litigant found to have manifestly abused the process.

80. The nature of the abuse bordering on dishonesty perpetrated by a career Security Officer with 12 years of service to the international civil service, who owed the Organization a special duty of care[27] is serious. The Tribunal has also considered that after his first attempt, on 15 March 2021, to mislead the Tribunal by filing five annexes, purporting to show that he had suffered economic loss and other harm as a result of his separation,[28] the Applicant made a second attempt on 6 May 2021, by filing another set of documents to show that he had undergone a heart valve replacement surgery for

[27] See for example, *Halidou* 2020-UNAT-1070, para. 30; *Massah* 2012-UNAT-274, para. 48; *Haniya* 2010-UNAT-024, para. 34.

[28] Motion regarding Applicant's 27 July 2021 submission, filed by the Respondent on 3 August 2021, para.2

EUR78,310.[29] Furthermore, the Tribunal has taken four years to resolve this matter since 2019 due to this issue,[30] a fact which not only wasted resources but also reflected negatively on the efficiency of the United Nations internal justice system.

81. The Respondent prayed for costs to be awarded against the Applicant. The Tribunal finds that for the manifest abuse of process, the Tribunal should award costs against the Applicant. In *Ntemde* Order No. 496 (2023), UNAT ordered the appellant in that case to pay USD300 as costs pursuant to art. 9(2) of the UNAT Statute for manifestly abusing the appeals process. In *Ntemde,* the appellant had been given several warnings on filing irrelevant and scandalous documents. He deliberately ignored the warnings by attempting to file further improper pleadings, hence the award of costs. In the case at bar, the abuse of proceedings was egregious as it was intended to mislead the Tribunal and would have brought the integrity of the Tribunal's proceedings into disrepute. Consequently, the award of costs should be greater.

Conclusion

82. In view of the foregoing, the Tribunal DECIDES that:

a. The application partially succeeds in so far as the facts on which the contested decision was based were not established under the applicable standard; and

b. Through his conduct in these proceedings, the Applicant undermined his integrity particularly as an international civil servant and in his functional capacity as Chief in the field of Security. He has destroyed the mutual trust and

[29] Paragraph 4 of the above motion.

[30] Through Order No. 19 (NBI/2022) issued on 16 February 2022, the Tribunal suspended the proceedings to allow the Respondent's appeal to UNAT of Order No. 174 (NBI/2021) on the issue of manifest abuse of process to be resolved. A decision was rendered on 28 October 2022 but published on 7 December 2022 in *Maruschak* 2022-UNAT-1282 remanding the matter to the UNDT.

confidence necessary in an employment relationship.[31] For these reasons, rescission of the contested decision is declined; and

c. The Tribunal awards USD500 costs against the Applicant for manifest abuse of proceedings.

(*Signed*)
Judge Rachel Sophie Sikwese
Dated this 20th day of December 2023

Entered in the Register on this 20th day of December 2023
(*Signed*)
René M. Vargas M., Officer-in-Charge, Nairobi

[31] See for example, *Saleh* 2022-UNAT-1239, at para. 33.