



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1331

Oswaldo Di Mario

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

Judgment

Before:	Judge Martha Halfeld, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2022-1672
Date of Decision:	24 March 2023
Date of Publication:	27 April 2023
Registrar:	Juliet Johnson

Counsel for Appellant: Michel Celi Vegas

Counsel for Respondent: Angélique Trouche

JUDGE MARTHA HALFELD, PRESIDING.

1. On 28 October 2019, Mr. Osvaldo Di Mario (Mr. Di Mario) filed an application with the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) challenging the decision of the Administration of the Office of the United Nations High Commissioner for Refugees (UNHCR) of 23 July 2019 imposing the disciplinary measure of separation from service with compensation in lieu of notice and one half of the termination indemnity (contested decision).
2. In its Judgment No. UNDT/2021/163¹ (impugned Judgment), the UNDT dismissed Mr. Di Mario's application on the grounds that: (i) the facts supporting the allegations of misconduct against him had been established by clear and convincing evidence; (ii) the facts established amounted to misconduct; (iii) the disciplinary measure imposed was proportionate to the gravity of the misconduct; (iv) Mr. Di Mario's due process right was respected.
3. M. Di Mario filed an appeal against the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set forth below, the Appeals Tribunal finds the impugned Judgment to be well-founded and, accordingly, dismisses the appeal and affirms the said Judgment. The Appeals Tribunal also refers the case to the High Commissioner for possible action to enforce accountability.

Facts and procedure

5. Mr. Di Mario commenced employment with UNHCR on 16 July 1984. At the time of his separation from service, he held a continuing appointment as a G-5 Senior Driver in the UNHCR Office.
6. On 6 March 2019, Mr. Di Mario went to the Shell service station "Les Libellules" (service station) in Geneva with the High Commissioner's official car in order to refuel. However, he also filled a personal gas can. He then attempted to pay for the entire transaction using the credit card and the tax exemption card of UNHCR.

¹ *Di Mario v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/163.

7. The owner and manager of the service station refused to accept payment for the transaction and informed him that this manoeuvre was not allowed. Mr. Di Mario acquiesced and paid the bill in cash.

8. On the same day, the incident was reported to the UNHCR Administration and to the Inspector General's Office of UNHCR (IGO).

9. In the days following this report, specifically from 7 to 11 March 2019, the IGO conducted an investigation, during which Mr. Di Mario and a few individuals who had witnessed the facts alleged against him were questioned.

10. During this same period, the IGO also obtained a copy of the service station's surveillance camera recordings. The recordings showed that on 28 February 2019, Mr. Di Mario had also driven the High Commissioner's official car to the service station and used the same manoeuvre, that is, using the UNHCR credit card and tax exemption card to pay for filling a personal gas can.

11. On 11 March 2019, during his interview with the IGO, Mr. Di Mario admitted to the allegations and confirmed that he had used the same manoeuvre more than 10 times, without specifying the exact number of times. During this interview, he also mentioned that he had done this to compensate himself for the use of his private vehicle for official purposes and to cover various related expenses incurred and unclaimed in the course of his work.

12. On 13 March 2019, Mr. Di Mario was placed on administrative leave with full pay for the duration of the investigation and disciplinary proceeding.

13. On 15 March 2019, the IGO provided Mr. Di Mario with the draft investigation report and requested that he provide written comments, which he did on 28 March 2019.

14. On 29 March 2019, the IGO sent the final version of its investigation report to the Division of Human Resources (DHR), UNHCR. In its report, the IGO found that Mr. Di Mario had committed several acts of misconduct, including by diverting UNHCR gasoline for personal use over several years.

15. On 1 April 2019, while on administrative leave with full pay, Mr. Di Mario submitted to the UNHCR Administration a medical certificate indicating his incapacity to work.

16. On 3 April 2019, the Director of DHR, UNHCR, informed Mr. Di Mario in writing that a disciplinary proceeding was being initiated in connection with the allegations of diversion of gasoline for personal use. She requested that he provide written comments and any evidence for consideration, which he did on 24 April 2019. In his comments, Mr. Di Mario reiterated, among other things, that his manoeuvre was commonplace in UNHCR and that he had taken that action in order to compensate himself for personal expenses incurred in the course of his work.

17. On 4 June 2019, following up on the information provided by Mr. Di Mario in his correspondence of 24 April 2019, the IGO interviewed the Chef de Cabinet of UNHCR.

18. On 13 June 2019, the Director of DHR, UNHCR provided Mr. Di Mario with the written record of the testimony of the Chef de Cabinet of UNHCR. She requested that he submit his comments in writing, which he did on 24 June 2019.

19. On 29 July 2019, Mr. Di Mario was served with a letter dated 23 July 2019 from DHR, UNHCR imposing a disciplinary measure of separation from service with compensation in lieu of notice and one half termination pay, as defined in Staff Rule 10.2(a)(viii).

20. The letter stated that this disciplinary action was imposed following the investigation and disciplinary proceeding, which found that he had used the UNHCR credit card and tax exemption card more than 10 times to fill a personal gas can. In doing so, he had directly contravened Staff Rules 1.2(b) and 1.7, Staff Regulations 1.2(b), (e), (g) and (q) and Inter-Office Memorandum IOM/044-FOM/044/2013 (Strategic Framework for the Prevention of Fraud and Corruption) of UNHCR, and had thereby committed misconduct and, more specifically, fraud and embezzlement.

Impugned Judgment

21. On 28 October 2019, Mr. Di Mario filed an application with the UNDT challenging the decision of 23 July 2019 imposing the disciplinary action of separation from service.

22. On 10 August 2021, in its case management Order No. 133 (GVA/2021), the Dispute Tribunal found that a hearing on the merits of Mr. Di Mario's application was not required pursuant to Article 19 of the Dispute Tribunal Rules of Procedure. It reiterated this finding in

its subsequent orders of 2 September (Order No. 138 (GVA/2021)) and 13 October 2021 (Order No. 154 (GVA/2021)), which also addressed case management.

23. On 28 October 2021, the parties filed their respective closing statements. Along with his closing statement, Mr. Di Mario submitted 15 additional documents, most of which were medical in nature.

24. On 1 November 2021, the Secretary-General filed a motion with the UNDT seeking to have the additional documents filed by Mr. Di Mario rejected.

25. On 28 December 2021, in the impugned Judgment, the Dispute Tribunal rejected the additional documents submitted by Mr. Di Mario, on the grounds that they had been submitted after the investigation of the case had been closed and that the Secretary-General had therefore been unable to respond to them. Consequently, their admission into evidence would be contrary to the principle of equality of arms and the adversarial process.²

26. On the merits, the UNDT also dismissed Mr. Di Mario's application on the grounds that: (i) the facts supporting the allegations of misconduct against him had been established by clear and convincing evidence; (ii) those facts amounted to misconduct; (iii) the disciplinary measure taken was proportionate to the gravity of the misconduct; (iv) Mr. Di Mario's due process right had been respected.

27. On 25 February 2022, Mr. Di Mario appealed the impugned Judgment to the Appeals Tribunal. The Secretary-General, in turn, filed his answer on 22 April 2022.

Submissions

Mr. Di Mario's Appeal

28. Mr. Di Mario seeks to have the Appeals Tribunal vacate the impugned Judgment and the contested decision. He also requests the Appeals Tribunal to restore retroactively all his related rights and order the UNHCR Administration to pay him compensation of CHF 25,000

² Impugned Judgment, paras. 30-33.

for proven non-material damage as well as reimbursement of his legal fees.³ Lastly, he requests that an oral hearing be held to establish the merits of his claims.

29. In support of his claims, Mr. Di Mario alleges that the UNDT committed errors in procedure that were such as to affect the impugned Judgment, within the meaning of Article 2(1)(d) of the Statute of the Appeals Tribunal, on five main grounds.

30. Firstly, he contends that the Dispute Tribunal erred in excluding the documents submitted with his closing statement of 28 October 2021. He submits that, in rejecting these documents, the Dispute Tribunal acted arbitrarily and in an “overly regulatory” manner, thereby disregarding his right to be heard, his right to proportionality and his right to an adversarial debate.

31. Specifically, with respect to the medical documentation, Mr. Di Mario submits that the Dispute Tribunal should have considered it in order to find that the UNHCR Administration could not take disciplinary action against him when he was on sick leave at the time of his separation from service.

32. Secondly, Mr. Di Mario avers that the Dispute Tribunal erred in failing to consider certain factual and testimonial evidence in its assessment of the facts upon which the disciplinary action of separation from service was based. He believes that the Dispute Tribunal considered only part of the investigation by the IGO and refused to consider the context in which he committed the actions of which he was accused. In this regard, he specifies that the testimony of his supervisors would have established that he was only following their “orders” and that the actions of which he was accused were common practice at UNHCR.

33. Thirdly, Mr. Di Mario submits that the Dispute Tribunal erred in finding that the actions underlying the disciplinary measure of separation from service amounted to misconduct. In particular, he specifies that he did not violate any legal provisions, but that he followed the practice established by his supervisors whereby he was allowed to take and store cans of gasoline on the Organization’s premises in order to facilitate the performance of his duties and in this way compensate himself for the use of his private vehicle for official purposes.

³ Mr. Di Mario refers the Appeals Tribunal to the same findings as those sought in his application before the Dispute Tribunal. In this regard, see the impugned Judgment, para. 26.

In doing so, he cannot be considered to have used the cans of gasoline for “strictly personal” purposes.

34. Fourthly, Mr. Di Mario contends that the Dispute Tribunal erred in holding that the disciplinary measure of separation from service with pay in lieu of notice and one half of the termination indemnity was proportionate to the nature and gravity of his misconduct, within the meaning of Staff Rule 10.3(b).

35. In this regard, he reiterates that the context in which he was working and, more specifically, the fact that the actions complained of were common practice and were based on “orders” from his supervisors, should have been taken into consideration in assessing the proportionality of the disciplinary measure imposed.

36. Fifthly, Mr. Di Mario claims that he was not afforded due process during the investigation and disciplinary proceeding.

37. With respect to the disciplinary investigation, Mr. Di Mario submits that his right to due process was not respected, since he never consented to the use of the video recordings from the service station’s surveillance cameras in order to establish the serious misconduct of which he was accused. He also reiterates that the Dispute Tribunal did not consider the fact that the testimony of his supervisors, and also that of a former UNHCR driver, was not taken as part of the investigation by the IGO.

38. Lastly, with respect to the lack of due process in the disciplinary proceeding, Mr. Di Mario argues that a staff member on sick leave cannot be terminated, since this contravenes Staff Rule 10.4(d), which requires that placement on administrative leave be without prejudice to the rights of the staff member, which in this case is his right to sick leave. Consequently, he submits that the disciplinary measure taken against him is illegal.

39. In this regard, Mr. Di Mario submits that the Dispute Tribunal erred in finding that he was not on sick leave at the time of his separation from service. He argues that the fact that the UNHCR Administration never rejected his medical certificates demonstrates that he was on sick leave at the time the disciplinary action of separation from service was imposed.

The Secretary-General’s Answer

40. The Secretary-General contends that the Dispute Tribunal correctly found that the disciplinary decision imposing separation of service on Mr. Di Mario was legal and requests the Appeals Tribunal to dismiss his appeal.

41. The Secretary-General submits that Mr. Di Mario has not demonstrated in what way the UNDT committed errors of procedure that were such as to affect the impugned Judgment, within the meaning of Article 2(1)(d) of the Statute of the Appeals Tribunal.

42. The Secretary-General submits that, on the contrary, the UNDT did not err in any way that would justify overturning the impugned Judgment.

43. Firstly, the Secretary-General argues that the Dispute Tribunal properly excluded the documents submitted by Mr. Di Mario with his closing statement of 28 October 2021.

44. In this regard, the Secretary-General first points out that Mr. Di Mario could have submitted this new evidence on several occasions before the submission of the closing statement, but that he failed to do so.

45. The Secretary-General then recalls that the Dispute Tribunal enjoys broad discretion in the admissibility of evidence and submits that, in the present case, it properly exercised that discretion in the light of the principle of the adversarial process, which requires that each party be given the opportunity to comment on the evidence submitted.

46. Secondly, the Secretary-General submits that the Dispute Tribunal did not err in finding that the facts supporting the allegations of misconduct against Mr. Di Mario were established by clear and convincing evidence.

47. In this regard, the Secretary-General argues that the Dispute Tribunal properly used its broad discretion in deciding how much weight to give to the various pieces of evidence submitted. It therefore correctly relied on Mr. Di Mario's admissions to the IGO and the surveillance camera recordings to conclude that the accusations against Mr. Di Mario had been established by clear and convincing evidence.

48. As to Mr. Di Mario's argument that the Dispute Tribunal considered only part of the investigation by the IGO and refused to hear testimony from his supervisors in order to establish that the actions he was accused of were standard practice at UNHCR, the Secretary-

General points out that Mr. Di Mario does not identify these additional witnesses who should be heard. The Secretary-General recalls that the IGO questioned the Chef de Cabinet of UNHCR, who supervised Mr. Di Mario and who confirmed that he had not authorized him to use his private vehicle for official purposes, other than in exceptional circumstances for short trips. Accordingly, the Secretary-General submits that Mr. Di Mario's argument that the actions of which he is accused were standard practice at UNHCR is without merit.

49. The Secretary-General also states that Mr. Di Mario's argument that supervisors consented to his method of compensation is not only unfounded, but is also inconsistent with the explanations he provided to the IGO. The Secretary-General recalls that Mr. Di Mario stated, during his interview on 11 March 2019, that he had never discussed this method of compensation with his supervisors. Those supervisors cannot, therefore, have consented to a manoeuvre of which they were never made aware.

50. Thirdly, the Secretary-General argues that the Dispute Tribunal properly found that the fraudulent use of the UNHCR tax exemption card and credit card for personal purposes amounted to misconduct.

51. The Secretary-General points out that by engaging in the actions of which he was accused, Mr. Di Mario directly contravened Staff Rules 1.2(b) and 1.7, Staff Regulation 1.2(b), (e), (g) and (q), Inter-Office Memorandum IOM/044-FOM/044/2013 and local law exempting gasoline from taxation solely for use in the official car of UNHCR and not for personal purposes.

52. Furthermore, the Secretary-General recalls that there is an expense reimbursement policy for the use of private vehicles for official purposes, which Mr. Di Mario must have been unaware of and which he should have used, if appropriate.⁴

53. In this regard, the Secretary-General also points out that Mr. Di Mario does not specify which particular expenses would be compensated for with the filling of a personal gas can, but makes only general statements.

⁴ Policy on the Use of Vehicles in UNHCR, December 2013.

54. Fourthly, the Secretary-General contends that the Dispute Tribunal correctly assessed the proportionality of the disciplinary measure imposed on Mr. Di Mario in the light of the nature and gravity of the misconduct committed, within the meaning of Staff Rule 10.3(b).

55. The Secretary-General notes that Mr. Di Mario has not demonstrated in what way the disciplinary measure was absurd or arbitrary, and has merely stated that the Dispute Tribunal should have taken into consideration the fact that he was acting under the “orders” of his supervisors in assessing the proportionality of the measure. However, he did not provide any details on the said “orders” and made only general statements.

56. Furthermore, the Secretary-General specifies that the personal expenses that Mr. Di Mario may have incurred in the course of his duties as a senior driver in the UNHCR Office of the were considered a mitigating circumstance and that, therefore, the context in which he committed the actions of which he was accused was taken into consideration.

57. Fifthly, the Secretary-General submits that Mr. Di Mario was afforded due process during the investigation and disciplinary proceedings.

58. In this regard, with respect to Mr. Di Mario’s argument that the Dispute Tribunal failed to consider the fact that the testimony of his supervisors as well as a former UNHCR driver was not taken as part of the disciplinary investigation by the IGO, the Secretary-General argues that Mr. Di Mario never asked the IGO to interview anyone, and therefore cannot use this as a ground of appeal to the Appeals Tribunal.

59. Lastly, the Secretary-General submits that the Dispute Tribunal correctly found that Mr. Di Mario was not on sick leave approved by the UNHCR Administration at the time when the disciplinary action of his separation from service was taken. Moreover, the Secretary-General points out that there is no provision that prohibits a staff member’s separation from service for disciplinary reasons while he or she is on sick leave.

Considerations

Oral procedure before the Appeals Tribunal

60. The Appeals Tribunal must first decide on the request for an oral hearing contained in the appeal. Article 8(2) of the Statute of the Appeals Tribunal stipulates that UNAT “shall

decide whether the personal appearance of the appellant or any other person is required at oral proceedings and the appropriate means to achieve that purpose”. Article 8(3) of the Statute of the Appeals Tribunal provides that “[t]he judges assigned to a case will determine whether to hold oral proceedings”. In addition, Article 18(1) of the Rules of Procedure of the Appeals Tribunal provides that the judges hearing a case may hold oral hearings if such hearings would assist in the expeditious and fair disposal of the case.

61. Mr. Di Mario’s argument in support of his request for an oral hearing is that he wishes to “provide oral clarification ... [on] the conduct of the investigation and the evidence during the proceedings”. This argument is insufficient under the Statute of the Appeals Tribunal or its Rules of Procedure. In the present case, the questions of fact and law arising from the parties’ arguments are clear and do not require further elaboration. Furthermore, a hearing would not assist in the fair and expeditious disposal of the case as required by art. 18(1) of the Rules of Procedure of the Appeals Tribunal.⁵ The request for an oral hearing is therefore denied.

Legal issues related to the procedure during the investigation and disciplinary proceedings and proceedings with the Dispute Tribunal

62. The first issue in this appeal is whether, within the meaning of Article 2(1)(d) of the Statute of the Appeals Tribunal, in refusing to consider the documents submitted by Mr. Di Mario with his closing statement the UNDT committed an error of procedure such that could affect the impugned Judgment. Mr. Di Mario also submits that the Dispute Tribunal made an error of procedure in not hearing testimony from his former supervisors, which he claims is all the more serious because these individuals were not interviewed by the IGO as part of the disciplinary investigation.

63. Under Article 18(1) and (5) of the Dispute Tribunal’s Rules of Procedure, the UNDT decides on the admissibility of evidence and may exclude evidence “which it considers irrelevant, frivolous or lacking in probative value. The Dispute Tribunal may also limit oral testimony as it deems appropriate”. Article 17(6) of the Rules of Procedure deals with the hearing of witnesses and experts and provides that the UNDT “shall decide whether the

⁵ *Gabriel Vincent Branqlidor v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1234, paras. 32-33.

personal appearance of a witness or expert is required at oral proceedings and determine the appropriate means for satisfying the requirement”.

64. In this case, the documents submitted by Mr. Di Mario with his closing statement to the UNDT consist primarily of medical documents for the purpose of establishing that he was on sick leave at the time of his termination. The Dispute Tribunal rejected them on the grounds that they had been submitted late. In particular, the UNDT found that these documents should have been submitted during the course of the investigation and not with the closing statement, which was to be based on the evidence already submitted.⁶ Analysing the evidence in the record, the UNDT found that at the time of his separation from service, Mr. Di Mario was not on sick leave.⁷ In doing so, however, the Dispute Tribunal in a sense avoided the question of whether Mr. Di Mario’s termination could legally take place if indeed he was on sick leave at the time of the termination.

65. Having considered Mr. Di Mario’s arguments, the Appeals Tribunal finds that even if the medical certificates were admitted into evidence because the timing of their submission by Mr. Di Mario was properly justified under jurisprudence,⁸ it would still be necessary to consider: (i) whether the medical certificates established that Mr. Di Mario was off sick at the time of his termination; (ii) whether, as a result, the outcome of his application might be different.

66. In this regard, the Appeals Tribunal is of the opinion that, even if it were to find that Mr. Di Mario was on sick leave at the time of his separation from service, the finding would be the same, since there is no provision or rule that prevents the UNHCR Administration from terminating a staff member’s employment on disciplinary grounds while he or she is on sick leave. In *Applicant*,⁹ a staff member was also dismissed on disciplinary grounds while on sick leave.

67. Furthermore, Staff Rule 10.4(d), to which Mr. Di Mario refers in his appeal, refers to administrative leave and not to disciplinary measures. It is therefore not unlawful to apply a

⁶ Impugned Judgment, paras. 31-32.

⁷ *Ibid.*, paras. 64-68.

⁸ *Oldrich Andrysek v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1169, paras. 52-54.

⁹ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209, para. 9.

disciplinary measure to a staff member while on sick leave. Consequently, in refusing to consider the documents submitted by Mr. Di Mario with his closing statement, the Dispute Tribunal did not commit a procedural error such that would affect the impugned Judgment.

68. Moreover, Mr. Di Mario also submits that the Dispute Tribunal committed a procedural error by not hearing testimony from his former supervisors. However, the information that Mr. Di Mario considers relevant and that could have been gathered from the testimony of his supervisors, including the High Commissioners and officials he drove during his years of service at UNHCR, is all related to the use of his private car for official purposes or to the resulting expenses (car washes, parking fees, fines, cleaning products and gasoline). However, Mr. Di Mario's use of his private car in the course of his duties was not denied by the UNHCR Administration and was even confirmed by the Administration and the Dispute Tribunal.¹⁰ Therefore, the relevant question in this case is not whether Mr. Di Mario incurred the said personal expenses for official purposes, but rather whether he followed the proper procedure to be reimbursed for those expenses. The testimony of his supervisors was therefore not necessary for the disposal of the case and the Dispute Tribunal did not err in considering the case complete and ready for adjudication without the need to hear their testimony.¹¹

69. Lastly, Mr. Di Mario challenges the Dispute Tribunal's finding that his right to due process during the investigation and disciplinary proceedings was respected, particularly with respect to the use of video recordings from the surveillance cameras at the service station where he filled the gas can.¹² In his appeal, Mr. Di Mario simply reiterates the same argument that was made before the Dispute Tribunal, namely, that the surveillance camera footage was obtained without his consent. However, merely repeating arguments that were previously submitted is not sufficient to overturn the Dispute Tribunal's finding.¹³ Instead, it is necessary for Mr. Di Mario to show that the Dispute Tribunal erred in its analysis, which is not the case here. On the contrary, in the matter at hand, Mr. Di Mario admits the essential facts that were the basis for the disciplinary action of termination.

¹⁰ Impugned Judgment, para. 52.

¹¹ *Wu v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-597, paras. 32-35.

¹² Impugned Judgment, paras. 59-60.

¹³ *Yatte Jules Beda v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1260, para. 68; *Al-Moued v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-458, paras. 16-19.

Legal issues related to the merits of the present case

70. The Appeals Tribunal must now consider whether the Dispute Tribunal erred in finding that the UNHCR Administration had successfully demonstrated with clear and convincing evidence that Mr. Di Mario had used the UNHCR credit card and tax exemption card for personal purposes. To do so, it must first refer to the case law on the burden of proof with respect to clear and convincing evidence. In *Beda*,¹⁴ the Appeals Tribunal recalled that:

43. In disciplinary cases, the Dispute Tribunal must establish: i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, and iii) whether the sanction is proportionate to the offence.

...

45. The 'Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred'. '[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence', which 'means that the truth of the facts asserted is highly probable'. Clear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards: clear requires that the evidence of misconduct must be unequivocal and manifest and convincing requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance.

71. Mr. Di Mario does not dispute the essential facts of this case, but rather the legal consequences arising from those facts. In his appeal, Mr. Di Mario admitted to filling and storing cans of gasoline using the UNHCR credit card and tax exemption card, but claimed he did so to compensate himself for the use of his private vehicle for official travel. In his appeal, Mr. Di Mario also stated that storing cans of gasoline on UNHCR premises and using them for his private vehicle for official purposes was a common practice at UNHCR and that he had therefore acted with the consent and following the orders of his supervisors.

72. It is necessary therefore to consider whether the Dispute Tribunal erred in finding that Mr. Di Mario's use of the UNHCR credit card and tax exemption card for non-official purposes (that is, specifically to fill a personal gas can) amounted to misconduct. To that end, the general

¹⁴ *Yatte Jules Beda, op. cit.* paras. 43 and 45.

legal framework applicable in this case is provided by Staff Rules 1.2, 1.7 and 10.1 and Staff Regulation 1.2, which provide that:

Staff Rules

Rule 1.2

Basic rights and obligations of staff

General

...

(b) Staff members must comply with local laws and honour their private legal obligations, including, but not limited to, the obligation to honour orders of competent courts.

...

Rule 1.7

Financial responsibility

Staff members shall exercise reasonable care in any matter affecting the financial interests of the Organization, its physical and human resources, property and assets.

...

Rule 10.1

Misconduct

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

Staff Regulations

Regulation 1.2

Basic rights and obligations of staff

Core values

...

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

General rights and obligations

...

(e) By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants.

...

(g) Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour.

...

Use of property and assets

(q) Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets.

73. Specifically, in this case, the provisions of Inter-Office Memorandum IOM/044-FOM/044/2013 should also be recalled, which define fraud as:

Any act or omission, including misrepresentation or concealment of a material fact, that knowingly or intentionally misleads, or attempts to mislead, a party to obtain a benefit, whether directly or indirectly, whether for oneself or for a third party. Fraud could involve misappropriation of cash (such as fraudulent claims/disbursements) or other assets (such as fraudulent shipments, falsifying inventory records), or fraudulent statements (purposefully misreporting or omitting information).

74. In addition, the document setting out the policy on the use of vehicles in UNHCR further provides that:¹⁵

IV. AUTHORIZATION TO USE PRIVATE VEHICLES FOR OFFICIAL PURPOSES

46. In field offices where there are no UNHCR vehicles or where UNHCR vehicles are not available for official deployment, private vehicles may be used for official purposes. *The use of private vehicles for official purposes must be pre-authorized by the Head of Office, only when:*

¹⁵ Policy on the Use of Vehicles in UNHCR, December 2013, paras. 46–47 (emphasis added).

- a) *other acceptable means of transport is not available;*
- b) *when funds have been set aside for this purpose; and*
- c) *it is fully justifiable and considered to be in the best interest of UNHCR.*

47. The authorization to use a private vehicle for official purposes *may only be given in exceptional circumstances. It must be given in writing* and contain the following conditions:

a) The validity of the authorization is *limited in time*, and not exceed one calendar year;

...

d) The authorized individual is responsible, in co-operation with the administrative officer, for maintaining *accurate records of the use of their private vehicle for official purposes, including proper submission of claims for reimbursement of mileage costs;*

e) If approved, claims for official use of a private vehicle must *indicate the purpose and distance of each journey*. The claims will be signed by both the authorized individual and the Head of Office or Competent Official, and should be settled monthly;

f) The travel authorization, if applicable, must specify that the mode of travel by private vehicle was approved in the interest of UNHCR and not for the convenience of the staff member; and

g) It is within the supervisory responsibility of the Head of Office that a *procedure is set up and properly implemented by the office for the reimbursement of mileage costs.*

75. In the present case, Mr. Di Mario avers that he was only following the orders of his supervisors and that he sometimes had to use his personal car to drive them around. He also claims that the use of the credit card and tax exemption card granted by the Organization was a common practice to pay for cans of gasoline stored on UNHCR premises and facilitated the performance of his duties. The fact that Mr. Di Mario used his personal car for official purposes and incurred unreimbursed personal expenses is not in dispute and was taken into account as a mitigating factor in determining the disciplinary measure to be imposed.¹⁶

¹⁶ Termination letter of 23 July 2019 from HRD, UNHCR to Mr. Di Mario.

76. In this regard, the written testimony dated 26 August 2021 of a former UNHCR driver who states that he too used his private car as a replacement car with the authorization of the High Commissioner “who then authorized him to take gasoline for [his] vehicle in order to compensate for the use of [his] private car” confirms that UNHCR drivers use their private cars for official purposes. This is also evident from an email of 15 October 2015 that shows that Mr. Di Mario was using his private car to drive UNHCR staff while the official car was being repaired.¹⁷ Finally, the testimony of the Chef de Cabinet of UNHCR, taken during the investigation by the IGO, leads the Appeals Tribunal to find that Mr. Di Mario used his private vehicle approximately ten times from 2016 to 2019 to drive the High Commissioner primarily to his residence located one kilometre away from the office.

77. It has therefore been clearly established that Mr. Di Mario did use his private car for official purposes, regardless of the apparently informal nature of this practice. Furthermore, the conditions stipulated by paragraph 47 of the policy on the use of vehicles in UNHCR,¹⁸ namely, exceptional circumstances, prior written authorization, limited in time and not exceeding one year, or even the keeping of a record, together with the administrative officer, of the use of the private car for official purposes, were not established in this case. In particular, the Appeals Tribunal notes that the procedure required by paragraphs 47d), e) and f) of that policy, with respect to mileage reimbursement claims, was not followed either. On the contrary, Mr. Di Mario seems to be pointing to the informal practice of using his private car in order to justify the equally informal compensation he made by using gasoline paid for with the UNHCR credit card.

78. None of these informal practices can be justified under this policy, however, which exists precisely to regulate situations justifying the use of private cars for official purposes, which must be exceptional and non-recurring. If such informal use of UNHCR drivers’ private cars contrary to internal policies had become commonplace, it was incumbent upon the UNHCR Administration to take the necessary steps to address the situation. The evidence in this case shows that no such arrangements were made but, on the contrary, that informality was the norm in that regard, giving rise to situations such as this one, where a driver believes

¹⁷ Email from UNHCR Administration of 15 October 2015 with the subject line: “Just to let you know that Osvaldo will drive you and Karen in his private car tomorrow”.

¹⁸ Policy on the Use of Vehicles in UNHCR, December 2013, para. 47.

that he has the right to grant himself financial compensation for the use of his private car for official purposes.

79. However, such inertia on the part of Mr. Di Mario's supervisors cannot be used to justify his misconduct. The fact that the UNHCR Administration tolerated an alleged common practice with respect to compensation for personal expenses incurred in the course of its drivers' duties is not grounds for exoneration for Mr. Di Mario. Indeed, it is clear that he breached Staff Rule 1.2(b), 1.7 and 10.1, Staff Regulation 1.2(b), (e), (g) and (q), Inter-Office Memorandum IOM/O44-FOM/O44/2013 and the UNHCR Code of Conduct. The argument that there is a common practice that is contrary to these standards cannot be accepted, as it would risk undermining internal policies aimed at eliminating the risks of fraud and corruption. Moreover, lack of knowledge of these rules cannot be invoked to justify breaching them, as ignorance is not an excuse for failing to adhere to established standards.

80. The jurisprudence of the Appeals Tribunal confirms this conclusion, as noted in *Mizyed*¹⁹ and *Konaté*.²⁰ In the latter case, the Appeals Tribunal also took into account the reputation that the Organization must have within the international community:²¹

23. The sanction in such disciplinary cases must be apt not only to punish the wrongdoer but also to publicise the Organization's commitment to combat all forms of corruption.

24. Under these circumstances, separation from service does not appear to be disproportionate and corresponds with the logical loss of trust suffered by the Administration as a consequence of the Appellant's misconduct. The Administration's apparent lack of action with respect to other staff members who may have also been involved, even to a greater degree than the Appellant, does not reduce his accountability but does justify the UNDT's decision to refer the case to the Secretary-General for eventual further actions.

81. Therefore, the Dispute Tribunal did not err in finding that the facts established amounted to misconduct warranting the disciplinary measure imposed.²²

¹⁹ *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, paras. 25-27.

²⁰ *Konaté v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-334, paras. 23-24.

²¹ *Ibid.*

²² Impugned Judgment, para. 47.

82. It is now necessary to consider whether the Dispute Tribunal erred in finding that the proportionality of the disciplinary sanction was well founded. In this regard, the Appeals Tribunal first notes that neither Mr. Di Mario nor the Secretary-General commented on the harm calculated on the basis of the abnormal gasoline consumption noted in the investigation report of the IGO and attributed to Mr. Di Mario. Secondly, Mr. Di Mario's argument is based exclusively on the alleged misconduct of his supervisors, which is not at issue in the present case, which concerns the breach of Mr. Di Mario's duties as a staff member of the Organization, without prejudice to the future accountability of his supervisors as a result of the referral ordered in the present Judgment. It follows that Mr. Di Mario has not been able to demonstrate, within the meaning of Article 2(1)(c) of the Statute of the Appeals Tribunal, that the Dispute Tribunal erred on a question of law when it found that the disciplinary measure of separation from service with compensation in lieu of notice and one half of the termination indemnity was commensurate with the misconduct committed by him. Therefore, Mr. Di Mario has not established an error in the disciplinary action taken, which is in accordance with Staff Rule 10.3(b)²³ and the jurisprudence of the Appeals Tribunal.²⁴

83. It follows that the appeal must be dismissed.

Referral of the case for possible action to enforce accountability

84. Given the Appeals Tribunal's findings that the regular use of private cars by certain UNHCR staff members (drivers) for official purposes "compensated for" by the reimbursement of gasoline expenses was known to the UNHCR Administration and, in particular, to Mr. Di Mario's supervisors, the Appeals Tribunal finds that there was apparent mismanagement and a breach of the policy on vehicle use at UNHCR.²⁵ Therefore, the Appeals Tribunal orders, in accordance with Article 9(5) of the Statute of the Appeals Tribunal, that the case be referred to the High Commissioner for possible action to enforce accountability for possible misconduct by Mr. Di Mario's supervisors.

²³ This rule provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

²⁴ *Yatte Jules Beda, op. cit.*, paras. 57-59; *Mizyed, op. cit.*, paras. 27-28.

²⁵ Policy on the Use of Vehicles in UNHCR, December 2013.

Judgment

85. The appeal is dismissed and Judgment No. UNDT/2021/163 is affirmed. The Appeals Tribunal also orders that the matter be referred to the High Commissioner for possible action to enforce accountability.

Original and Authoritative Version: French

Dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Halfeld,
Presiding

(Signed)

Judge Raikos

(Signed)

Judge Knierim

Published and entered in the Register on this 27th day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar