



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

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Judgment No. 2023-UNAT-1339

**Marina Mancinelli  
(Respondent/Appellant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

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Before:	Judge Martha Halfeld, Presiding Judge Kanwaldeep Sandhu Judge Dimitrios Raikos
Cases Nos.:	2022-1699 & 2022-1700
Date of Decision:	24 March 2023
Date of Publication:	5 May 2023
Registrar:	Juliet Johnson

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Counsel for Ms. Mancinelli: Julia Kyung Min Lee, OSLA

Counsel for Secretary-General: Amanda Stoltz

**JUDGE MARTHA HALFELD, PRESIDING.**

1. Marina Mancinelli, a former staff member of the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), contested the imposition of a disciplinary measure of separation from service for misconduct with compensation in lieu of notice and without termination indemnity (contested Decision).
2. By Judgment No. UNDT/2022/035<sup>1</sup> (impugned Judgment), the United Nations Dispute Tribunal (UNDT) ordered that Ms. Mancinelli be paid the termination indemnity.
3. Each party lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set out below, the Appeals Tribunal dismisses Ms. Mancinelli's appeal and grants the Secretary-General's appeal to reverse the UNDT judgment and dismiss Ms. Mancinelli's application in its entirety.

**Facts and Procedure<sup>2</sup>**

5. Ms. Mancinelli first joined the United Nations Population Fund (UNFPA) based in Conakry, Guinea, in April 2009 as a Programme Specialist.<sup>3</sup> She transferred to UN Women on 1 March 2012. On 1 November 2018, she re-joined UNFPA to assume her appointment with UNFPA as the Deputy Representative, UNFPA Guinea Country Office (CO), at P-4 level, step 10.
6. On 6 February 2018, the Investigations Division of the Office of Internal Oversight Services (ID/OIOS) received, via hotline, a report of possible misconduct, implicating UN Women's personnel at the United Nations Headquarters in New York.<sup>4</sup> It was specifically reported that Ms. Mancinelli had utilized, without authorization, UN Women's official United Parcel Service (UPS) account for personal purposes on at least two separate occasions in December 2017.
7. OIOS opened an investigation and, on 6 November 2018, issued an investigation report.<sup>5</sup> The investigation report concluded that Ms. Mancinelli had: (a) used UN Women's official UPS account to ship personal packages internationally to Italy and Austria by taking discontinued UPS

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<sup>1</sup> *Mancinelli v. Secretary-General of the United Nations*, Judgment dated 6 April 2022.

<sup>2</sup> Summarized from the impugned Judgment as relevant to the appeals.

<sup>3</sup> Impugned Judgment, para. 5.

<sup>4</sup> *Ibid.*, para. 6.

<sup>5</sup> *Ibid.*, para. 8.

shipping labels from a copy room; and (b) expressly elected to bill the charges for those personal packages to UN Women's corporate UPS account instead of paying directly by personal credit card at the time of shipment.

8. On 13 December 2018, UNPFA's Chief, Legal Unit (LU), received an e-mail and referral from UN Women's Chief, Legal, referring from OIOS the investigation report regarding Ms. Mancinelli as the subject of the investigation as she had joined UNFPA on 1 November 2018.<sup>6</sup> The LU forwarded the investigation report to UNFPA's Office of Audit and Investigation Services (OAIS) for review and endorsement. On 16 August 2019, OAIS endorsed the OIOS investigation report and referred the matter to the LU and UNFPA's Division for Human Resources (DHR).

9. By a memorandum dated 5 September 2019, the Director, DHR, transmitted the investigation report and all exhibits to Ms. Mancinelli and her counsel and provided her with an opportunity to submit comments on the factual findings.<sup>7</sup> She submitted her comments on the investigation report on 24 October 2019.

10. Based on the findings of the investigation report and Ms. Mancinelli's comments, the Director, DHR, issued a notification of charges dated 24 September 2019, notifying her that there was sufficient evidence to charge her with two counts of misconduct based on her unauthorized use of UN Women's UPS account on two occasions.<sup>8</sup> The notification of charges letter informed her that she could respond to the charges and produce exculpatory evidence within 10 days of receiving the notification. She received two extensions of time to reply and provided her response to the charges on 24 October 2019.

11. By letter of 13 December 2019, UNFPA's Executive Director issued the contested Decision.<sup>9</sup> It informed Ms. Mancinelli that her conduct had been in violation of Staff Regulation 1.2(b), Staff Regulation 1.2(q), Staff Rule 10.1(a) and the Standards of Conduct for the International Civil Service (2013), paragraphs 5 and 25, and constituted misconduct and that it had been decided that, as a disciplinary measure, she should be separated from service, with compensation in lieu of notice and without termination indemnity, in accordance with Staff Regulation 10.1(a) and Rules 10.1(a) and 10.2(a)(viii).

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<sup>6</sup> *Ibid.*, para. 9.

<sup>7</sup> *Ibid.*, para. 12.

<sup>8</sup> *Ibid.*, para. 14.

<sup>9</sup> *Ibid.*, para. 16.

12. On 18 March 2020, Ms. Mancinelli filed an application requesting that the UNDT vacate the finding of misconduct and rescind the imposed sanction or, in the alternative, substitute the imposed sanction with a lesser sanction in the form of a written censure, order her reinstatement or set a compensation in the amount of two years' net base salary in lieu of reinstatement, and award three months' net base salary in moral damages.

*The Impugned Judgment*

13. The UNDT allowed the application in part, ordering that the Secretary-General calculate and pay Ms. Mancinelli a termination indemnity, and dismissed the application in all other respects.

14. The UNDT noted that she had admitted her actions during the investigation and during a hearing before the Tribunal and that there was agreement on the substantive issue that she had used official UPS services without authority to mail personal packages to her relations and a friend.<sup>10</sup> The oral hearing also established that she did not return for duties in Guinea after being cleared by medical services because she had by the time of her clearance been separated from service on disciplinary grounds.

15. The UNDT found that a lack of policy on management of official UPS was not a licence to breach clear rules and regulations governing the use of the Organization's assets.<sup>11</sup> Although this was not verified, the fact that she and other staff members had possibly acted in contravention of rules and regulations before, is not a valid excuse when considering culpability for misconduct.

16. The UNDT observed that she had not provided any legal basis for the assumption that she had meant to reimburse the use of the Organization's facilities.<sup>12</sup> Not having received any training on the use of UPS services was also an invalid reason from a senior officer with 10 years of experience in the Organization. Ignorance of the law is not a defence.

17. The UNDT was of the view that the facts as established constituted misconduct.<sup>13</sup> Ms. Mancinelli had acted dishonestly in breach of integrity standards by using the Organization's UPS facility for personal benefit without any lawful justification. She did not adduce any evidence

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<sup>10</sup> Impugned Judgment, paras. 35–38.

<sup>11</sup> *Ibid.*, para. 39.

<sup>12</sup> *Ibid.*, para. 41.

<sup>13</sup> *Ibid.*, paras. 48 and 51.

to show that there were exceptions to the rule of using the Organization's property and assets for official purposes alone and for the benefit of the Organization alone.

18. The UNDT found that she had not produced any evidence to show why she could not send the presents in good time for Christmas.<sup>14</sup> She has not made a connection between her pregnancy and the breach of her terms and conditions of employment. There is no evidence that she was on sick leave during the period when the events happened. Her accounts do not excuse the acts of misconduct.

19. The UNDT noted that Ms. Mancinelli's due process rights had been respected.<sup>15</sup> She knew the nature of the allegations against her. Although the complaint against her included an element of fraud in using UPS services, this was found by the Administration as not substantiated, hence it was dropped from the charges. Furthermore, during trial, she did not demonstrate how the endorsement of the "third party dossier" by UNFPA affected her due process rights.

20. The UNDT observed that she had not been able to single out any particular person or authority who had a grudge against her nor for what reason.<sup>16</sup> She did not adduce any evidence of bias or ill motive. She did not prove the allegation of bad faith.

21. Moving to the proportionality of the sanction, the UNDT was of the view that a cell phone incident<sup>17</sup> which had not been investigated, could not have been used as an aggravating factor.<sup>18</sup> The Secretary-General did not adduce any evidence to show that any administrative or disciplinary process was instituted where Ms. Mancinelli was able to explain her conduct. The Administration applied an irrelevant aggravating factor and the UNDT is entitled to interfere with the sanction as it was arrived at arbitrarily, in violation of her due process rights.

22. The UNDT concluded that separation with salary in lieu of notice and with termination indemnity was reasonable under the circumstances of this case.<sup>19</sup> She had a 10-year unblemished record in the Organization in senior positions and she admitted that she had a momentary lapse of judgment. Although the amount involved is not a relevant factor for purposes of finding

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<sup>14</sup> *Ibid.*, para. 52.

<sup>15</sup> *Ibid.*, paras. 53–54.

<sup>16</sup> *Ibid.*, paras. 55–56.

<sup>17</sup> The UNDT noted that the Administration had considered that Ms. Mancinelli had used an official cell phone for personal purposes while at UN Women, incurred a bill of USD 473.41 and did not pay it promptly even after instruction from the management of UN Women to do so and a reminder.

<sup>18</sup> *Ibid.*, paras. 58–59.

<sup>19</sup> *Ibid.*, para. 61.

culpability, it is a relevant mitigating factor, as well as the fact that the Organization recovered it fully.

*Procedure before the Appeals Tribunal*

23. On 6 June 2022, each party filed an appeal of the impugned Judgment with the Appeals Tribunal. Each party responded to the opposing party's appeal on 8 August 2022.

24. On 26 October 2022, the Appeals Tribunal consolidated the appeals.

**Submissions**

**The Secretary-General's Appeal**

25. The Secretary-General requests the Appeals Tribunal to find that the UNDT erred in substituting the sanction imposed by the Administration, to uphold the contested Decision and dismiss the application.

26. The Secretary-General submits that the UNDT exceeded its jurisdiction and erred in law and in fact in its consideration of the proportionality of the imposed sanction. The UNDT did not address whether the imposed sanction bears a rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline, nor find that the imposed sanction was blatantly illegal, arbitrary, excessive, abusive, discriminatory or absurd.

27. The Secretary-General argues that replacing the Administration's discretion with a marginally more lenient sanction demonstrates in and of itself that the original sanction was not arbitrary, excessive or abusive. The UNDT should have considered whether the contested Decision was lawful even if Ms. Mancinelli's prior conduct could not be relied upon as an aggravating factor. The UNDT also failed to consider the consistency of the contested Decision with the past practice of the Organization in similar cases.<sup>20</sup>

28. The Secretary-General contends that the UNDT erred in law and in fact and exceeded its jurisdiction in its consideration of mitigating factors. Additional mitigating factors had not been raised by her in the disciplinary process or before the UNDT, which deprived the Administration

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<sup>20</sup> The Secretary-General references the "Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour: Compendium of Disciplinary Measures", in particular, Nos. 157, 193, 223, 304, 306, 311, 353, 365, 394, 464.

of the opportunity to present its views on their relevancy. Furthermore, contrary to the UNDT's finding, misuse of the Organization's assets will attract a strict sanction, regardless of the monetary value of the misconduct.<sup>21</sup>

29. The Secretary-General submits that there is no evidence of Ms. Mancinelli having had a "momentary lapse of judgment". Even when she was requested to reimburse the Organization, she did not promptly do so. She has expressed no regret or remorse for her actions but maintained before the UNDT that they did not constitute misconduct. The Administration did not fail to take into account that the amount was recovered and she was a long-serving staff member with no prior disciplinary record.

**Ms. Mancinelli's Answer**

30. Ms. Mancinelli requests that the Appeals Tribunal dismiss the Secretary-General's appeal.

31. She submits that the UNDT had the jurisdiction to set aside the Administration's sanction and to order a lesser sanction. However, the UNDT failed to exercise jurisdiction to determine the validity of other aggravating factors as relied upon by the Administration. The Administration conflated the aggravating factors with the alleged misconduct. Also, she was not required nor permitted to voluntarily disclose the ongoing OIOS investigation when transferring to UNFPA, without being specifically asked to do so. Moreover, she was presumed to be innocent at the time. She was not asked by UNFPA to disclose such information and she provided truthfully all the information requested of her by the UNFPA.

32. Ms. Mancinelli states that upon being told by the Administration that she was not allowed to use the UPS for personal use, she expressed remorse and apologized for her actions. However, she never testified to having had a "momentary lapse of judgment" as found by the UNDT. The UNDT failed to take into consideration the context in which she took the UPS envelopes. She paid the full cost of the shipments of USD 300.07 as soon as she received the exact breakdown of the cost. Provided references to sanctions in prior cases are inapposite as she was never charged with theft or misappropriation of funds.

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<sup>21</sup> The Secretary-General cites *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024; *Ibrahim v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-776; and *Jahnsen Lecca v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-408.

**Ms. Mancinelli's Appeal**

33. Ms. Mancinelli requests that the Appeals Tribunal vacate the impugned Judgment, rescind the contested Decision and order her reinstatement or, in the alternative, payment of two years' net-based salary as compensation in lieu of reinstatement, based on her salary at the time of her separation, compensation for the moral damages caused by her separation and order the Administration to expunge from her personnel record all adverse materials relating to the disciplinary proceedings leading to her separation from service.

34. She submits that the UNDT erred in fact and in law in making findings of fact that were not supported by any evidence, therefore concluding that she was charged with serious misconduct. Contrary to the UNDT's finding, fraud was never "dropped from the charges" at the relevant time. Fraud was a charge at the time the sanction was imposed, given that, in the contested Decision, the Administration had alleged that she had used the name of a Ms. S. to send one of the parcels and had concluded that she had acted "willfully and in bad faith".

35. She adds that the UNDT's finding that she "did not return for duties in Guinea after being cleared by medical services because she had by the time of her clearance been separated from service on disciplinary grounds" is also incorrect. She was medically cleared to return to her post as Deputy Representative of UNFPA Guinea on 19 September 2019. However, she was placed on Administrative Leave With Pay (ALWP) without justification on 20 September 2019. She was separated from service on 19 December 2019, well after she was medically cleared to return to work.

36. Ms. Mancinelli argues that the UNDT erred in fact and in law by applying the standard of strict liability instead of the standard of clear and convincing evidence. Furthermore, the UNDT did not point to any evidence that supported its finding that she had acted dishonestly—there is no evidence that she ever lied to the Organization in sending the shipments.

37. She contends that the UNDT erred in fact and in law by finding that the sanction of separation from service with termination indemnity was appropriate. She did not commit fraud and was not dishonest. The UNDT failed to carry out a factual assessment of the elements of proportionality. A written censure and a fine would have been a more appropriate sanction.<sup>22</sup>

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<sup>22</sup> Ms. Mancinelli references *Papas v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/020; and the "Practice of UNFPA in cases of wrongdoing 2016-2018", para. 4(b).



**The Secretary-General's Answer**

38. The Secretary-General requests that the Appeals Tribunal dismiss Ms. Mancinelli's appeal.

39. The Secretary-General submits that the UNDT correctly found that the facts on which the disciplinary measure was based were established by clear and convincing evidence. Ms. Mancinelli's assertions are unsubstantiated. She made no effort to inform UN Women of having used the UN Women's UPS account. The cost of shipping the packages was clearly detailed in the 30 January 2018 e-mails to her. Also, she made no meaningful effort to seek clarification until receiving notification of the OIOS investigation.

40. The Secretary-General maintains that the UNDT correctly found that the facts amounted to misconduct.

41. The Secretary-General argues that the sanction of separation from service was appropriate and proportionate. The 13 December 2019 sanction letter did not assert that Ms. Mancinelli had written Ms. S.'s name on one of the parcels, nor contained any reference to fraud. She has failed to demonstrate how any error in the UNDT's summary regarding the circumstances of her not returning to Guinea resulted in a manifestly unreasonable decision. It was not required to establish that she had lied to the Organization—such an allegation was not part of the charges.

**Considerations**

42. Although the acts attributed to Ms. Mancinelli happened when she was working at UN Women (from March 2012 until November 2018), at the time of separation, she was in the service of the UNFPA, to which she had been appointed since April 2009 and returned to in November 2018.

*Ms. Mancinelli's appeal*

43. The sanction letter reveals that Ms. Mancinelli was separated from service on account of the following two charges of misconduct having been established:<sup>23</sup>

**Count 1:**

By using UN Women's business account with UPS, with neither prior authorization nor subsequent notice, to ship your personal packages, you failed to uphold the highest

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<sup>23</sup> Sanction letter, para. 3.

standards of integrity required under Staff Regulation 1.2(b). In particular, you displayed a lack of honesty and transparency in your actions and your conduct failed the honesty required of you under Staff Regulation 1.2(b) and paragraph 5 of the Standards of Conduct for the International Civil Service, 2013.

**Count 2:**

By using UN Women's business account with UPS, with neither prior authorization nor subsequent notice, to ship your personal packages; by taking discontinued UPS labels (prepopulated with UN Women's business account information) from the Organization's premises; by billing the charges for those personal packages to UN Women's account and expressly failing to pay for the shipment with your personal credit card, all of which you have admitted, you failed to use the property and assets of the Organization solely for official purposes, in violation of Staff Regulation 1.2(q) and paragraph 25 of the Standards of Conduct for the International Civil [Service], 2013.

44. Contrary to Ms. Mancinelli's contention, neither the OIOS report nor the sanction letter, nor even the UNDT, addressed that she had used the name of another staff member to send one of her parcels abroad. It is true that the investigation by OIOS had been initiated under a report of possible misconduct which included the allegation that, on at least one occasion, Ms. Mancinelli had entered the name of the Mailroom Supervisor Ms. S. as the sender of one of her personal packages abroad.<sup>24</sup> However, while the OIOS report established a list of facts relating to Ms. Mancinelli, concluding that she had failed to observe the standards of conduct expected of a United Nations civil servant, it clearly denied any wrongdoing concerning Ms. Mancinelli's identification of another staff member as the shipper of her package to Austria.<sup>25</sup>

45. Moreover, even though the sanction letter mentioned that fact in its account of details as a way of establishing the context of the investigation into misconduct<sup>26</sup>, it did not mention the aforementioned fact in its conclusion<sup>27</sup>, nor was the said fact taken into consideration in either "counts" of the misconduct imputed to Ms. Mancinelli.<sup>28</sup> The UNDT Judgment, in turn, correctly recognized that, although the complaint against Ms. Mancinelli included that she had fraudulently used UPS services, this was found by the Administration to be unsubstantiated,

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<sup>24</sup> Investigation report, para. 2.

<sup>25</sup> *Ibid.*, para. 81, "b". The Appeals Tribunal can only assume that this OIOS finding was reached in light of Ms. Mancinelli's explanation that she used her own name as the sender for both packages but Ms. S.'s name appeared as the sender for the shipment to Austria because of Ms. S.'s position at the Distribution Unit Focal Point (see investigation report, para. 41).

<sup>26</sup> Sanction letter, para. 10.

<sup>27</sup> *Ibid.*, para. 31 and following.

<sup>28</sup> *Ibid.*, para. 3.

hence it was removed from the charges.<sup>29</sup> In reality, this issue was not raised by the Administration when it imposed the disciplinary measure on Ms. Mancinelli. Since Ms. Mancinelli was not charged with fraud, the Appeals Tribunal thus concludes that the UNDT's finding in this regard is in line with the arguments and documents presented by the parties.

46. Ms. Mancinelli also contends that the UNDT erred when it found that she did not return to her duty station in Guinea because she was separated from service before being medically cleared for work. However, Ms. Mancinelli's contention that she had been cleared for work *before* being placed on ALWP in September 2019 is inconsequential for the purposes of the present case. What matters most here is the *determination of the (un)lawfulness of the disciplinary measure* imposed on Ms. Mancinelli in December 2019 concerning facts dating from December 2017, rather than the *identification of the reason behind her not returning to her post* in September 2019 before being separated. In this regard, the UNDT mentioned the reason for Ms. Mancinelli's absence from her duty station at the time of the separation only in the first paragraph of the consideration of its Judgment and this had no bearing on the outcome of the case. Consequently, there is no need to address so trivial an argument in Ms. Mancinelli's appeal, even though the Secretary-General concedes that on 23 September 2019, Ms. Mancinelli was indeed placed on administrative leave pending the investigation.

47. Ms. Mancinelli further argues that the UNDT erred when it applied an incorrect standard of proof of *strict liability* instead of *clear and convincing evidence* regarding disciplinary cases. However, her argument is unsubstantiated, as the main facts of the case were undisputed by both parties. Ms. Mancinelli had admitted having used UN Womens' UPS account to send two private shipments abroad, without mentioning any prior authorization. The main issue was therefore whether this behaviour amounted to misconduct, given the justification Ms. Mancinelli provided for her behaviour.

48. In order to assess whether the UNDT erred when it found that the facts amounted to misconduct, it is fundamental to identify the applicable legal framework, which is as follows:

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<sup>29</sup> Impugned Judgment, para. 54.

**Staff 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;...

**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; ...

**Staff 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....

**Standards of Conduct for the International Civil Service (2013)**

**Guiding principles**

...

5. The concept of integrity enshrined in the Charter of the United Nations embraces all aspects of an international civil servant's behaviour, including such qualities as honesty, truthfulness, impartiality and incorruptibility. These qualities are as basic as those of competence and efficiency, also enshrined in the Charter. ...

**Use of the resources of United Nations organizations**

25. International civil servants are responsible for safeguarding the resources of United Nations organizations which are to be used for the purpose of delivering an organization's mandate and to advance the best interests of the organization. International civil servants shall use the assets, property, information and other resources of their organizations for authorized purposes only and with care. Limited personal use of the resources of an organization, such as electronic and communications resources, may be permitted by the organization in accordance with applicable policies.

49. Ms. Mancinelli's reliance on *Turkey*<sup>30</sup> to argue that the UNDT applied an incorrect standard of proof is misleading. It is true that in that particular case, the Appeals Tribunal held that, in the absence of "a clear written pronouncement" on a "zero-alcohol" policy, not every violation should result in separation. However, in that case, the UNDT established a

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<sup>30</sup> *Turkey v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-955.

much lesser amount of alcohol consumed and a lower level of inebriation than suggested in the disciplinary decision, a fact which had been an essential consideration for the imposition of the disciplinary sanction.<sup>31</sup>

50. In the present case, however, as discussed above, the main factual circumstances described in both counts were not disputed and thus not reviewed by the UNDT, which affirmed the main elements of the misconduct, only reviewing some of the aggravating and mitigating elements, which are by nature peripheral to the sanction imposed. Moreover, the use of an official payment account for personal items directly violated the UN Women Distribution Center policy, according to which there should be no shipping of “personal items”, as highlighted by the investigation report.<sup>32</sup> Even considering Ms. Mancinelli’s unsubstantiated argument that the use of the UN Women’s UPS account would be possible for sending personal shipments with prior management approval (which would be against the policy), Ms. Mancinelli never mentioned specific prior approval in her defence. Furthermore, there is no evidence on the record of Ms. Mancinelli’s allegation that two other staff members had used the official UN Women accounts to send personal parcels, which would also violate the existing policy.

51. Even if this improper practice of using an official account for personal purposes had been wrongly tolerated, there should still have been payment by the staff member concerned. In the present case, Ms. Mancinelli communicated that she would pay for her personal shipments with a cheque, but this only occurred well after she had been requested on 30 January 2018 to explain the use of the official account for her private packages in December 2017. Moreover, even though Ms. Mancinelli was provided with both a screenshot of the invoice and supporting documents on the same day with an explicit request to “kindly add the below order to your reimbursement”, she did not reimburse UN Women, nor ask for additional information.<sup>33</sup> Thereafter, Ms. Mancinelli was absent from work on maternity leave and only sought to actually pay for her private shipment once she had been contacted by OIOS in May 2018 for an interview schedule.<sup>34</sup> She finally paid the total amount of USD 300.07 on

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<sup>31</sup> *Ibid.*, paras. 36, 39 and 42.

<sup>32</sup> Investigation report, para. 20. This information is also available on the UN Women website.

<sup>33</sup> See e-mail correspondence between Ms. Mancinelli and the Distribution Unit Focal Point of UN Women Headquarters of 30 January 2018.

<sup>34</sup> See e-mails of 24 and 25 May 2018.

25 May 2018, almost four months after she had received the request for reimbursement of the amount due on 30 January 2018.

52. The Appeals Tribunal finds that Ms. Mancinelli's arguments are without merit. Even though she admitted having to pay for her private shipments once having been contacted by e-mail and informed of the amount due in January 2018, she only in fact settled her debts in May 2018, after having been informed that an investigation had been launched in this regard. Ms. Mancinelli should have been more forthcoming once she was made aware that the use of the official account for personal mail had been brought into question. Instead, she missed at least two opportunities to settle the matter: (i) directly after sending her private shipments, she should have taken the initiative to be informed of the amount and to pay for such shipments; (ii) once contacted in January 2018 with regard to the amount, she should have paid her debts immediately. She did not act promptly and only paid as late as May 2018 once she became a subject of an investigation.

53. As established by this Appeals Tribunal previously, concerning judicial review:<sup>35</sup>

(...) The judicial review of decisions of whether or not misconduct has been established dictates that due deference be given to the Secretary-General to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Administration in the exercise of its rule-making discretion. The Administration is better placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements.

54. Furthermore, the Appeals Tribunal has found:<sup>36</sup>

(...) Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is 'to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence'. And, of course, '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,

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<sup>35</sup> *Nadasan v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-918, para. 41.

<sup>36</sup> *Ishfaq Hossain v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1181, para. 32 (internal citations omitted).

imports two high evidential standards. The first (“clear”) is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard (“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. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be.

55. In light of the above, the UNDT did not err when it found that the facts were established to the requisite standard of proof, that Ms. Mancinelli’s alleged justifications were not supported by any rule or regulation, that Ms. Mancinelli violated the legal framework cited above and that her acts qualify as misconduct.<sup>37</sup>

*The parties’ appeals regarding the proportionality of the sanction*

56. Staff Rule 10.3(b), addressing due process in the disciplinary process, provides that any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct. Staff Rule 10.2(a), setting out disciplinary measures, stipulates that disciplinary measures may take one or more of the following forms only:

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
- (ix) Dismissal.

57. While the Administration had imposed on Ms. Mancinelli the disciplinary measure of separation from service with compensation in lieu of notice and *without* termination indemnity, in its Judgment, the UNDT reduced the sanction to separation from service with “salary” in lieu of notice and *with* termination indemnity to be calculated and paid by the Organization.

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<sup>37</sup> Impugned Judgment, paras. 38–43, 48 and 51.

58. Both parties have filed appeals regarding the proportionality of the sanction. The Secretary-General maintains on appeal that the UNDT exceeded its jurisdiction and erred in law by substituting the Secretary-General's discretion with its own by ordering a lesser sanction and considering other mitigating factors, whereas in her appeal, Ms. Mancinelli contends that the UNDT should have imposed an even lesser sanction, arguing that separation even with termination indemnity was too severe. The issue here is thus whether the UNDT exceeded or failed to exercise its jurisdiction, or erred in law in considering the potentially aggravating and mitigating circumstances for determining the proportionate sanction.

59. The UNDT found that it had been inadequate for the Administration to consider a certain aggravating factor and not to consider certain mitigating elements in assessing the proportionality of the sanction. Specifically, the UNDT first found that the circumstance of Ms. Mancinelli's having previously not promptly paid an invoice of USD 473.41 (for the use of an official mobile phone for personal purposes) could not be used as an aggravating factor, since the incident had not been properly investigated with an opportunity for Ms. Mancinelli to be heard. For the UNDT, in using this element as an aggravating factor, the Administration violated Ms. Mancinelli's due process rights and the sanction was arbitrary, allowing it to interfere with the sanction. The UNDT also maintained that the Administration did not consider the mitigating factor of the amount involved and the fact that the Organization recovered it fully. Consequently, the UNDT imposed a lesser sanction, which only differed from the one imposed by the Administration in that it ordered the payment of a termination indemnity.<sup>38</sup>

60. The discretionary authority of the Administration is not unfettered, as established by this Appeals Tribunal in its jurisprudence. The Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee are implied in every contract of employment. Both parties must act reasonably and in good faith.<sup>39</sup> As established by the jurisprudence of the Appeals Tribunal:<sup>40</sup>

(...) The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a

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<sup>38</sup> Impugned Judgment, paras. 58–61.

<sup>39</sup> *Sergio Baltazar Arvizú Trevino v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1231, para. 49.

<sup>40</sup> *Appellant v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1216, para. 45.



natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures; to wit: a sanction within the limits stated by the respective norms, which is sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. That is why the tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed without any change in the jurisprudence of this Tribunal. The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.

61. Regarding the assessment of the Administration's exercise of discretion, the Appeals Tribunal has found:<sup>41</sup>

(...) due deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application. ... The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline.

62. The Appeals Tribunal's Judgments have also emphasized that "the first instance tribunal is not conducting a merit-based review, but a judicial review". Indeed, this Appeals Tribunal has clarified:<sup>42</sup>

(...) Judicial review is more concerned with examining the manner in which the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker.

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<sup>41</sup> *George M'mbetsa Nyawa v. Secretary General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 90, citing *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, paras. 24–25.

<sup>42</sup> *Arvizú Trevino, op. cit.*, para. 51.

63. The Appeals Tribunal has also recognized that the authority of a tribunal in the internal justice system to adjust disciplinary sanctions imposed by the Administration is highly controversial. The jurisprudence of the Appeals Tribunal has been quite moderate with regard to the modification of sanctions imposed by the Secretary-General. As a general rule, the “principle of proportionality requires that a disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct. The Administration has discretion to impose a disciplinary measure that it considers adequate to the circumstances of a case, and the Tribunal should not interfere with administrative discretion unless it is tainted by irrationality or is arbitrary.”<sup>43</sup> As discussed in *Arvizú Trevino*:<sup>44</sup>

(...) When judging the validity of the Administration’s exercise of discretion in administrative matters, (...) the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The first instance tribunal may consider whether relevant matters were ignored, and irrelevant matters considered, and also examine whether the decision is absurd or perverse. It is not the role of the first instance tribunal to consider the correctness of the decision made by the Administration amongst the various courses of action open to it. Nor is it the role of the first instance tribunal to substitute its own decision for that of the Administration.

64. With regard to breaches of the standards of integrity and, in particular, honesty, this Appeals Tribunal has held:<sup>45</sup>

(...) Fraud and dishonesty are serious misconduct. Any form of dishonest conduct, deception or fraud compromises the necessary relationship of trust between the Organisation and a staff member and will generally warrant the termination of employment. While the decision to terminate employment necessarily involves the consideration and weighing of a number of factors, both mitigating and aggravating, in instances of dishonesty the severity of the misconduct tends to outweigh other mitigating considerations such as length of service, a clean disciplinary record, difficult personal circumstances, expressions of remorse and the like. The reason for that is dishonesty by a staff member invariably seriously damages or destroys the relationship of mutual trust and confidence in a way that renders the continuation of a quasi-fiduciary employment relationship untenable or even intolerable.

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<sup>43</sup> *Leontine Geertina Petronella Specker v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1298, para. 26.

<sup>44</sup> *Op. cit.*, para. 50.

<sup>45</sup> *Hassan Abdel Majid Saleh v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1239, para. 33.

65. In respect of the disciplinary measure of separation from service, the Appeals Tribunal has noted:<sup>46</sup>

(...) In this regard, it must be kept in mind that termination is the ultimate sanction and should not be imposed automatically. The question to be answered in the final analysis is whether the staff member's conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable. (...) A decision on the appropriate sanction for misconduct, therefore, involves a value-judgment and the consideration of a range of factors. The sanction prescribed by the relevant staff rules or governing contractual provisions is normally the primary signifier of the appropriateness of a sanction, but the Tribunal remains vested with the authority to overturn a prescribed penalty if it is regarded as too excessive in the circumstances of the case. The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.

66. Having established the above, the UNDT's argument that the use of the previous "cell phone event" as an aggravating factor violated Ms. Mancinelli's due process rights and that the sanction was therefore arbitrary<sup>47</sup> was not accurate. Even if it was not appropriate for the Administration to use the incident as an aggravating factor (as it was not previously properly investigated), this fact alone did not render the sanction arbitrary, as other elements existed which could justify the same sanction. For instance, apart from using discarded and unauthorised shipping envelopes and the official UPS account to send her personal packages abroad, Ms. Mancinelli violated the usual practice of using DHL to ship internationally (due to the higher cost of UPS).<sup>48</sup> None of the members of the Facilities and Administrative Service of UN Women (FAS)<sup>49</sup> team were involved in the processing or approval of the two shipments

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<sup>46</sup> *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, paras. 47–48.

<sup>47</sup> Impugned Judgment, para. 60.

<sup>48</sup> Investigation report, para. 24. The investigation report also states that those envelopes were discontinued before November 2016 and the discarded ones were stored in a cabinet in the mail room. After November 2016, the practice was to generate shipment requests and labels through the UPS automated system (para. 22).

<sup>49</sup> Investigation report, para. 16, refers to the function of FAS as follows: "FAS ensures continued efficient, effective and high-quality support for management of facilities operations, space management and asset and lease management. It provides support in the areas of mail and pouch services, archiving and records management, office supplies and furniture, real estate, building management, hospitality and gifts."

and, as a result of the events involving Ms. Mancinelli, FAS opted to close the affected UPS account.<sup>50</sup>

67. Furthermore, the “momentary lapse of judgment” referred to by the UNDT as an argument to modify the sanction,<sup>51</sup> apart from being denied by Ms. Mancinelli in her answer to the Secretary-General’s appeal, is not consistent with the fact that she never expressed regret or remorse for her actions. Quite the opposite, whereas she had been requested to pay the precise amount since January 2018, in her correspondence with both OIOS and an Administrative and Facilities Specialist, Ms. Mancinelli incorrectly said that she had not been informed of the amount she owed and that this was “the mistake of others”. By so doing, she unjustifiably tried to excuse herself by blaming others for the delay of almost four months before she reimbursed UN Women.

68. The UNDT did not discuss these surrounding circumstances, which, taken together, could have led to the same sanction as imposed by the Administration. Other circumstances raised by Ms. Mancinelli in her answer to the Secretary-General’s appeal were not considered either by the UNDT, leading this Appeals Tribunal to the conclusion that, on the one hand, Ms. Mancinelli tries to use the opportunity to answer to the Secretary-General’s appeal as a way to file additional submissions to her own appeal, which is not permitted; on the other hand, the complex context in which the sanction was imposed, where various circumstances could have been taken into account, reaffirms the Appeals Tribunal jurisprudence that the Administration is best placed to assess the entirety of the situation, and the tribunals have limited scope to interfere, namely only in extreme situations where abuse or excess occur, which is not the case here.

69. Furthermore, the UNDT erred when it found that the Administration did not consider the mitigating factor of the amount involved and the fact that the Organization recovered it fully. As discussed previously, the fact that Ms. Mancinelli did not promptly reimburse the Administration was considered as relevant to the *core* of her wrongdoing and the delayed payment of her debt and/or its value could not be taken into account as a mitigating (and *peripheral*) circumstance to her benefit.

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<sup>50</sup> Investigation report, para. 28.

<sup>51</sup> Impugned Judgment, para. 61.

70. In addition, to the extent that the decision taken was not considered by the UNDT to be reasonable, the outcome should have been its rescission (so that the Administration would have had another opportunity to “accurately” exercise its discretion given all the circumstances of the case), rather than its adjustment by the UNDT itself. Thus, the UNDT erred in this regard.

71. The sanction was therefore not arbitrary, excessive, or abusive, and was thus a reasonable exercise of the Secretary-General’s discretion, which was based on a thorough investigative process in which various interviews were conducted, resulting in a comprehensive report. The UNDT hence committed an error of law when it improperly interfered with the choice of the sanction. Moreover, the elements identified by the UNDT had no impact on the establishment of the facts relevant to the determination of proportionality. The UNDT accordingly erred in taking these irrelevant considerations into account when determining the proportionality of the sanction. The fact of the matter is that the misappropriation by Ms. Mancinelli did occur and only inconsequential aspects of her behaviour were contested.

72. Ms. Mancinelli’s appeal accordingly fails and the Secretary-General’s appeal succeeds.

73. Having reached this decision, the Appeals Tribunal understands that certain disciplinary measures may seem harsh, begging the question as to whether the Administration could employ the principles of progressive or corrective discipline and graduation in sanction,<sup>52</sup> when the circumstances of the case reveal that remedies have been made by the relevant party and that the element of trust in the relationship can be repaired. A mediation process involving a pedagogical approach can often resolve issues with a positive outcome for both parties in the interest of the Organization.

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<sup>52</sup> *Turkey, op. cit.*, paras. 24, 39, 42.

**Judgment**

74. Ms. Mancinelli's appeal is dismissed, and the Secretary-General's appeal is granted. Judgment No. UNDT/2022/035 is reversed and Ms. Mancinelli's application is dismissed in its entirety.

Original and Authoritative Version: English

Decision dated this 24<sup>th</sup> day of March 2023 in New York, United States.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Sandhu

*(Signed)*

Judge Raikos

Judgment published and entered in the Register on this 5<sup>th</sup> day of May 2023 in New York, United States.

*(Signed)*

Juliet Johnson, Registrar