UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2023/038
Judgment No.: UNDT/2024/061
Date: 13 September 2024
Original: English

Before: Judge Margaret Tibulya

Registry: New York

Registrar: Isaac Endeley

ROTHEROE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

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

Introduction

1. On 27 October 2023, the Applicant, a former Deputy Director of Investment Management in the Office of Investment Management ("OIM") of the United Nations Joint Staff Pension Fund ("UNJSPF"), filed an application in which she contests the decision to impose upon her "the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity".

2. As grounds for imposing the sanction, the Applicant had been found to have (a) engaged, together with other senior managers in the OIM, in a course of behaviour targeting BP (name redacted for privacy reasons); (b) participated, together with other OIM staff members, and in opposition to the former Representative of the Secretary-General ("RSG"), in discussions suggestive of collaborative efforts or contemplations to disclose, without authorization, sensitive information relating to the OIM to the media, blogs and Permanent Missions of Member States; and (c) used her official United Nations-issued mobile telephone to exchange numerous messages using offensive and derogatory nicknames and disparaging remarks concerning two OIM staff members: AA and BB (names unknown to the Tribunal).

3. On 24 November 2023, the Respondent filed a reply in which he contends that the application is without merit.

4. On 1 April 2024, the case was assigned to the undersigned Judge.

On 15 and 16 July 2024, a hearing was held via MS Teams, where the Applicant, EH (a former colleague of the Applicant), and MR (a former staff representative at UNJSPF) testified (names redacted for privacy reasons). These witnesses were all called by the Applicant, whereas the Respondent did not call any witnesses.

5. For the reasons set forth below, the application is rejected.

Facts

6. According to the information available on its website, the United Nations Joint Staff Pension Fund ("UNJSPF" or the "Pension Fund" or the "Fund") has two major components: Pension Administration and the Office of Investment Management ("OIM"). The OIM, under the leadership of the Representative of the Secretary-General ("RSG"), is further divided into multiple sections including: the Office of the RSG; Investments; Risk and Compliance; Operations; Information Systems; Data Analytics and Business Applications; Programme Administration; Accounting; and Legal.

7. The Investments section, which is "responsible for achieving the optimal investment return for the Fund", consists of several teams, including: North American Equity; European Equity; Asia Pacific Equity; Global Emerging Markets Equity; Real Assets; Alternative Investments; Trade Execution; External Managers; and Fixed Income and Treasury.

8. According to the Appeals Tribunal, if the parties agree to certain facts, then the Dispute Tribunal is not to further review these facts but accept them as settled (see *Ogorodnikov* 2015-UNAT-549, para. 28). In the present case, in response to the Duty Judge's Order No. 007 (NY/2024) dated 23 January 2024, the parties submitted a consolidated list of agreed facts in which they presented the following chronology (footnote references from the original omitted):

> In 2002, the Applicant joined the Organization as a P-4 Investment Officer in the Office of Investment Management (OIM) of the [United Nations] Joint Staff Pension Fund (UNJSPF). At the time of the contested decision, she was serving at the D-1 level as Deputy Director of Investment Management with a permanent contract.
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> Effective 1 January 2018, [SR or the former RSG (name redacted for privacy reasons)], was appointed as Representative of the Secretary-General (RSG) for the investment of the UNJSPF assets.
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> On 19 July 2019, [EH], filed with [the Office of Internal Oversight Services, "OIOS"] on behalf of the Applicant as well as on behalf of [TH (name redacted for privacy reasons)], Senior Investment Officer, Private Equity; [MS (name redacted for privacy reasons)], Senior Investment Officer, Asia-Pacific; [EC (name redacted for privacy reasons)], Investment Officer, Private Equity; [TB (name

redacted for privacy reasons)], then Senior Investment Officer; and [TW (name redacted for privacy reasons)], then Senior Investment Officer, Fixed Income, a complaint against [SR], then RSG, and [HB (name redacted for privacy reasons)], then OIM Director, (D-2).

On 26 July 2019, the Applicant started an e-mail exchange involving [CH, MS, TW, TB, and EH], which stated: "Lots of updates today-lengthy article". In response, [EC] attached a link to the blog [link redacted] informing that she had found it in one of [EH's] previous e-mails. [MS] e-mailed the group: "we should (or have someone) write in the blog in details" and "Do you know how to contribute to the blog? Do we use email? Maybe we can create a new account so no one can guess who the writer is (most of us use our names in our email address now). And a better writer among us should represent us?"

On 26 July 2019, the Applicant replied: "Maybe a retiree can ask some of the questions. The blogger already identified concerns about the website and how much staff is/isn't involved in some decision making. I was happy to see reminder that this is a conservative fund and the approach has served beneficiaries well for 70 years". [EH] suggested: "Lets work through the staff union on the blog issue. They might set up a meeting between us and the blogger" [*sic*].

On 23 September 2019, the Applicant signed annual certification for 2019 certifying that she has read, [understood], and agree[d] to abide by the policies, including "Information sensitivity, classification of documents and records management policy" for the purposes of ensuring compliance and the maintenance of the UNJSPF's reputation and integrity. The Applicant also signed the annual certifications for 2020 and 2021.

On 13 November 2019, in response to an e-mail from [EH] dated 12 November 2019, the Applicant wrote: "Thank you so very much [EH] for putting all this together and speaking with WS (a former OIM staff member). I have a company meeting today, but can join the town hall in progress if it is still ongoing. Can you please send me the details. Funny that [the former] RSG hasn't invited all of OIM to this townhall, like he does everything else…"

On 13 March 2020, [EH], on behalf of the Applicant and on behalf of [TS (name redacted for privacy reasons)], Deputy Director, Equities; [WW (name redacted for privacy reasons)], Chief Operating Officer; [TW]; [TH]; [MS] and [EC], filed a written complaint to the Secretary-General about "concerns regarding actions taken by [the former RSG] over the past two years" and in the context of issues at that time in financial markets. [EH] referred

> to a "toxic culture… created by the OIM leadership," and the absence of professional collaboration and retaliation. This led to a second review by Internal Audit Division, OIOS (IAD/OIOS).
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> On 30 March 2020, [the former RSG] resigned and the Secretary-General appointed [PG, or the new RSG (name redacted for privacy reasons)] as the Acting RSG.
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> On 8 May 2023, the Applicant was requested to respond to formal allegations of misconduct.
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> On 30 June 2023, the Applicant responded with comments.
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> On 14 July 2023, the Applicant submitted her resignation. The Applicant requested her resignation to take effect on 18 August 2023.
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> On 7 August 2023, the Applicant received the contested decision ["the "sanction letter"].

The parties' submissions

9. The Applicant's main contentions may be summarized as follows:

a. The Applicant was never the subject of any complaint of misconduct. The allegations against her arose solely from the "unexplained blanket seizure" of the information technology equipment of OIM staff members and the retrieval of "private email or text communications between colleagues". Those communications were all related to "a protected activity in reporting abuse of authority" by the former RSG of OIM. The charges against the Applicant relate not to her "actual conduct" but to "responsibility for the private words and even the thoughts of others", which did not have "any practical effect on the Applicant's work or her relations with colleagues". This case exemplifies the Administration's "hostility to whistleblowers who attempt to report misconduct".

b. Proof that the actions of the Applicant and her colleagues were justified "has been withheld for specious reasons" and the Tribunal "may wish to draw adverse inferences from this decision to cover up critical evidence exonerating the actions of the Applicant and her colleagues".

c. Following the filing of a formal complaint of misconduct with OIOS in July 2019 by the Applicant and her colleagues against the former RSG and the former Director of OIM, there was no response from the Administration. The Ethics Office was approached but "did not offer any practical help". This "lack of response" led the Applicant and her colleagues to contact the Secretary-General directly in March 2020, "to report the abuse of power, harassment, and the increased risk to the Pension Fund". The private communications between the Applicant and her colleagues, both before and after the complaint was filed, were all "pursuant to and in furtherance of this protected activity".

d. Faced with "threats of retaliation and in the absence of any action" by the Administration, the Applicant and her colleagues sought help from their staff representative. The Applicant herself "never used any external mechanisms" to report misconduct, but she is charged with supporting or contributing to "possible violations" resulting from the disclosure of sensitive information to external parties.

e. The contested decision fails to meet any of the requirements set forth in the jurisprudence of the Tribunal, as the facts on which the allegations are based have not been established; there is no basis for a finding that misconduct occurred; the penalty imposed is disproportionate to the offence; and the Applicant's due process rights were violated.

f. BP never filed a complaint against the Applicant and charges related to BP have arisen from a breach of confidentiality of the staff selection process. The Applicant's references to BP's resume did not constitute harassment and were "part of a well-founded concern over the [former] RSG's decisions".

g. The Secretary-General's bulletin ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) expressly provides that "[d]isagreement on work performance or on other work-related issues is normally not considered prohibited conduct and is not dealt with under the provisions of the present bulletin but in the context of performance management". The concerns expressed over BP's involvement in the [Investment Fund] proposal were precisely of this nature and were not

personal. They did not question BP's capacity to perform the job for which she had been selected and were more directed at the former RSG for his poor judgment. They were private communications and "should not be used after the fact to suggest that an unknowing recipient of comments was somehow injured by them".

h. The Administration has not put forward a legal basis for concluding that privately expressed opinions are prohibited or how any of the Applicant's opinions as to capacity to handle a particular task amount to instilling animosity or hostility. Moreover, the Administration has not explained why the statements and allegations concerning another staff member are being attributed to the Applicant. The evidence offered by the Administration "consists of hearsay, largely based on BP's conjecture". Both the former RSG and HB "were the objects of the complaint to OIOS in July 2019 and were the subject of a request for protection from retaliation". The new RSG testified that he saw no evidence of any harassment of BP.

i. The Administration also completely overlooked the context of the exchanges between the Applicant and her colleagues, which involved a critical OIOS Audit Report, losses on UNJSPF's investments, and an unprecedented complaint to the Secretary-General by senior managers of OIM regarding abuse of authority by the former RSG and his sudden resignation.

j. The Applicant had no control over BP's career and no interest in BP's advancement as an Investment Officer in the North American Equity section of OIM. The Applicant had no decision-making authority over the proposed new infrastructure position at the P-4 level, and she was never BP's reporting officer. Moreover, BP has not demonstrated any harm to her career, but on the contrary is still gainfully employed by OIM and has been promoted from the P-3 to the P-4 level.

k. There is "absolutely no evidence" that the Applicant disclosed sensitive information to the media. The "use of the Applicant's personal email address was not in violation of OIM policy". This was not official business but private communication. At the same time, the Organization's information technology

policy allows for use of United Nations devices for personal matters. This understanding was established especially during the COVID-19 pandemic.

l. The disciplinary measure imposed by the Administration "fails the test of being balanced and proportional", particularly in light of the Applicant's expressed intention to leave the Organization and opt for early retirement. Under the Tribunal's jurisprudence, the Administration was required to give full and proper consideration to less drastic and more suitable means to achieve the objectives of the disciplinary policy. The Applicant's "long record of exemplary service" should have served in mitigation.

m. This case demonstrates that despite the appearance of offering protection for whistleblowers who speak up against the abuse of authority, it is the whistleblowers who are targeted. The Applicant's separation only a short time before she was due to go on early retirement was "unduly harsh and disproportionate, and another act of retaliation".

n. The Applicant requests the rescission of the contested decision; the reinstatement of all her entitlements up to the age of retirement; and the award of compensation for damage to her reputation and "dignitas".

10. The Respondent's primary submissions may be summarized as follows:

a. The contested decision is based on the following facts: (a) between October 2019 and September 2021, the Applicant, together with other senior managers at the OIM, engaged in a course of behaviour targeting BP, an Investment Officer in the OIM; (b) between July 2019 and April 2020, the Applicant, together with other OIM staff members, and in opposition to the former RSG, "participated in discussions suggestive of collaborative efforts and/or contemplations to disclose without authorization sensitive information relating to the OIM to the media, blogs and/or Permanent Missions" to the United Nations; and (c) between September 2020 and June 2022, using her official United Nations-issued mobile telephone, the Applicant and [SP (name redacted for privacy reasons)], an OIM senior manager, exchanged "numerous

messages in which they used offensive and derogatory nicknames and/or disparaging remarks concerning AA and BB", two of their OIM colleagues.

b. The material facts of this case are "based on forensic/documentary evidence, including the Applicant's own e-mails and messages" and the Applicant does not challenge their authenticity. The contested decision is not connected to the Applicant's filing of a group complaint against the former RSG and HB in July 2019. That group complaint was addressed in a separate process and in May 2021 the Applicant was informed of the outcome, which she did not contest. Therefore, any claims related to the outcome of that process are time-barred and not receivable.

c. Through an authorized review of United Nations information and communication technology ("ICT") resources, OIOS on 24 November 2021 identified "numerous exchanges", mainly via personal email accounts, "which indicated possible misconduct including on the part of the Applicant". After investigating the matter, OIOS transmitted its report to the Office of Human Resources ("OHR") on 23 February 2023. The Applicant was notified of the formal allegations of misconduct against her on 8 May 2023 and invited to submit her comments, which she did on 30 June 2023. She was informed of the contested decision (the "sanction letter") on 7 August 2023.

d. The facts of this case are established by clear and convincing evidence as set out in the sanction letter. The fact that the Applicant "engaged in concerted behavior of targeting BP" is established by BP's testimonial evidence "that is direct, detailed, internally consistent and corroborated by forensic/documentary evidence". BP's evidence is "consistent with contemporaneous e-mails exchanged among the Applicant and other Senior Investment Officers" in OIM.

e. There is also "ample evidence that the Applicant together with other OIM staff members, and in opposition to [the former RSG], participated in discussions suggestive of collaborative efforts and/or contemplating to disclose sensitive information to the media, blogs and/or Permanent Missions". The Applicant did not at any point object to the plans, withdraw from the group's

discussions, or report the possible misconduct by other staff members. "Whether the Applicant herself shared sensitive information with the media is not at issue". She was sanctioned for "her active and willing participation" in the series of discussions leading to the contemplated or actual disclosure of sensitive information.

f. In the application, the Applicant did not dispute the fact that between September 2020 and June 2022, she had used her official United Nations-issued mobile phone to exchange "numerous messages" with [SP] in which they used "offensive and derogatory nicknames and/or disparaging remarks concerning AA and BB".

g. The Administration "enjoys broad discretion in determining what constitutes misconduct" and under the jurisprudence of the Tribunal, "judicial review of whether or not misconduct has been established dictates that due deference be given" to the Administration to hold staff members to the highest standards of integrity.

h. As detailed in the sanction letter, the Applicant's established conduct violates multiple provisions of the Staff Regulations and Staff Rules of the United Nations; the Secretary-General's bulletin ST/SGB/2004/15 (Use of information and communication technology resources and data); OIM's "Information sensitivity, classification of documents and records management policy"; and the Secretary-General's bulletin ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment and abuse of authority).

i. The Applicant betrayed the Organization's trust by engaging in collaborative efforts to mobilize Member States and the public against the OIM leadership in furtherance of her opposition to the management's agenda. Even after the change in leadership at the OIM, the Applicant continued to participate in discussions aimed at removing colleagues from their positions. Her "extensive messages" in which she was "constantly disparaging other colleagues" constitute a breach of her obligations as a United Nations staff member to respect the personal dignity of others and to maintain civility at

work. She also failed in her duty as a senior manager to promote a harmonious work environment. This "compound misconduct" constitutes serious misconduct and "essentially renders continuation of her employment untenable".

j. The disciplinary measure imposed on the Applicant was proportionate to the offence. This was not a case of "obvious absurdity or flagrant arbitrariness", and all relevant circumstances, including various aggravating and mitigating factors, were considered in reaching the sanction imposed. The Applicant's plan to resign and opt for early retirement benefits prior to her mandatory retirement age bears "no rational connection to the evidence or serious nature of the misconduct" and "did not determine the outcome of the disciplinary process".

k. The Applicant's claim that she was targeted by the Organization because she was a "whistleblower" is without merit. There is clear and convincing evidence establishing the Applicant's misconduct, and nothing in the legal framework provides that filing a complaint against a head of entity would grant "blind exemption or blanket immunity to a complainant from the liability arising from his/her own wrongdoing". Additionally, the Applicant's procedural fairness rights were respected throughout the investigation and the disciplinary process. Her request for compensation should be rejected, particularly since she had already submitted her resignation before the contested decision and "there was no expectation for her to remain in service until the mandatory retirement [age]".

Considerations

The sanction letter dated 7 August 2023

11. The impugned decision was premised on a determination that there was clear and convincing evidence that:

a. between October 2019 and September 2021, the Applicant, together with other senior managers in OIM, engaged in a course of behaviour targeting

BP, an Investment Officer in OIM, in the context of contemplation of interfering with BP's professional circumstances;

b. between July 2019 and April 2020, the Applicant, together with other OIM staff members, and in opposition to the former RSG, participated in discussions suggestive of collaborative efforts or contemplations to disclose, without authorization, sensitive information relating to the OIM to the media, blogs and Permanent Missions of Member States; and

c. between September 2020 and June 2022, the Applicant used her official United Nations-issued mobile telephone to exchange with SP, a Senior Programme Management Officer in the OIM, numerous messages using offensive and derogatory nicknames and made disparaging remarks concerning OIM staff members AA and BB, that, if known to them, would reasonably be expected to have caused offence and distress.

The burden of proof and the Tribunal's limited judicial review

12. The Administration bears the burden of establishing, by clear and convincing evidence, that the misconduct occurred, which means that the truth of the facts asserted is highly probable (see para. 51 of *Karkara* 2021-UNAT-1172, and similarly in, for instance, *Molari* 2011-UNAT-164; *Diabagate* 2014-UNAT-403; *Modey-Ebi* 2021-UNAT-1177; *Khamis* 2021-UNAT-1178; *Wakid* 2022-UNAT-1194; *Nsabimana* 2022-UNAT-1254; *Bamba* 2022-UNAT-1259).

13. Pursuant to art. 9.4 of the Statute of the Dispute Tribunal, and in keeping with established jurisprudence (see, for instance, *Maslamani* 2010-UNAT-028, para. 20), the Tribunal's role is to determine:

a. Whether the facts on which the sanction is based have been established;

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

c. Whether the sanction is proportionate to the offence; and

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

Whether the Applicant was a whistleblower

14. As a preliminary matter, the Tribunal will determine the issue of the Applicant's whistleblower status. The Applicant's other arguments are to be considered as and when they are raised, in the evidence evaluation process.

15. The Applicant alleges that instead of offering her protection as a staff member who speaks up against the abuse of authority, the Administration has targeted her for engaging in a protected activity. According to her, the sanction imposed on her exemplifies the Administration's "hostility to whistleblowers who attempt to report misconduct".

16. Section 4 of ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) provides that "[n]otwithstanding staff regulation 1.2(i), protection against retaliation will be extended to an individual who reports misconduct to an entity or individual outside of the established internal mechanisms, where the criteria set out in subparagraphs (a), (b) and (c) below are satisfied":

a. Such reporting is necessary to avoid:

i. A significant threat to public health and safety; or

ii. Substantive damage to the Organization's operations; or

iii. Violations of national or international law; and

b. The use of internal mechanisms is not possible because:

i. At the time the report is made, the individual has grounds to believe that he/she will be subjected to retaliation by the person(s) he/she should report to pursuant to the established internal mechanism; or

ii. It is likely that evidence relating to the misconduct will be concealed or destroyed if the individual reports to the person(s) he/she should report to pursuant to the established internal mechanisms; or

iii. The individual has previously reported the same information through the established internal mechanisms, and the Organization has failed to inform the individual in writing of the status of the matter within six months of such a report; and

c. The individual does not accept payment or any other benefit from any party for such report.

17. For a claim to protection under sec. 4 of ST/SGB/2017/2/Rev.1 to succeed, the criteria in part (c) and at least two criteria, one from each of parts (a) and (b), must be satisfied.

18. In her oral evidence, the Applicant testified that the communications with entities or individuals outside the established internal mechanisms were necessary to avoid substantial financial damage to UNJSPF's finances. Further, that the use of internal mechanisms was not possible because the people to whom she could have reported were the very ones she was complaining about, and no one within OIM could therefore help her.

19. The Respondent argued that issues relating to the resignation of the former RSG effective 31 March 2020, and those concerning the Applicant's complaint of 19 July 2019 the outcome of which was given to her via the 12 May 2021 letter, are not receivable. The Respondent also argued that there is no administrative decision against the Applicant with respect to the former RSG's resignation, and that the assertion that no investigation was ever initiated, or that the Applicant was not interviewed by OIOS with regard to her 19 July 2019 complaint are time-barred.

20. The Tribunal considers that the foregoing arguments by the Respondent seem to miss the point that by her arguments the Applicant only seeks to demonstrate that she satisfies the whistleblower criteria under sec. 4 of ST/SGB/2017/2/Rev.1. Therefore, whether or not she challenged the outcome of her OIOS complaint is irrelevant to the argument. The Applicant does not have to prove the existence of an

administrative decision in relation to her OIOS complaint for her claim to whistleblower protection to stand.

21. Moreover, by the time of the outside reporting, the Applicant's complaint of 19 July 2019 had not been addressed, the former RSG had not resigned, and the outcome had not been communicated to her. Based on these factors, the Respondent's arguments relating to the receivability of issues concerning the OIOS report and the former RSG's resignation have no bearing on whether the Applicant satisfies the criteria in sec. 4 of ST/SGB/2017/2/Rev.1.

22. It is understood that the Applicant's claim to whistleblower status is premised on her understanding that she satisfies the criteria in secs. 4(a)(ii), 4(b)(i) and 4(b)(iii). In this regard, she seeks to prove that her outside reporting was necessary to avoid substantive damage to the Organization's operations (sec. 4(a)(ii)). Further, she relies on the fact that the use of internal mechanisms was not possible because: (a) at the time the report was made, she had grounds to believe that she would be subjected to retaliation by the persons she should report to pursuant to the established internal mechanism; and (b) she had previously reported the same information through the established internal mechanisms, and the Organization had failed to inform her in writing of the status of the matter within six months of her report (secs. 4 (b)(i) and 4(b)(iii)).

23. Section 3 of ST/SGB/2017/2/Rev.1 provides that reports of misconduct should be made through the established internal mechanisms: to OIOS, the Assistant Secretary-General for Human Resources Management (currently the Assistant Secretary-General for the Office of Human Resources, "ASG/OHR"), the head of department or office concerned, or the focal point appointed to receive reports of sexual exploitation and abuse.

24. In terms of sec. 3 of ST/SGB/2017/2/Rev.1 above, the Applicant could only make a report to OIOS or the ASG/OHR, considering that her complaint was against the heads of her office. She therefore rightly reported to OIOS.

25. The Applicant states in the application that OIOS never interviewed any of the complainants or followed up in any way on their complaint, implying that no

investigation was ever initiated. She states that instead, she and her colleagues were investigated. Further, that the Investigation Division of OIOS ("OIOS/ID") "apparently leaked" her complaint to the former RSG.

26. The complaint that the Applicant was not interviewed, even if proved, is irrelevant. The conduct of investigations is governed by administrative instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). Section 6.1 of ST/AI/2017/1 provides, in relevant part, that "investigator(s) should pursue all lines of enquiry as considered appropriate and collect and record information, both inculpatory or exculpatory, in order to establish the facts".

27. Clearly, OIOS's only obligation is to investigate a complaint. There is no obligation to conduct the investigation in any particular manner. The assertion that the Applicant was not interviewed, even if proved, does not mean that investigations were never conducted. The assertion that there was no follow-up of the Applicant's complaint in any way is outright false. Had it been true that there was no follow-up, there would be no outcome. That outcomes were subsequently communicated to the Applicant proves that her complaint was followed up and investigated.

28. The assertion that "OIOS/ID apparently leaked" the Applicant's complaint to the former RSG appears to be solely premised on the fact the alleged retaliatory conduct only surfaced after a report of misconduct was filed against the former RSG.

29. First, even if it were proved that the former RSG retaliated against the Applicant on account of her report of his alleged misconduct, the conclusion that the source of his information was OIOS/ID is speculative. It is significant that the Applicant has not substantiated her assertion that OIOS/ID leaked her report to the former RSG.

30. Secondly, it must be understood that the Applicant's request for protection against retaliation relates to the former RSG's, and not OIOS/ID's, conduct. Moreover, in terms of sec. 4(b)(i) of ST/SGB/2017/2/Rev.1, it is OIOS, and not the former RGS, that the Applicant "should report to pursuant to the established internal mechanism". In the circumstances, even if it were proved that the former RSG retaliated against the Applicant, such proof would not satisfy the criteria of sec. 4(b)(i) of ST/SGB/2017/2/Rev.1.

31. Since the Applicant has not proved that at the time she participated in making the external report she had grounds to believe that she would be subjected to retaliation by OIOS, or the ASG/OHR (that is, the persons she should report to pursuant to the established internal mechanisms), the Tribunal finds that the criteria in sec. 4(b)(i) of ST/SGB/2017/2/Rev.1 have not been met.

32. Regarding the sec. 4(b)(iii) criteria, it is common knowledge that the Applicant was informed of the outcome of her complaint on 12 May 2021, outside the statutory six-month limit. Ideally, her activities would be protected. She, however, participated in discussions relating to sharing sensitive information with the media and Permanent Missions before the lapse of the six-month period as demonstrated below.

33. Concerning reports to the Permanent Missions of Member States, on 13 September 2019 (only two months after the report to OIOS), EH emailed the Applicant and others stating, "… I will continue working on the general writeup I sent around last week. I would like to send the next version to [MR] and eventually to [WW, Chief Operating Officer, OIM] and [OIM staff member, TS]. If we can all agree on the same text it will be our script for going to our mission [the Permanent Mission of his country] in a few weeks. I had lunch with [TS] today and he was on board with going to the [Permanent Mission of his country] with the script". On the same day, the Applicant replied: "Wow, what a list! No wonder we all have a headache". She then thanked EH "for all [his] hard work!!!".

34. On 21 October 2019, EH informed the Applicant and others that WW had received a response from the Permanent Mission of his country agreeing to "set up a meeting in the next few days". He also referred to colleagues possibly visiting their respective Permanent Missions.

35. On 14 February 2020, EH informed the Applicant that he "sent both my cancelled and new epasses to [GK] the Deputy Director of OIOS and it has apparently caused a stir. I said that [the former RSG] is still attacking my performance, as is shown in the new epass, despite OIOS's report on real estate. […] Also, [WW] is seeing the [Permanent Mission of his country] Tuesday. I gave them info ahead of time on the EM [presumably Emerging Markets] equity and debt performance as well as the junk bond issue to help [WW] with the meeting".

36. On the same day the Applicant replied*:* "Ooh I love a good 'stir'! Try to relax this weekend, you've been doing a lot".

37. Regarding contact with the media, in a 6 December 2019 email (still before the six months elapsed), EH informed the Applicant that he had shared with MR, the staff representative, confidential information critical of the former RSG "to forward to [a news media entity]". EH forwarded his email to MR in which he wrote: "I just wanted to make sure this supplemental information, which is not in my memos, gets to the [news media] reporter".

38. On 12 December 2019, in response to EH's email sharing an article on the [Investment Fund] posted on a news media website, the Applicant wrote: "Thanks for this. The article mentions in numerous places 'investing in more external managers', which sounds like outsourcing the fund". EH replied: "Yes – [MR] picked up on this too. Very useful for the staff union. Little by little things are coming out. The reporter is very interested in doing more profiles on us. She apparently has a copy of the ALM [acronym unknown to the Tribunal] study and our new benchmarks and asset allocation so anything on this issue is fair game. She will work off the record as she did with me. If you wish to speak with her directly her number is [redacted for privacy reasons] and email is [redacted for privacy reasons]".

39. Clearly, the dates on which the Applicant participated in discussions relating to the media and to the Permanent Missions were much earlier and certainly before the end of the statutory six-month period.

40. Similarly, with the issue of the blog, the Applicant may not claim whistleblower protection either. Her interactions on this issue seem to have commenced on 26 July 2019, shortly after the start of the six-month period. EH's email to the Applicant and others requesting them to explain to MR about the OIM's "irrational and ill timed" decisions to invest in two named countries, indicating that it "needs to hit the blog immediately" is not dated. The only dated email thread relating to the blog issue, and which bears a connection with the Applicant is dated 26 July 2019. The Applicant's involvement in discussions regarding blog activities therefore fails to satisfy the sec. 4(b)(iii) criteria.

41. The Tribunal recalls that in the memorandum of disputed facts jointly submitted by the parties, the Applicant only disputes the relevance and not the contents or import of the email exchanges which are the subject of the earlier discussion, concerning her involvement in activities or discussions in relation to the media and Permanent Missions.

42. The emails prove that the Applicant participated in discussions suggestive of collaborative efforts and/or contemplations to disclose without authorization sensitive information relating to the OIM to the media, to a blog and to Permanent Missions before the statutory six months ended. She does not therefore satisfy the whistleblower criteria and cannot claim any protection under sec. 4(b)(iii) of ST/SGB/2017/2/Rev.1. Accordingly, the Tribunal finds that the Applicant is not a whistleblower.

43. The Tribunal will now determine whether the facts on which the disciplinary measure was based have been established.

Whether it has been proved that between October 2019 and September 2021, the Applicant, together with other senior managers at the OIM, engaged in a course of behavior targeting BP

44. The material facts of the contested decision, as stated in the 7 August 2023 sanction letter, were based on forensic and documentary evidence, including the Applicant's own emails and text messages, the authenticity of which she does not challenge before the Tribunal.

45. In the sanction letter, the Applicant was alleged to have engaged in a course of behaviour targeting BP by collecting and sharing information or comments suggestive of collaborative efforts or contemplations to:

> i. undermine [BP's] professional standing,
>
> ii. influence the new RSG against [BP],
>
> iii. instil animosity and hostility against [BP], and
>
> iv. impede [BP's] professional circumstances, including her return to her P-3 level position at the OIM following the conclusion of her temporary assignment at the P-4 level.

v. The Applicant is also alleged to have shared information given to her in good faith by [BP], including BP's resume, in group discussions disparaging [BP] and in the context of contemplation of interfering with [BP's] professional circumstances.

46. As these five allegations were stated in the sanction letter, the Tribunal will review them individually under the following subheadings, although also noting that since the allegations are, to some extent, overlapping, repetitions will occur.

Whether the Applicant engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to undermine BP's professional standing

47. The Respondent seeks to rely on information in emails to and from the Applicant to prove that she engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to undermine BP's professional standing.

48. The Applicant objects to the admission of the emails in evidence on two grounds, namely that they are not relevant to these proceedings insofar as they refer to third-party communications, and that her "personal" emails are private communications expressing assessments of professional competence and capacities.

49. Regarding the relevance of third-party emails, it is recalled that the case against the Applicant is that she engaged in collecting and sharing information or made comments "suggestive of collaborative efforts or contemplations" to undermine BP's professional standing. The allegation is therefore premised on the understanding that the Applicant acted in concert with other persons. The existence of third-party activities is one of the major aspects of the allegation. Whether or not a third-party communication is relevant depends on the nature of the information it contains, and the nature and level of the Applicant's activities or interactions in relation to it.

50. The Applicant argues that private communications should not be used after the fact to suggest that a person who did not receive the comments was somehow injured by them. Further, the communications were not meant to be harmful to anyone. She also argues that there is no legal basis for concluding that privately expressed opinions are prohibited. According to her, the emails were personal in the sense that she was

only communicating with people who could not be hurt on account of the contents of the emails, and not those who could be hurt.

51. In the Tribunal's view, the argument that the emails in issue are private communications expressing assessments of professional competence and capacities is unsupported. The Applicant's admission that the communications were made using official United Nations-issued devices removes them from the realm of complete privacy. While sec. 4 of ST/SGB/2004/15 (Use of information and communication technology resources and data) permits staff members to make "limited personal use" of the Organization's ICT resources, such use must be "consistent with the highest standard of conduct for international civil servants". The argument that the communications were not meant to be harmful to anyone is against the weight of evidence. This will be demonstrated when considering the contents of some of the email exchanges.

52. Whether the Applicant was merely expressing her assessment of BP's professional competence and capacities is also dependent on the content and import of the email exchanges. The Tribunal will pronounce itself on this issue when considering the relevant exchanges, during the evidence evaluation process.

53. Going back to the issue of whether the Applicant undermined BP's professional standing, the Respondent's case is premised on email exchanges between the Applicant and her colleagues. The Tribunal will therefore review those exchanges and determine whether they constitute clear and convincing evidence that the Applicant engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to undermine BP's professional standing.

54. The Applicant does not dispute her response to EH's 7 April 2020 email about an upcoming meeting with the new RSG, in which she stated, "Maybe you will also have the opportunity to mention [BP] and other issues…", Following the said meeting with the new RSG, EH reported to the Applicant and others that the new RSG said that BP "was going back to being a P3 equity analyst and asked if [EH] would be able to take on infrastructure". MS then wrote that "I'm glad that [the new RSG], so far, has been open and flexible, not being political… Good news about [BP] as well. Sounds like there's not a position for her in [North American Equity] anymore which I love…"

The Applicant's response was that "[TS] should push back on having [BP] return to his section".

55. In her oral testimony, when confronted over the above response, the Applicant explained that the context of her response was that she wanted to make sure that the issue was thought about holistically, since there were many other temporary job openings which could have been used to recruit BP.

56. The fact, however, that the Applicant did not mention the existence of other portfolios but only bluntly stated that TS should "push back" nullifies her explanation about the context of her response.

57. It is worth noting that the Applicant was in the European Public Equity team and not in the North American Public Equity team. Her concern about BP's returning to North American Equity, which was not even her team, is curious. Her explanation that BP could be more helpful in the External Managers team where she would be at the P-4 level sits uncomfortably with her blunt suggestion that "[TS] should push back on having [BP] return to his section".

58. On the same day, 7 April 2020, MS asked EH about a possible "separate 1 on 1 meeting" with the new RSG and indicated that she could talk to him together with the Applicant since she and the Applicant were "very much on the same page". In response, EH advised that MS should email the new RSG directly and added: "[t]alking together is a good idea".

59. The Applicant thanked MS for emailing the new RSG requesting a call. In response, EH informed the Applicant and MS that he had learnt that "[BP] has once again changed her bio on [LinkedIn, an online professional networking platform] – no more infrastructure – now she is back to [North American] equities".

60. In response to EH's report on his second one-on-one meeting with the new RSG, the Applicant wrote that "no one wants [BP] back in equities". On 14 April 2020, MS also asked EH what the three of them could do to "prevent [BP] from coming back to public equities" and added that "[t]echnically it's the most realistic way as that's where she was before and as she's not doing infrastructure anymore". The Applicant replied: "My suggestion to [TS] was to put [BP] was P3 replacement for [RH (a former

OIM staff member, name redacted for privacy reasons)] who's contract is up in June" [*sic*] and stated that "[p]utting [BP] back would not be harmonious and this is where 55% of Fund's assets are managed".

61. The Applicant disputes the import of this document on the basis that the document is incomplete and incorrect. She explains that the replacement was for RH who was on a P-4 level post (not a P-3 level post) and that the suggestion was to offer a lateral move within the Public Equity team for BP.

62. The Applicant does not, however, sufficiently indicate what was missing from the document or what she believes is the correct information. Her explanation that the replacement was for RH who was on a P-4 level post and that the suggestion was to offer a lateral move within the Public Equity team for BP does not support her assertion that the email exchange is incomplete.

63. In the email of 8 April 2020 in response to EH, the Applicant wrote, copying MS: "Before our call with [the new RSG] today, can you tell us what impression you think [the new RSG] has about [BP]? Does he know she is most definitely part of the problem? We will reinforce this point today, thanks".

64. When cross-examined about why she needed to get the information on the new RSG's impression about BP, the Applicant responded that her intention was to tell the new RSG that BP was part of the problem in the OIM. She explained that BP was the right-hand person to the former RSG and was part of the toxic culture because he corrupted her. Further, she stated that the new RSG had reached out to her and her colleagues to find out what needed to be done and how they were to move forward. According to the Applicant, her actions did not amount to affecting BP's career since BP's P-4 level status was already being decided.

65. This explanation contradicts the Applicant's position stated earlier that she wanted to make sure that the issue was thought about holistically, since there were many other temporary job openings which could have been used for BP.

66. Questioned about whether she had reinforced this point when she communicated with the new RSG, she could only remember that a conversation was held but not how it flowed. The Tribunal considers that it is strange that the Applicant

specifically requested this information from EH, yet she does not recall whether she raised it with the new RSG. The Applicant's testimony lacks credibility in this regard.

67. Other evidence comprises of the emails of 13 April 2020, in which the Applicant asked MS and EH whether the three of them should discuss the organizational chart with the new RSG, indicating that although the Applicant had not seen a copy of it in years, she believed there were "many inconsistencies and straight out lies". The Applicant added that she was not sure if she needed to "get [MR] involved in this yet".

68. MS responded that the new RSG might have listened to BP "multiple times", so the Applicant and her colleagues may have to talk to him several times to make their stories sound "more credible and critical." In response to EH's report on his second one-on-one meeting with the new RSG, the Applicant wrote on the same day, 13 April 2020, that "no one wants [BP] back in equities".

69. On 14 April 2020, MS asked EH what they and the Applicant could do to "prevent [BP] from coming back to public equities" and added that "[t]echnically it's the most realistic way as that's where she was before and as she's not doing infrastructure anymore".

70. The Applicant replied: "My suggestion to [TS] was to put [BP] was P3 replacement for [RH] who's contract is up in June" and "putting [BP] back would not be harmonious and this is where 55% of Fund's assets are managed" [*sic*].

71. The Applicant disputes the import of this document on the basis that the document is incomplete and incorrect. She explains that the replacement was for RH who was on a P-4 level post (not P-3 level) and that the suggestion was to offer a lateral move within the Public Equity team for BP.

72. The Applicant does not, however, sufficiently indicate what was missing from the document or what she believes is the correct information. Her explanation that the replacement was for RH who was on a P-4 level post and that the suggestion was to offer a lateral move within the Public Equity team for BP does not support her assertion that the email exchange is incomplete.

73. The 5 November 2020 email from EH to the Applicant and MS is also relevant. EH was worried that "the gender parity issue may allow [BP] to get the 2nd p4 slot for [North American] equities over [MM, a male candidate, (name redacted for privacy reasons)]", and added: "We don't want [BP] to get it by default". He hoped that the new RSG "knows that this is one case where he has to make an exception". MS replied that she would try to get excellent female candidates from outside.

74. The Applicant disputes the relevance of this email. However, the email is relevant since its contents prove that there was a concerted effort involving the Applicant, to block BP's career progress.

75. The Applicant's other suggestion is that the email only conveys a genuine concern for gender parity. She further suggests that there was concern that the process might not be transparent, and that she and her colleagues hoped that the most experienced candidate would be selected to be at the P-4 level managing the largest portfolio.

76. However, the Tribunal considers that the contents of the email are very clear. There is no indication of any concern for gender parity. On the contrary, EH hoped that the new RSG would make an exception to the requirement for gender parity. Thus, the Applicant's explanations remain unsupported.

77. The contents of the 7, 8, 13 and 14 April 2020 email threads and those of the 5 November 2020 email do not support the claim that by her responses, the Applicant was only expressing assessments of BP's professional competence and capacities. On the contrary, they evidence efforts at undermining BP's career progress. Moreover, the email threads are relevant to this case since the Applicant actively participated in the discussions, as both a recipient and an originator. The assertion that they were third-party emails is negated by the fact that the Applicant participated in the discussions thereby part-owning the communications.

78. Accordingly, the Tribunal finds that the allegation that the Applicant engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to undermine BP's professional progress has been proved by clear and convincing evidence.

Whether the Applicant engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to influence the new RSG against BP

79. The Applicant sought to rely on the new RSG's statements to OIOS that he was not influenced in decisions concerning BP, to challenge the alleged assertion that she influenced him against BP. It is recalled, however, that the charge against the Applicant is not that she influenced the new RSG, but that she engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to influence the RSG against BP. The Tribunal therefore agrees with the Respondent that the new RSG's statements are not determinative.

80. The Tribunal's discussions and findings above relating to the Applicant's emails of 7 and 8 April 2020 are relevant to this issue. In those emails the Applicant suggests that mention should be made of BP in discussions with the new RSG. After EH indicated that he had discussed BP with the new RSG, MS wrote: "I'm glad that [the new RSG], so far, has been open and flexible, not being political… Good news about [BP] as well. Sounds like there's not a position for her in [North American Equity] anymore which I love…" In response, the Applicant wrote: "[TS] should push back on having [BP] return to his section".

81. In the 8 April exchanges, MS asked EH about a possible "separate 1 on 1 meeting" with the new RSG and indicated that she could talk to the new RSG together with the Applicant since they were "very much on the same page". In response, EH advised that MS should email the new RSG directly and added: "[t]alking together is a good idea". The same day, the Applicant thanked MS for emailing the new RSG requesting a call.

82. Also relevant to this issue is the Applicant's statement that "before our call with [the new RSG] today, can you tell us what impression you think [the new RSG] has about [BP]? Does he know she is most definitely part of the problem? We will reinforce this point today, thanks".

83. When confronted over the above response, the Applicant explained that the context of her response was that she wanted to make sure that the issue was thought

about holistically, since there were many other temporary job openings which could have been used to recruit BP.

84. The fact, however, that the Applicant did not mention the existence of other portfolios but only bluntly stated that TS should "push back" nullifies her explanation about the context of her response.

85. When cross-examined about why she needed to get the information on the new RSG's impression about BP, the Applicant responded that her intention was to tell the new RSG that BP was part of the problem. She explained that BP was the right-hand person to the former RSG and was part of the toxic culture because he corrupted her. She further stated that the new RSG reached out to the Applicant and her colleagues to find out what needed to be done and how they were to move forward. According to the Applicant, her actions did not amount to affecting BP's career since BP's P-4 level status was already being decided.

86. This explanation contradicts the Applicant's position stated earlier, that she wanted to make sure that the issue was thought about holistically, since there were many other temporary job openings which could have been used for BP.

87. Questioned about whether she had reinforced this point when she communicated with the new RSG, she could only remember that a conversation was held but not how it flowed.

88. That the Applicant specifically requested for this information from EH, yet she could not recall whether she raised it with the new RSG, is not credible.

89. The Tribunal finds the arguments that: (a) the Applicant had no control over or interest in BP's career as an Investment Officer in North American Equity; (b) she had no decision-making authority over the proposed P-4 level infrastructure position; (c) she was never BP's reporting officer; and (d) BP has demonstrated no harm to her career, but on the contrary is still gainfully employed by the OIM and has been promoted from the P-3 to the P-4 level as of 1 January 2022, irrelevant to the charge as laid.

90. The contents of the email exchanges of 7 and 8 April 2020 constitute clear and convincing evidence that the Applicant participated in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to influence the new RSG against BP.

Whether the Applicant engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to instil animosity and hostility against BP

91. The Applicant questions the basis of this charge, since BP never lodged any complaint against her. It is on record, however, that BP lodged a complaint against EH with whom the Applicant is alleged to have acted in concert, and on the basis of the same facts. The charge as laid is therefore not without basis.

92. The Applicant does not dispute the evidence that in a 17 October 2019 email in which EH stated that "There is really no other explanation. The [former RSG's] devotion to [BP] is unnatural", and MS replied that "It's too gross to think about it but their relationship appears too intimate and bizarre…". The Applicant then stated, "Probably both lying about their backgrounds!".

93. She does not deny that in a 23 August 2021 text message exchange, MS stated: "Wow can you believe we got rid of majority of problematic people in 15 months? One more to go, ideally two including [BP]" and TH commented that "There are just some people I NEVER need to speak [to] again. Not too many but she [BP] is one of them…." MS then replied, "Same here. I don't even want to 'see' her", to which the Applicant responded: "Big surprise". EH then commented: "Let's see where she [BP] ends up. This is a good result for everyone and one less person in the [former RSG]/HB] group of 'special' staff who were willing to go to any lengths to get promoted".

94. In her oral testimony, the Applicant recalled the email of 14 April 2020, in which she mentioned her conversation with somebody in North American Equity, based on which she believed that BP was not wanted back there. She also thought that [PP, an OIM staff member, (name redacted for privacy reasons)] may be reluctant to say anything as a temporary staff member at the P-5 level. Further, she stated that the new RSG kept mentioning that he wanted a harmonious working environment, and that

placing BP back would not be harmonious, and this was where 50% of the Fund's assets were managed.

95. The Applicant explained that her mentioning that nobody wanted BP back in North American Equity was because she was unpopular due to her association with the former RSG.

96. The Applicant's objection to the admission of the above emails and text messages in evidence is without merit, since the contents of the communications relate to BP and how the Applicant and her colleagues did not want her to be placed in a P-5 level position. The contents also indicate that the Applicant and her colleagues did not even want to see BP. The other content is that the former RSG's devotion to BP was unnatural.

97. The Tribunal finds that the admitted fact that the Applicant engaged in these exchanges renders the emails relevant to the allegation that she engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to instil animosity and hostility against BP.

Whether the Applicant engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to impede BP's professional circumstances, including her return to her P-3 level position at the OIM following the conclusion of her temporary assignment at the P-4 level

98. The Tribunal recalls the evidence, discussed earlier, that in response to EH's 7 April 2020 email, the Applicant stated: "Maybe you will also have the opportunity to mention BP [to the new RSG] and other issues…", and that the Applicant suggested that "[TS] should push back on having [BP] return to his section". The Tribunal also recalls the Applicant's response to MS's 14 April 2020 email that, "My suggestion to [TS] was to put [BP] was P3 replacement for [RH] who's contract is up in June" [*sic*] and that "[p]utting [BP] back would not be harmonious and this is where 55% of Fund's assets are managed". These comments support the charge that the Applicant collected and shared information or comments suggestive of collaborative efforts or contemplations to impede BP's professional circumstances, including her return to her

P-3 level position at the OIM following the conclusion of her temporary assignment at the P-4 level.

99. Indeed, all the evidence and the Tribunal's findings above are relevant to this issue. The email and text message exchanges referred to earlier constitute clear and convincing evidence that the Applicant collected and shared information or comments suggestive of collaborative efforts or contemplations to impede BP's professional circumstances, including her return to her P-3 level position at the OIM following the conclusion of her temporary assignment at the P-4 level.

Whether the Applicant engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to share information given to her in good faith by BP in group discussions disparaging BP and in the context of contemplation of interfering with her professional circumstances

100. At the oral hearing, the Applicant admitted to having shared documents with colleagues, but she explained that the documents were attachments to an old resume and were public documents. She also stated that she did not share BP's personal history profile ("PHP", a type of resume used by the United Nations) with EH.

101. This explanation is, however, against the weight of evidence. The Applicant does not deny that on 9 April 2020 and with the subject line "[BP]", EH shared with her and other colleagues that he noticed from BP's biography that her previous time working at the United Nations was not mentioned. EH stated that he would make sure that the new RSG knew about that. EH asked if the Applicant, TS or MS had BP's PHP from the time when she returned to the United Nations after a period working with another employer. In response, the Applicant sent to EH two emails "with some background information" on BP.

102. Still on 9 April 2020, the Applicant sent to her personal email address what BP had shared with her as reference materials on 13 December 2011. On the same day she also sent to her personal email address a copy of BP's resume from 2003.

103. In response to EH's 9 April 2020 email, TS wrote to several colleagues, including the Applicant, that BP "used to be my assistant (G-6 APAC [unknown

abbreviation] team)" and that "[s]he was a consultant or temp worker from the same company […] in 2003", to which MS replied, "according to her LinkedIn, she was never an assistant". The Applicant responded: "I sent you the bios she has provided. Fraud!".

104. The Applicant does not deny that on 6 May 2020**,** MS forwarded to her alone her email to the OIM Compliance Officer by which she reported that a staff member had misrepresented his previous roles, and that BP had "been lying [about] her title in LinkedIn for a long time", and had deleted her profile when the other staff member was "caught" previously, "but it's back in again".

105. She also does not deny that on 2 July 2020**,** she forwarded an automated email notification relating to BP's LinkedIn profile to MS who commented that BP had "doubled her lies in there". She does not deny that she replied: "This needs to be highlighted" and MS indicated that she had just informed the Compliance Officer about it. The Applicant also commented that she did not recall BP being "part of Europe team as a [General Services level] staff for 4 years". MS also commented: "CFA [Chartered Financial Analysts] institute [referenced in BP's qualifications] is very strict about misrepresentation" and the Applicant replied: "Maybe this is the entity that needs to be informed".

106. Neither does the Applicant deny that on 22 July 2020, she forwarded another automated email notification about BP's LinkedIn profile to MS with the questions, "Now what?" MS replied that BP had taken out some details and asked the Applicant if a staff member at the General Services level could be a "Senior Investment Management Analyst", to which the Applicant replied in the negative.

107. In a text message exchange on 17 September 2021, the Applicant requested MS to share BP's "bio". When MS said she was having difficulties sharing the document, the Applicant suggested she take a picture of it. MS said: "I am running the risk of being noticed by [BP] that I have already checked her profile 10 time[s] today".

108. The Applicant objects to the admission of the above emails into evidence on the grounds that TS, who was the supervisor and First Reporting Officer for all the

OIM colleagues in these emails and the Second Reporting Officer for BP, never raised any issues regarding the conversations.

109. The Tribunal considers that this explanation lacks merit. The fact that TS did not raise issues does not excuse the Applicant's actions of sharing information given to her in good faith by BP. Moreover, it is not open to the Applicant to point a finger at TS when she also failed in her duty to report misconduct.

110. The Applicant's objections to the evidence on grounds of relevance are also without merit, since the emails bear relevant information regarding the communications in which she participated.

111. The Applicant's assertions that BP's resume was public information since she had been employed by the OIM from 2002-2011, and that the vacancy announcement of her subsequent employer was public information, does not nullify the charge that the Applicant shared information given to her in good faith by BP. Whether LinkedIn is a public social media website, which is the Applicant's other argument, is irrelevant as well.

112. Based on the contents of the above emails, the Tribunal finds that there is clear and convincing evidence that the Applicant shared information given to her in good faith by BP, including BP's resume, in group discussions disparaging BP and in the context of contemplation of interfering with her professional circumstances.

Were the factual allegations in the sanction letter established?

113. In conclusion, the Tribunal finds that there is clear and convincing evidence that the Applicant engaged in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to, as per the sanction letter:

> i. undermine [BP's] professional standing,
>
> ii. influence the new RSG against [BP],
>
> iii. instil animosity and hostility against [BP], and
>
> iv. impede [BP's] professional circumstances, including her return to her P-3 level position at the OIM following the conclusion of her temporary assignment at the P-4 level.

> v. The Applicant also shared information given to her in good faith by [BP], including [BP's] resume, in group discussions disparaging [BP] and in the context of contemplation of interfering with [BP's] professional circumstances.

114. Consequently, the Tribunal finds that all the five sub-areas of misconduct which grounded the allegation that the Applicant, together with other senior managers at the OIM, UNJSPF, engaged in a course of behavior targeting BP have been proved by clear and convincing evidence.

Whether it has been proved that between July 2019 and April 2020, together with other OIM staff members, and in opposition to the former RSG, the Applicant participated in discussions suggestive of collaborative efforts and/or contemplations to disclose without authorization sensitive information relating to the OIM to the media and Permanent Missions.

115. The Respondent's case is premised on email exchanges in which the Applicant is alleged to have participated. The Tribunal will review those email exchanges to establish whether they constitute clear and convincing evidence that the Applicant engaged in the alleged misconduct.

116. The first email, dated 13 September 2019, was from EH to the Applicant and others. EH stated: "I thought we had a good meeting with [MR]. Here are my takeaways from the meeting" which include, among other things: "I will continue working on the general writeup I sent around last week. I would like to send the next version to [MR] and eventually to [WW] and [TS]. If we can all agree on the same text it will be our script for going to our mission [the Permanent Mission of his country] in a few weeks. I had lunch with [TS] today and he was on board with going to [his country's Permanent Mission] with the script".

117. To the 13 September 2019 email, EH attached a "long list of harassment issues" against the former RSG and asked the recipients to add "any harassment items" to the list. He indicated that the list would "form the basis of an eventual harassment filing with the [United Nations Dispute] Tribunal". The Applicant's reply was, "Wow, what a list! No wonder we all have a headache". She provided comments on EH's list and thanked him "for all [his] hard work!!!"

118. In her oral testimony, the Applicant admitted that she was aware that EH was meeting with the representative of his country's Permanent Mission to the United Nations. She further admitted that she received the email of 13 September 2019 which was a preparation to go to the various Permanent Missions, and she responded in the alleged manner. She, however, did not think that they were doing anything wrong by going to the Permanent Missions. Her position at the time was in full support of EH going to his country's Permanent Mission, and other colleagues going to their respective countries' Permanent Missions with their grievances against the former RSG.

119. The sole ground for the Applicant's objection to the inclusion of this communication in the proceedings before the Tribunal relates to its relevance to the allegations against her.

120. The Tribunal determines that the contents of the email thread are relevant to the charge. The Applicant participated in the discussions, a key element of the charge. By participating in the exchanges, she co-owned them with her colleagues, thereby rendering the assertion that they were third-party communications incorrect.

121. The second email is dated 21 October 2019, in which EH informed the Applicant and others that he had received a response from his country's Permanent Mission agreeing to "set up a meeting in the next few days". EH referred to colleagues possibly visiting their respective countries' Permanent Missions.

122. At the hearing, the Applicant admitted knowledge of the above communication. She also admitted that she mentioned that other colleagues should also go to their respective countries' Permanent Missions. She was aware that prior to their communication to the Secretary-General (dated March 2020), some of the OIM staff who signed that letter had visited their countries' Permanent Missions. She did not think there was anything wrong with going to her country's Permanent Mission although she never went there, and never disclosed sensitive information to its representatives.

123. While the Applicant objects to the inclusion of this communication on grounds of relevance, the fact that she contributed to the discussion renders the exchange relevant to the charge as laid.

124. The only issue is whether what was disclosed to the Permanent Mission of EH's country was sensitive information within the meaning of ST/SGB/2007/6 (Information sensitivity, classification and handling) and in terms of the OIM's "Information sensitivity, classification of documents and records management policy" which the Applicant had agreed to respect. It is alleged that on 31 October 2019, EH sought the Applicant's views on his "Talking Points for Meeting with [his country's] Mission". These included matters of risk and liquidity, portfolio issues, budget, staff issues and governance issues related to the concentration of authority and fiduciary duty in the person of the former RSG.

125. According to the Applicant, issues of risk and liquidity, staffing issues (mentioning that staff of a certain nationality were being sidelined) are all public information. She is, however, not sure whether North American portfolio issues, and the fact that the head of one-third of UNJSPF has not been replaced, are public information. Nonetheless, information on redeployment of funds towards emerging markets, the selling of USD1 billion of United States securities, and investing USD1 billion in China is public since it is on the UNJFP's website.

126. The assertion that the above issues are public information contradicts the admitted fact that the Applicant participated in discussions to disclose them to the Permanent Missions. The fact that there was a need to have them disclosed implies that they were not public information. Moreover, the internal nature of the information leaves no doubt that it was sensitive. The Tribunal therefore rejects the assertion that the issues were public information.

127. The Applicant objected to the inclusion of the 31 October 2019 communication on grounds of relevance to the allegations. The key elements of the charge against the Applicant are that, together with other OIM staff members, and in opposition to the former RSG, she participated in discussions suggestive of collaborative efforts and/or contemplations to disclose without authorization sensitive information relating to the OIM to the media and Permanent Missions. Like all the email exchanges the Tribunal

has reviewed, the Applicant was privy to the above email. The communication is therefore relevant.

128. EH's email of 20 November 2019 in which he informed the Applicant and others that he had been "warmly received" at the meeting with staff at his country's Permanent Mission and that they were "supportive of [WW] staying in his post as [Chief Operating Officer—"COO"], and that he had shared "the staff table and the summary of 13 ways to improve OIM" evidences the fact that information was indeed shared with staff of the Permanent Mission. EH added that he had been asked and would send a "copy of the OIOS filing" to the Permanent Mission and would "mention our other documentation [if] they would like to see it". EH also wrote: "I think that now that we have been to the [Permanent Mission] it is good for [TH], [MS] and [TW] to make appointments at their missions to help explain the situation at OIM". The email is relevant since the Applicant is privy to it.

129. Other than asserting, without basis, that she does not think it was wrong for staff members to go to their countries' Permanent Missions, the Applicant does not dispute the fact that they were not authorized to go there. She even admitted during cross-examination that disclosing sensitive United Nations information without authorization to an entity external to the Organization is prohibited under staff regulation 1.1.

130. The Applicant was emphatic that she did not go her country's Permanent Mission, and that she did not disclose any information to them. She was, however, not sanctioned for visiting the Permanent Mission and/or disclosing information to its representatives. She was sanctioned for having participated in discussions suggestive of collaborative efforts and/or contemplations to disclose without authorization sensitive information relating to the OIM to the media and Permanent Missions. Available evidence leaves no doubt that she participated in those discussions.

131. Regarding disclosing sensitive information to the media, the Applicant testified that the protocol at the OIM was that when she received a call from the media, she would decline to talk to them and refer them to the Public Information Office. She denied that she disclosed or supported or encouraged the disclosure of confidential or

sensitive information to the media. She was not sure whether any of her colleagues spoke to the press.

132. The Respondent's case is premised on EH's email of 6 December 2019, which was copied to the Applicant informing her that EH had shared with MR confidential information critical of the former RSG "to forward to [a media entity]". EH forwarded his email to MR in which he wrote: "I just wanted to make sure this supplemental information, which is not in my memos, gets to the [news media] reporter".

133. On 12 December 2019, in response to EH's email sharing an article on the [Investment Fund] posted on [a news media website], the Applicant wrote: "Thanks for this. The article mentions in numerous places 'investing in more external managers' which sounds like outsourcing the fund". EH replied: "Yes – [MR] picked up on this too. Very useful for the staff union. Little by little things are coming out. The reporter is very interested in doing more profiles on us. She apparently has a copy of the ALM [unknown abbreviation] study and our new benchmarks and asset allocation so anything on this issue is fair game. She will work off the record as she did with me. If you wish to speak with her directly her number is [redacted for privacy reasons] and email is [redacted for privacy reasons]".

134. As with all email exchanges on which the Respondent seeks to rely, the Applicant objects to the 6 and 12 December 2019 emails on grounds of relevance. The fact that she participated in the exchanges, however, renders them relevant.

135. The Applicant did not recall the 12 December 2019 email from EH and she did not know that he was sharing sensitive information with MR for publication in the media. To her recollection, someone from [a media entity] was contacting people. She knew that the media was trying to reach out to staff members, but no one contacted her.

136. This assertion is, however, contradicted by the contents of the email, which are that EH was informing the Applicant and others that he had shared with MR confidential information critical of the former RSG "to forward to [a media entity]". That the Applicant thanked him "for this" means that she understood and supported his actions.

137. Testifying about the 12 December 2019 email from EH to multiple recipients including her and to which she responded, the Applicant stated that she was not sure about what was said, and that the email did not raise any alarm to her given that the protocol was to decline to speak with any reporter and refer them to the Public Information Office. This explanation does not, however, nullify the charge that she participated in discussions suggestive of collaborative efforts and/or contemplations to disclose without authorization sensitive information relating to the OIM to the media.

138. Regarding whether the information in issue was sensitive, the Applicant maintained that she did not know and was not sure if what happened with the [Investment Fund] which EH mentioned, the recusal of the former RSG from the Private Markets Committee ("PMC") and whether the investment had been made or not, is sensitive information because some of it was on the UNJSPF's website. In response to the question of whether reports that the real pressure was coming from [GS, an investment firm] as the Chairman of the [Investment Fund] was sensitive information, the Applicant said she was not sure about the connection between [GS] and the Chairman and the [Investment Fund], and that it is a private market transaction and not her area and so she was not the subject matter expert on this.

139. The fact that the Applicant and her colleagues felt the need to disclose the information to the media can only mean that it was sensitive information, otherwise the media would have easily accessed it. This, coupled with the internal nature of the information leaves no doubt that it was sensitive information.

140. It is of note that the Applicant did not object to or withdraw from the group's discussions, plans or actions, and did not report the possible misconduct by other staff members.

141. Based on the foregoing, the Tribunal finds that there is clear and convincing evidence that between July 2019 and April 2020, together with other OIM staff members, and in opposition to the former RSG, the Applicant participated in discussions suggestive of collaborative efforts and/or contemplations to disclose without authorization sensitive information relating to the OIM to the media and Permanent Missions.

Whether it has been proved that between September 2020 and June 2022, using her official United Nations-issued mobile phone, the Applicant exchanged with SP, Senior Programme Management Officer, OIM, numerous messages in which they used offensive and derogatory nicknames and/or made disparaging remarks concerning AA and BB

142. The Applicant admits that between September 2020 and June 2022, using her official United Nations-issued mobile telephone, she and SP exchanged numerous messages in which they used offensive and derogatory nicknames and/or made disparaging remarks concerning AA and BB.

143. Specifically, the forensic evidence of messages shows that the Applicant and SP frequently referred to AA by the nickname, "Lumpy" or "Lump", "fat ass", "fatso" and "fats". They referred to AA as being "lethargic" and "overweight". In describing BB, the Applicant and SP used disparaging terms such as "lazy", "not literate", "a princess", "should have been fired", "a servant to power", "very selfish", "very emotional", and "spoiled".

144. At the oral hearing, the Applicant explained that although the communications were on her official mobile telephone, they were personal in that only she and SP were communicating. She admits that they were discussing work-related matters, but it was during the COVID-19 pandemic, otherwise they could have gone to each other's offices and orally shared the information. The communications were not meant to be harmful to anyone and she did not know whether the offensive messages were ever conveyed to AA and BB. She believed that these exchanges were kept privately, just between her and SP.

145. Counsel for the Applicant highlights the fact that no one was harassed since AA and BB never received or even came to know about the offensive messages. He argues that messages which were not received could neither have been "unwelcome" nor could they have "interfere[d] with work", in terms of sec. 1.3 of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

146. He bases his submission on sec. 1.3 of ST/SGB/2019/8 which defines harassment as "any unwelcome conduct that might reasonably be expected or be

perceived to cause offence or humiliation to another person, when such conduct interferes with work or creates an intimidating, hostile or offensive work environment". He also relies on sec. 1.4 which provides that harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another.

147. Had this charge been brought under the harassment policy, the Tribunal would have agreed with Counsel's submissions. It is true that since AA and BB did not receive the messages and never saw them, they could not have been annoyed, alarmed, abused, demeaned, intimidated, belittled, humiliated or embarrassed, in terms of the United Nations harassment policy.

148. However, the charge against the Applicant is not that she harassed AA and BB, but that she used her official United Nations-issued mobile phone to exchange with SP numerous messages in which they used offensive and derogatory nicknames and/or made disparaging remarks concerning AA and BB.

149. Therefore, it is not relevant that AA and BB did not see the messages and were not hurt by them. The relevant provisions are staff regulations 1.2(a) (failure to respect the dignity of AA and BB), 1.2(b) (failure to uphold the highest standards of integrity), 1.2(f) (failure to conduct herself at all times in a manner befitting her status as an international civil servant), and 1.2(q) (failure to use the official device only for official purposes).

150. The key elements of the charge are the Applicant's use of United Nations ICT resources, and exchange of offensive and derogatory nicknames or disparaging remarks. Since the Applicant admits that she used her official United Nations-issued mobile phone to exchange messages, which bore offensive and derogatory nicknames and/or disparaging remarks concerning AA and BB, all elements of the charge as laid have been proved.

151. The Tribunal finds the charge that between September 2020 and June 2022, using her official United Nations-issued mobile telephone, the Applicant exchanged with SP, Senior Programme Management Officer, OIM, numerous messages in which

they used offensive and derogatory nicknames and/or made disparaging remarks concerning AA and BB proved by clear and convincing evidence.

Whether the established facts amount to misconduct under the Regulations and Rules

152. That the established facts amount to misconduct under the Staff Regulations and Rules is not disputed. The Applicant contravened staff regulations 1.2(a), 1.2(b), 1.2(f), and 1.2(q) and staff rule 1.2(c) and also contravened secs. 1.3 and 1.8 of ST/SGB/2019/8 by engaging in collecting and sharing information or comments suggestive of collaborative efforts or contemplations to, as per the sanction letter:

> i. undermine [BP's] professional standing,
>
> ii. influence the new RSG against [BP],
>
> iii. instill animosity and hostility against [BP], and
>
> iv. impede [BP's] professional circumstances, including her return to her P-3 level position at the OIM following the conclusion of her temporary assignment at the P-4 level.
>
> v. In addition, the Applicant shared information given to her in good faith by [BP], including [BP's] resume, in group discussions disparaging [BP] and in the context of contemplation of interfering with [BP's] professional circumstances.

153. By participating in discussions suggestive of collaborative efforts and/or contemplations to disclose without authorization sensitive information relating to the OIM to the media and to Permanent Missions, the Applicant contravened staff regulations 1.2(e), 1.2(f) and staff rules 1.2(c) and 1.2(j).

154. By using her official United Nations-issued phone to exchange with SP messages in which they used offensive and derogatory nicknames and/or made disparaging remarks concerning AA and BB, the Applicant contravened staff regulation 1.2(q) and staff rule 1.2(c). She also contravened secs. 1.3 and 1.8 of ST/SGB/2019/8 and secs. 4.1 and 5.1 of ST/SGB/2004/15 (Use of information and communication technology resources and data).

155. Accordingly, the Tribunal finds that by concluding that the Applicant's behaviour amounted to misconduct, the Administration did not exceed its authority in

accordance with the Appeals Tribunal's consistent jurisprudence (see, for instance, its seminal judgment in *Sanwidi* 2010-UNAT-084, paras. 19-21).

Whether the sanction is proportionate to the offence

156. The Applicant submits that the Administration applied a disproportionate and harsh sanction in light of her expressed intention to opt for early retirement, to resign and to voluntarily separate from the Organization, and the fact that she is a whistleblower who spoke up against abuse of authority.

157. The stated reasons for the sanction include the past practice of the Administration; the fact that the Applicant's conduct was not a mistake, or a lapse of judgment; the fact that she did not make full and timely disclosure or show remorse for her conduct; that she did not take ownership of the conduct; and that she worked in concert with others and with full knowledge of the group's plans and progress made in the scheme.

158. The Tribunal considers that the above factors outweigh the mitigating factors such as the Applicant's long period of service and the fact that she had expressed the intention to leave the Organization. The Tribunal's finding that the Applicant is not a whistleblower nullifies the Applicant's submissions to that effect.

159. Each of the three allegations is serious on its own. The compound nature of the allegations left no possibility for any other punishment than separation. The Organization's zero-tolerance policy also entails severe punishments for those who engage in harassment (see, for instance, the Appeals Tribunal in *Conteh* 2021-UNAT-1171, para. 41).

160. The record indicates that the decision-maker weighed all factors, both mitigating and aggravating, before arriving at the contested decision. Since there is sufficient evidence that all factors were given due consideration, but that the aggravating factors outweighed the mitigating factors, there is no basis upon which the Tribunal may interfere with the decision.

161. The Tribunal considers that the Applicant does not come with clean hands, heart, conscience and mind. For instance, her response to the question of whether OIOS

investigator NY (name redacted for privacy reasons) was sharing confidential information with her and her colleagues was very disappointing, to say the least. The information which was shared by NY was that EH "needs to defend himself, that there was no concealment in any sort. He may actually be able to turn things around as a false accusation. I would much appreciate it if you could secretly convey this message to him so that he can prepare".

162. Questioned about the above interaction which involved NY leaking to the Applicant and her colleagues vital information about the OIOS investigation, the Applicant stated that she would not consider the information confidential because within OIM they knew that the former RSG was investigating a number of staff members including EH.

163. Even when Counsel for the Respondent explained to her that the information related to a meeting between OIOS auditors and EH regarding his alleged performance gap and that it was before the meeting that NY was informing them what kind of questions would be asked in the meeting and then how EH should respond, the Applicant's response was that she thought the information was confidentially shared among them (in the OIM) and that she did not see a problem with that. She further mentioned that these would be normal questions one would get if their performance was being audited.

164. Such a response coming from a senior staff member of the United Nations underlines the fact that the imposed sanction was justified. All factors considered, the Tribunal finds that the disciplinary measure imposed on the Applicant is proportionate to the offences, also noting that the Administration has broad discretion in sanctioning misconduct even if the sanction is considered harsh or severe (see, the Appeals Tribunal in *Egian* 2023-UNAT-1333, para. 104, and in many other judgments, including *Sanwidi*, as referenced above).

Whether the Applicant's due process rights were respected

165. That the Applicant was informed of the allegations against her, and she had ample opportunity to mount a defence before the disciplinary action was taken is not disputed. She was interviewed by OIOS and asked about material aspects of the matter.

Following the interview, she was given the audio-recording of her interview and was given an opportunity to submit written statements on the topics discussed during the interview. In the allegations memorandum of 8 May 2023 from the Administration, the Applicant was provided with supporting documentation, was informed of her right to seek the assistance of counsel and was given the opportunity to comment on the allegations against her. Her comments were duly considered and addressed in the sanction letter.

166. The Tribunal agrees with the Respondent that contrary to the Applicant's contention, BP's formal complaint under ST/SGB/2019/8 is not a prerequisite to an investigation or the disciplinary process. She named the Applicant as a member of the group that was hostile towards her. Nothing in BP's evidence supports the Applicant's account of events.

167. The Applicant's assertion that OIOS or the Administration breached the confidentiality of the staff selection process involving BP disregards sec. 6.11 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), which allows OIOS to have direct and prompt access to all records, documents or other information under the control of the Organization. Only those confidential records explicitly listed under sec. 6.12 of ST/AI/2017/1, which do not include staff selection records, are excluded from OIOS's access.

The Tribunal's overall findings

168. The Tribunal finds that the decision to impose the impugned disciplinary measure on the Applicant was based on clear and convincing evidence and was taken in compliance with applicable legal norms. The disciplinary measure applied is proportionate to the offences.

169. Having found that the facts on which the disciplinary measure was based have been established, that the established facts amount to misconduct, that the sanction was proportionate to the offences, and that the Applicant's due process rights were respected, the Tribunal must also reject the Applicant's requests for the rescission of the contested decision, for the reinstatement of all her entitlements up to the age of retirement, and for the award of compensation for damage to her reputation and

dignitas.

Conclusion

170. The application is dismissed.

(Signed)

Judge Margaret Tibulya
Dated this 13th day of September 2024

Entered in the Register on this 13th day of September 2024

(Signed)

Isaac Endeley, Registrar, New York