UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2022/006
Judgment No.: UNDT/2023/123
Date: 7 November 2023
Original: English

Before: Judge Margaret Tibulya

Registry: Geneva

Registrar: René M. Vargas M.

REILLY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Jérôme Blanchard, HRLU, UNOG

Introduction

1. The Applicant, a former Human Rights Officer at the P-3 level in the Office of the United Nations High Commissioner for Human Rights ("OHCHR"), Geneva, contests the disciplinary sanction of separation from service with compensation in lieu of notice and half termination indemnity.

2. For several years and on numerous occasions, the Applicant has been denouncing a practice by the Organization that she considers unlawful. In her view, the Secretariat of the Human Rights Council ("HRC"), OHCHR, has on several occasions illegally disclosed to a Member State's delegation the names of human rights activists who were accredited to attend HRC sessions ahead of the sessions ("the practice"). This practice was allegedly putting in jeopardy the safety of activists and their families.

3. In this connexion, the Applicant has also filed complaints of possible misconduct implicating high-ranking officials and requested protection against retaliation. The issues around these complaints are the subject of other cases under adjudication at this Tribunal and will not be determined in the instant judgment, which is limited in scope to determine the lawfulness of the contested decision, i.e., the disciplinary sanction imposed on the Applicant following an investigation into possible unsatisfactory conduct.

4. For the reasons set out below, the Tribunal dismisses the application in its entirety.

Facts

5. By letter of 10 June 2020 to the Applicant, the Under-Secretary-General, Management Strategy, Policy and Compliance ("USG/DMSPC") informed her that:

a. A fact-finding panel ("the 2019-2020 fact-finding panel") had been convened to investigate the complaints for possible misconduct that the Applicant filed against the former United Nations High Commissioner for

Human Rights, and the Chief, Human Rights Council Branch ("HRCB"), OHCHR;

b. The fact-finding panel found insufficient evidence to support her claims;

c. She reviewed the information the fact-finding panel collected and agreed with its findings;

d. She noted that the Applicant told the fact-finding panel that she had shared the subject of her complaints with external parties, including Member States and the press, on a number of different occasions, both verbally and in writing; and

e. Advised the Applicant that she was not authorized to engage with Member States or contact the media concerning those issues.

6. On 18 June 2020, the Deputy High Commissioner for Human Rights ("DHC") met virtually with the Applicant at the request of the then High Commissioner for Human Rights ("High Commissioner") and the USG/DMSPC. In this meeting, the DHC reiterated the instructions in the letter dated 10 June 2020, further emphasizing that the Applicant was not authorized to make comments to any external entity about the issues she had raised in her complaints of possible misconduct.[1] The DHC further advised the Applicant that, if she did, she would be in breach of her obligations as a staff member of the United Nations ("UN"). Subsequently, the DHC requested the Applicant to cease and desist from raising these matters publicly, and to remove her recent posts from social media.

7. On 26 June 2020, the Office of Internal Oversight Services ("OIOS") received a report of possible unsatisfactory conduct regarding the Applicant filed by the then High Commissioner. The report noted, *inter alia*, that the Applicant had posted an extensive number of tweets and retweets since 10 June 2020 on an almost daily

[1] See Annex 2 to the Respondent's reply, pp. 367-370 of the case file.

basis, implicating several senior officials and advancing serious accusations against the Organization.[2]

8. On 15 July 2020, after its initial assessment, OIOS forwarded the matter to OHCHR for appropriate action, pursuant to ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).[3] The following day, the High Commissioner recused herself from any further review and referred the matter to the USG/DMSPC for assessment of any further steps.[4]

9. On 21 October 2020, OIOS received a second report of possible unsatisfactory conduct (the "supplementary report") indicating that the Applicant had continued to advance her allegations against the Organization by contacting external diplomatic representatives, posting an extensive number of tweets and retweets in her personal Twitter account, and giving unauthorized media interviews.[5]

10. On 17 December 2020, the Secretary-General delegated authority to the USG/DMSPC to act as the responsible official on the two reports OIOS received against the Applicant.[6]

11. On 4 January 2021, the USG/DMSPC appointed an investigation panel ("the investigation panel") under ST/AI/2017/1 to investigate the allegations contained in the two reports.[7] Namely, the investigation panel was requested to:

> a. Investigate and ascertain the nature, content and substance of any external communications by the Applicant; and
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> b. Obtain all information and/or evidence relevant to any justification the Applicant may provide for any external communications.

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2 Case file, p. 372.
3 Ibid., p. 376.
4 Ibid., p. 377.
5 Ibid., p. 378.
6 Ibid., p. 1420.
7 Ibid., p. 393.

12. On 5 April 2021, the investigation panel completed its investigation report.[8] It found that subsequent to and in defiance of the letter dated 10 June 2020 and the instructions of 18 June 2020, the Applicant continued to communicate with third parties external to the Organization without authorization. She did so by posting on social media, engaging with the media through interviews to different outlets and contacting representatives of Member States and of the European Union ("EU").

13. By memorandum dated 30 July 2021, the Applicant was requested to respond to formal allegations of misconduct, which, if established, would constitute violation of staff regulations 1.2(f), (g), and (i), staff rules 1.2(a), (j), and (t), as well as section 4 of ST/AI/2000/13 (Outside Activities).

14. On 30 September 2021, after having been given an extension of time, the Applicant submitted her comments on the allegations of misconduct.

15. On 9 November 2021, the Applicant was informed that the USG/DMSPC:

a. Found clear and convincing evidence that she engaged in serious misconduct; and

b. Decided to impose on the Applicant the disciplinary sanction of separation from service with compensation in lieu of notice and half termination indemnity ("the contested decision").

Procedural History

16. On 7 July 2022, the Applicant filed the instant application against the contested decision.

17. On 11 March 2022, the Respondent filed his reply.

18. On 3 April 2023, the above-mentioned case was assigned to the undersigned Judge.

[8] Ibid., p. 423.

19. By Order No. 30 (GVA/2023) of 4 April 2023, the Tribunal invited the parties to attend a Case Management Discussion ("CMD") in person.

20. During the CMD on 26 April 2023, the Tribunal heard the parties' positions concerning the subject-matter under adjudication, holding a hearing on the merits, and the Applicant's requests for disclosure of evidence.

21. On 18 May 2023, the Respondent filed a motion requesting authorization to file the annexes to the investigation report, which were neither attached to the application nor to the Respondent's reply.

22. By email notification dated 19 May 2023, the Tribunal granted the Respondent's motion of 18 May 2023.

23. By Order No. 50 (GVA/2023) of 19 May 2023, the Tribunal:

a. Instructed the Respondent to file documentary evidence in support of the delegation of authority of the USG/DMSPC to act as the responsible official in the matter at hand; and

b. Decided to hold a hearing on the merits, in camera, on 8 June 2023.

24. On 23 May 2023, the Respondent filed the documentary evidence requested in Order No. 50 (GVA/2023), and the annexes referred to in para. 21 above.[9]

25. By motion filed on 2 June 2023, the Applicant requested the Tribunal to reconsider having the hearing in camera, except for the testimony of a witness.

26. By Order No. 56 (GVA/2023) of 5 June 2023, the Tribunal reiterated its intent to protect the identity of the witness called to testify. It also underlined that the hearing was an opportunity for the parties to fully make their case through, *inter alia*, opening and closing submissions, and that the interest of justice was better served if the parties could do so as freely as possible. Accordingly, the Tribunal determined that the testimony of the witness would be heard "in camera",

[9] Ibid., p. 553.

alongside the parties' opening and closing submissions, and the part of the hearing related to the Applicant's testimony would be open to the public.

27. On 8 June 2023, the Tribunal held a hearing on the merits, pursuant to Orders No. 50 (GVA/2023) and No. 56 (GVA/2023).

28. By Order No. 64 (GVA/2023) of 26 June 2023, the Tribunal instructed the parties to file their respective closing submission.

29. On 10 July 2023, the Respondent filed his closing submission. The Applicant filed hers on 14 July 2023.

Consideration

30. Pursuant to the Appeals Tribunal's jurisprudence, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing evidence requires more than a preponderance of evidence but less than proof beyond a reasonable doubt. It means that the truth of the facts asserted is highly probable (*Molari* 2011-UNAT-164, para. 2).

31. The Appeals Tribunal has also guided that in imposing a disciplinary sanction, decision-makers enjoy a wide discretionary area of judgment. Due deference should be given to the discretion of the decision-maker (*Cheikh Thiare* 2021-UNAT-1167, para. 33). In *Cheikh Thiare*, the Appeals Tribunal further added:

> 33. […] the Administration is the best suited actor to select an adequate sanction able to fulfil the following general requirements, which include *inter alia* that the sanction imposed is within the limits stated by the respective norms, and second, the sanction must be 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.

32. It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him, nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General. The role of the Dispute Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence (*Molari*, para. 1).

33. Having examined the evidence on record, the Tribunal identified the following issues for determination:

a. Whether the facts on which the disciplinary measure was based have been established by clear and convincing evidence;

b. Whether the Applicant had a lawful justification for her conduct;

c. Whether the established facts legally amount to misconduct;

d. Whether the disciplinary measure is proportionate to the offence; and

e. Whether the Applicant's due process rights were respected.

Whether the facts have been established

34. It is undisputed that between 10 June 2020 and the issuance of the investigation panel's report, the Applicant:

a. Contacted Member States and the European Union;

b. Responded to the press; and

c. Posted several times on social media.

35. During the hearing, the Applicant explained that following previous hearings in the Dispute Tribunal where the Respondent claimed that the practice in issue had not ceased, she went through some 2019 documents to establish the veracity of this information. She established that some of the people whose attendance at the HRC had been "disclosed" prior to the sessions were nationals of Member States that

were unaware of the practice. Consequently, she sent letters to representatives of the European Union and to the relevant Member States to inform them of the practice as far as some of their citizens were concerned.[10]

36. The Applicant's testimony and the documentary evidence prove that the Applicant:

a. On several occasions, repeated her allegations concerning the practice, criticized senior officials, and requested action from external parties by:

i. Contacting the Minister of Foreign Affairs for the European Union, European External Action Service, by letter on 6 July 2020;[11]

ii. Contacting the Permanent Representatives of the United States to the United Nations in New York and in Geneva, the Permanent and Deputy Permanent Representatives of the Republic of Ireland to the United Nations in Geneva, a State Department official, a staffer for the United States Senate Appropriations Committee, and the generic address of the United States Permanent Mission to the United Nations in New York, by email on 29 July 2020;[12]

iii. Contacting a member of the European Parliament by letter on 4 October 2020 without authorization. In the letter, she also suggested the possibility of the European Commission withholding its annual contribution to OHCHR;[13] and

iv. Contacting the Permanent Representative of Austria in Geneva and the Swiss Mission by letter of 22 January 2021. This letter contains serious allegations of unlawful acts, cover ups and retaliation against senior officials up to and including the Secretary-General;[14]

[10] See audio recording of the hearing on the merits, first part, starting at 1:12:03.
[11] Case file, p. 845.
[12] Ibid., p. 1167.
[13] Ibid., p. 843.
[14] Ibid., pp. 1034-1038.

b. Admitted that the statements made on her Twitter profile were indeed from her, namely over 300 tweets and retweets, and did not deny that the content of her posts was damaging to the Organization. She further stated that she created a Twitter account specifically to respond to what she considered defamation against her by the Organization in relation to its press release of 2017;[15]

c. Responded to a number of media outlets and/or gave interviews without authorization, including but not limited to:

i. Fox News, in an article entitled "UN official, in recording, talks of getting US 'off the UN's back', preventing cuts with whistleblower system", published on 21 July 2020;[16]

ii. LBC (British Radio Station) on 1 November 2020;[17]

iii. Talk East Turkestan, live-streamed on 2 November 2020;[18]

iv. Radio Free Asia, in an article entitled "Former UN official calls for probe of rights body confirming dissident testimonies to China", published on 6 November 2020;[19]

v. Conflits France on 8 November 2020;[20]

vi. Libération, in an article entitled "L'ONU donne-t-elle des noms de militants ouighours aux autorités chinoises, comme l'affirme Emma Reilly ?", published on 17 November 2020;[21]

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15 See audio recording of the hearing on the merits, first part, starting at 1:13:42.

16 Case file, p. 1136 of the case file.

17 See "Annex A: Evidence Log" to the investigation report, document 4.4.5 titled "Ms. Reilly interview with LBC, dated 1 November 2020.

18 See "Annex A: Evidence Log" to the investigation report, document 2.7.3 titled "Talk East Turkestan interview – 'Live Emma Reilly: Is the UN selling out the Uyghurs?' – live-streamed dated 2 November 2020".

19 Case file., p. 914.

20 Ibid., p. 972 and audio recording of the hearing on the merits, second part, starting at 14:08.

21 Ibid., p. 981 and audio recording of the hearing on the merits, second part, starting at 16:05.

vii. South China Morning Post, in an article entitled "What to do when the UN human rights office may have violated human rights?", published on 13 December 2020;[22]

viii. Anadolu Turkish News Agency, in an article entitled "Leaked emails confirm UN passed info to China in name-sharing scandal", published on 18 January 2021;[23]

ix. Foundations of Defence of Democracies Podcast, in an interview entitled "the UN and the illiberal international order", aired on 26 February 2021;[24] and

x. Global Liberty Alliance Podcast, in an interview entitled "United Nations corruption endangering human rights activists, a talk with whistleblower & lawyer, Emma Reilly", aired on 2 March 2021.[25]

d. Asked about the oral warning received on 18 June 2020 reiterating the content of the letter dated 10 June 2020, the Applicant said that she considered the instructions to be illegal. She further admitted that she was aware of the implications of her actions, specifically stating that she believed she had an international legal obligation to disobey the orders.[26]

37. The remaining news articles that are part of the allegations of misconduct only reverberated the news from the Applicant's posts and interviews to other media outlets. They cannot, therefore, be attributed to the Applicant and are not established as part of her conduct. The same goes for letters to Member States that were inferred from interviews during the investigation by OIOS, but were not verified by this Tribunal, either by documentary or oral evidence.

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22 Ibid., p. 920 and audio recording of the hearing on the merits, second part, starting at 10:50.

23 Ibid., p. 900 and audio recording of the hearing on the merits, second part, starting at 18:44.

24 Ibid., pp. 900 and 927 and audio recording of the hearing on the merits, second part, starting at 12:55.

25 Ibid., p. 925 and audio recording of the hearing on the merits, second part, starting at 11:32.

26 See audio recording of the hearing on the merits, first part, starting at 2:00:40.

38. Based on the Applicant's own admissions and the available extensive documentary evidence, the Tribunal finds that the aforementioned facts detailed on para. 36 above, and on which the disciplinary measure was mostly based, have been established by clear and convincing evidence.

Whether the Applicant had a lawful justification for her conduct

39. The Applicant argues that she was legally justified to communicate externally.

40. She claims that despite her best efforts to report the matter internally, no action was taken regarding the Organization's alleged illegal and dangerous practice (see para. 2 above). She justifies her conduct as an obligation under the Charter of the United Nations and international law.

41. The Tribunal will analyse these claims to determine whether they indeed amount to a legal justification.

Right to speak to the media

42. In a letter to the Guardian dated 21 January 2018,[27] the Under-Secretary-General for Management, United Nations, stated, *inter alia* that "contrary to the article, the United Nations does not prevent staff from speaking to the media and UN staff accused of crimes do not enjoy diplomatic immunity". Citing this statement, the Applicant claims that she acted under the understanding that she had a right to respond to the press.[28]

43. The question of whether staff members may address the press is a function of the law.

44. The Standards of Conduct for the International Civil Service stipulate under para. 9 that (emphasis added):

> Impartiality implies tolerance and restraint, particularly in dealing with political or religious convictions. While their personal views

[27] See https://www.theguardian.com/world/2018/jan/21/un-is-dealing-with-sexual-harassment.
[28] See audio recording of the hearing on the merits, first part, starting at 2:24:26.

> remain inviolate, international civil servants do not have the freedom of private persons to take sides **or to express their convictions publicly on controversial matters,** either individually or as members of a group, irrespective of the medium used. This can mean that, in certain situations, personal views should be expressed only with tact and discretion.

45. In addition, staff rule 1.2(t) provides that:

> Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any outside activities that relate to the purpose, activities or interests of the United Nations. Outside activities include but are not limited to:
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> (i) Issuing statements to the press, radio or other agencies of public information;
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> (ii) Accepting speaking engagements;
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> (iii) Taking part in film, theatre, radio or television productions;
>
> (iv) Submitting articles, books or other material for publication, or for any electronic dissemination.
>
> Approval may be granted in accordance with staff regulation 1.2 (p).

46. In the Tribunal's view, even if the Under-Secretary-General for Management's statement referred to in para. 42 above were interpreted in the way the Applicant suggests, that statement does not support a right to freely communicate with the media or to engage in unauthorized outside activities. The statement simply indicates that a prohibition against speaking to the media does not exist. It does not mean that staff members are allowed to circumvent their obligations under the rules of the Organization.

47. Even if the aforementioned statement were interpreted in the way suggested by the Applicant, the Tribunal notes that after the letter of 21 January 2018 to the Guardian, the Applicant was instructed to cease her conduct from 10 June 2020.

48. In this scenario, the above statement could only serve to justify the Applicant's actions between 21 January 2018 and 10 June 2020. Once the Applicant was advised by the USG/DMSPC that she was "not authorized to engage with Member States or contact the media concerning [those] issues", she should have ceased her actions. She did not.

49. The Tribunal is therefore not persuaded by the Applicant's assertion that she was justified in her actions based on a right to address the press.

The Applicant's whistleblower status

Alleged recognition by the Secretary-General

50. During the hearing, the Applicant reiterated her understanding that the Secretary-General had granted her whistleblower status during an in-person meeting at the diplomatic lounge of the Geneva Airport in February 2020 and that, consequently, her subsequent conduct was protected from retaliation.[29]

51. When confronted about the fact that the meeting allegedly took place four months before the 10 June 2020 letter, the Applicant responded that she wrote to the Secretary-General after receiving the letter seeking clarification about whether he had changed his position about her whistleblower status. She did not get a response. She therefore understood that her whistleblower status remained unchanged, and that the instructions from the USG/DMSPC of 10 June 2020 and the DHC of 18 June 2020 were illegal.[30]

52. The Applicant further suggests that she could reasonably rely on the Secretary-General's description of her status to claim the right to report externally, including through social media.[31]

53. In the Tribunal's view, however, the applicable legal framework does not clothe the Secretary-General with powers to grant whistleblower "status" or protection against retaliation to anyone. Whistleblower is not a "status" to be given,

[29] See audio recording of the hearing on the merits, first part, starting at 2:28:22.
[30] See audio recording of the hearing on the merits, second part, starting at 20:33.
[31] Ibid., starting at 20:55.

but rather the condition of an individual who in good faith reports any breach of the Organization's Regulations and Rules to a responsible official. Pursuant to secs. 1.4 and 2.1 of ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) (the "PaR policy"), that individual has a right to be protected against retaliation in the event of any direct or indirect detrimental action aimed at punishing, intimidating or injuring her/him on account of having engaged in a protected activity.

54. When reporting wrongdoing, the "whistleblower" has a right, under sec. 5 of the PaR policy, to preventive measures of protection if OIOS identifies a retaliation risk. In this scenario, OIOS will inform the Ethics Office, which will then take action.

55. In the event that a "whistleblower" believes that a retaliatory action has been taken against him/her for having engaged in a protected activity, the individual may submit a request for protection against retaliation to the Ethics Office, pursuant to sec. 6 of the PaR policy. In this scenario, the Ethics Office would subsequently conduct a preliminary review to determine (a) if the complainant engaged in a protected activity, and (b) if there is a *prima facie* case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.

56. Secs. 7 and 8 of the PaR policy provide that the Ethics Office will grant protective measures, if any, to whistleblowers for whom a finding of *prima facie* case of retaliation has been made, which will be followed by a full fact-finding investigation into the matter by OIOS. If the investigation finds that retaliation indeed occurred and the standard of proof is met, the Ethics Office will recommend to the head of department or office concerned the appropriate measures aimed at addressing the issue, correcting negative consequences suffered, and protecting the complainant from any further retaliation.

57. Accordingly, protection against retaliation and correlated corrective measures shall be recommended by the Ethics Office following a finding of a *prima facie* case of retaliation and an investigation by OIOS. Pursuant to sec. 8.8, should the Ethics Office not be satisfied with the response from the head of department or

office concerned, it can make a recommendation to the Secretary-General, who will then provide a written decision on the recommendations of the Ethics Office to the complainant.

58. As it follows, the PaR policy does not foresee any other possibility for granting protection against retaliation, and the Secretary-General may only act upon recommendation by the Ethics Office. Never on its own volition.

59. Furthermore, even if the Secretary-General had the legal authority to grant it, there is no evidence supporting the assertion that he, in fact, granted "whistleblower status" to the Applicant. The Applicant bases this claim on three events:

a. An in-person meeting in February 2020;[32]

b. A 2 April 2018 letter[33] from the Secretary-General's Chef de Cabinet; and

c. A Town Hall of December 2019.[34]

60. According to the Applicant, in February 2020, the Secretary-General

> [e]xplicitly stated that he knew [the Applicant and Ms. M. B.] were both whistleblowers who had fulfilled [their] duties as staff members in reporting misconduct, and were being subjected to ongoing retaliation. He claimed resolution of our cases would be "difficult," because he was himself facing public criticism from the persons who had led retaliation against [them] in the recent past. He further stated that he had no control over OHCHR, despite it being part of the Secretariat that he heads, or even over the persons handling our cases, whom he did not name, but who appeared in context to have more direct reporting lines to him.[35]

61. The 2 April 2018 letter, in its relevant parts, states as follows:

> It is clear that, whatever the merits of her concerns, and whatever other formal procedures may still be pending, [the Applicant]

[32] See the Applicant's response to allegations of misconduct, annex 7 to the application, para. 115.
[33] Case file, p. 290.
[34] See the Applicant's response to allegations of misconduct, annex 7 to the application, para. 114.
[35] Ibid., para. 115.

> considers her working environment to be hostile and that she is the subject of harassment and/or retaliation. The Secretary-General has the responsibility to ensure that all efforts are made to provide staff with a harmonious work environment.
>
> The Secretary-General has also taken note that the events underlying the concerns of [the Applicant] occurred approximately five years ago, and that the UNDT case and her complaint of prohibited conduct of March 2017 remain pending with an uncertain outcome and timeframe for completion.
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> …
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> Notwithstanding such mediation efforts, for this particular case, the Secretary-General is delegating authority under the applicable legal framework to the Assistant Secretary-General for Human Resources Management, through the Under-Secretary-General for Management, to exercise placement authority to move [the Applicant] to an appropriate position within OHCHR at the earliest opportunity."

62. Far from granting "whistleblower status" to the Applicant, the Secretary-General only sought to recognize a duty of care to her and to fulfil the Organization's obligation to ensure that all efforts were made to provide her with a harmonious work environment, since she considered her working environment to be hostile and that she was the subject of harassment and/or retaliation.

63. The Secretary-General's directive to move the Applicant to an appropriate position within OHCHR was clearly tentative and based on the Applicant's own perception of her situation. This cannot be the basis for the assertion that she was "given protection" by the Secretary-General.

64. Similarly, there was no "granting [of] whistleblower status" by the Secretary-General during the diplomatic lounge meeting. The Applicant's assertion in this regard is factually incorrect.

65. The Applicant's own statement is that the Secretary-General simply acknowledged her action of reporting misconduct and stated that he "knew she was a whistleblower".[36]

66. The sworn testimony of the Applicant's colleague[37] who attended the same meeting is that,

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> [the Secretary General] indicated straight away that he was familiar with both of [their] situations and immediately recognized that [they] were whistleblowers and that [they] had been subject to serious retaliation.
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> …
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> [the Secretary General's] message was essentially that he heard [them both], he acknowledged that [they] were whistleblowers who had been subjected to ongoing retaliation […]. [The] impression [of the Applicant's colleague] was that he genuinely accepted [their] positions were correct and wanted to resolve [their] situations.

67. In the Tribunal's view, a distinction must be made between the Applicant's statement that the Secretary-General "explicitly stated" that she was a whistleblower, and her colleague's statements that the Secretary-General "immediately recognized" and "acknowledged that [they] were whistleblowers". That distinction is made clear by the colleague's further statement that her "impression" was that the Secretary-General genuinely accepted that their positions were correct and wanted to resolve their situations.

68. Contrary to the Applicant's assertion, the conclusion that the Secretary-General recognized her as a whistleblower is only based on her own perception. There are no explicit statements supporting it. This is lent credence by his silence[38] when the Applicant sought clarification on the issue.

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[36] See audio recording of the hearing on the merits, first part, starting at 2:28:22.

[37] Case file, p. 316.

[38] Case file, pp. 319-322.

69. Finally, the claim that the Secretary-General recognized the Applicant as a whistleblower during a Town Hall is equally flawed. At the Town Hall in question, the Secretary-General responded to a query from a former staff representative of the World Intellectual Property Organization ("WIPO") about retaliation and dismissal of staff by the WIPO Director-General despite legal protections.[39]

70. The former WIPO staff representative explained that retaliation was not taking place at WIPO alone, but at other specialized and non-specialized UN agencies such as OHCHR where two people (one of whom was allegedly the Applicant) were retaliated against and blacklisted. He further explained that the Applicant blew the whistle on the aforementioned practice, but that she was now paying with her own existence. He appealed to the bigger UN system for protection and asked that the Secretary-General intervene to re-establish a sense of justice.

71. In his response, the Secretary-General stated that he is interested in making sure that harassment does not exist in the Organization. He noted that the whistleblower policy has been changed twice, and that he is interested in making it work and not to have any whistleblowers penalized. He stated that he had been informed that the whistleblower policy in place is adequate, but that he would improve it if necessary.

72. The Secretary-General further mentioned that he had looked into the cases of retaliation that were mentioned, some of which were in the Secretariat, that investigations were being conducted, and that other measures had been taken to protect the staff.

73. The above excerpts clearly indicate that the conclusion that the Applicant was a whistleblower was of the former WIPO staff representative, and not of the Secretary-General. Indeed, in his response, the Secretary-General only talked about the effectiveness/ineffectiveness of the whistleblower policy in the Organization, and his desire to have the current policy work flawlessly. Nowhere in his response did he state, explicitly or by implication, that he recognized the Applicant as a

[39] See annex 54 (audio file) to the Applicant's response to allegations of misconduct (annex 7 to the application).

whistleblower. His reference to the cases of retaliation that were mentioned is not basis for the assertion that he recognized the Applicant as a whistleblower, especially since he mentions that he was aware that investigations were still ongoing, thus implying that a conclusion was yet to be arrived at.

74. There is therefore no evidence supporting the claim that the Secretary-General "granted" the Applicant "whistleblower status". Even if he had done so, such recognition would be without legal consequence since the Secretary-General has no powers to grant it.

Recognition by the Ethics Office

75. On 27 July 2020, the then Alternate Chair of the Ethics Panel of the United Nations ("EPUN"), issued a report about his review of the determination of the UN Ethics Office ("Ethics Office" or "UNEO") of 25 October 2019 concerning the Applicant's request for protection against retaliation rendered in Case ID 20331. In said report, the Alternate Chair concluded that the UNEO October 2019 determination be reversed and replaced by a *prima facie* finding of retaliation. He also made several other recommendations.[40]

76. On 21 September 2020, the USG/DMSPC addressed a note to the Director, UNEO, informing him that the Administration would not implement the recommendations of the Alternate Chair, who was found to have "exceeded his mandate in carrying out his review and making his findings".[41]

77. By memorandum of 5 October 2020, the Director, UNEO, informed the Applicant *inter alia* that the Organization decided not to implement the recommendations made by the Alternate Chair, and that it would follow-up with an investigation.[42]

[40] Case file, pp. 685-696.
[41] See facts section of *Reilly* UNDT/2023/122, para. 16.
[42] Ibid., para. 19.

78. On 26 October 2020, the Ethics Office referred the Applicant's case to OIOS for investigation pursuant to sec. 8.1 of the PaR policy.[43]

79. On 11 January 2021, OIOS advised UNEO that it fully agreed with the conclusion of the USG/DMSPC that the Alternate Chair, EPUN, exceeded his mandate in the aforementioned review, and that in the absence of a *prima facie* case of retaliation, it would not open an investigation into the matter.[44]

80. On 16 April 2021, the Applicant filed an application contesting *inter alia* the decision not to implement the recommendations of the Alternate Chair, EPUN, which is the subject of another case before the Tribunal registered under Case No. UNDT/GVA/2021/024 (Reilly).

81. The Applicant maintains that she was recognized as a whistleblower in the report of 27 July 2020 and that, for the period covered by the allegations of misconduct under the instant judicial review, the official position of the Ethics Office was that she was a whistleblower whom the Organization had failed to protect for the previous seven years.

82. Aware that the decision not to implement the former Alternate Chair's report is the subject of litigation in Case No. UNDT/GVA/2021/024 (Reilly), the Tribunal considers that issues relating to the propriety/impropriety of the decision not to follow the recommendations of that report are best left for the Tribunal's determination in that case.

83. For the purpose of determining the issues presented in this case, both parties agree that the Applicant's request for protection against retaliation related to a report about misrepresentation of academic qualifications by the former DHC, OHCHR.

84. The parties also agree that the Administration refused to implement the former Alternate Chair's report, which caused a fresh review by the Ethics Office. Absent a judicial pronouncement determining that, even with the identified

[43] Ibid., para. 22.
[44] Ibid., para. 23.

anomalies the former Alternate Chair's report was still valid, the Applicant cannot rightly base her claim to whistleblower status on that report.

85. Furthermore, even if the Applicant was indeed under the impression that she was granted whistleblower status under the recommendations of the Alternate Chair, EPUN, of 27 July 2020, her position ceased, at the earliest, on 5 October 2020 (see para. 77 above), or, at the latest, on 19 October 2020, when the Applicant tweeted the following: "[the Secretary-General] just refused to follow the UN Ethics Panel recommendations that I be protected from blowing the whistle".[45]

86. Based on the foregoing, it is clear that on that date, the Applicant was aware that she was not being granted protection against retaliation or "whistleblower status".

87. It should be further emphasized that even if the Applicant had indeed been granted protection against retaliation for "blowing the whistle" on the practice, it would not have conferred on her a right to act against her obligations as an international civil servant or against the law of the Organization.

88. A whistleblower plays a crucial and fundamental part in helping the Organization function in an open, transparent, and fair manner. Individuals who report misconduct or cooperate with duly authorized audits or investigations are and should be protected from retaliation.

89. Under sec. 1.4 of the PaR policy:

> [r]etaliation means any direct or indirect detrimental action that adversely affects the employment or working conditions of an individual, where such action has been recommended, threatened or taken for the purpose of punishing, intimidating or injuring an individual because that individual engaged in an activity protected by the present policy as set out in section 2 below ("protected activity").

[45] Case file, p. 1408.

90. The Applicant's claim in this case, however, is not to be protected against retaliation following engagement in a protected activity. Rather, she is seeking a "blank check" or "free rein" to act without consequences, to not be investigated for possible misconduct, or be disciplined as a result. That is not what the PaR policy seeks to protect, and that is not what being a whistleblower entails.

91. Whistleblower protection against retaliation seeks to shield whistleblowers from adverse actions as a result of blowing the whistle. A whistleblower, however, is not to be protected from disciplinary measures when he or she commits misconduct.

92. In other words, suffering retaliation for blowing the whistle is one thing. Being placed under investigation for engaging in unauthorized outside activities including mounting a public campaign against the Organization and some of its officials, after being explicitly advised against it, is a completely different matter.

93. The Tribunal therefore finds no basis for the assertion that the Applicant was a recognized whistleblower during the time of the events. Even if she had been, such status does not shield her from an investigation for unrelated conduct.

Right to report misconduct externally

94. The Applicant claims that she had a right as a staff member and whistleblower to report misconduct through external mechanisms, pursuant to sec. 4 of the PaR policy. The Respondent argues, however, that the Applicant does not meet the cumulative criteria under sec. 4 and, thus, that her actions were not legally protected.

95. Sec. 4 of the PaR policy provides as follows in its relevant parts:

> **Reporting misconduct through external mechanisms**
>
> [P]rotection against retaliation will be extended to an individual who reports misconduct to an entity or individual outside of the established internal mechanisms, where the criteria set out in subparagraphs (a), (b) and (c) below are satisfied:
>
> (a) Such reporting is necessary to avoid:

(i) A significant threat to public health and safety; or

(ii) Substantive damage to the Organization's operation; or

(iii) Violations of national or international law; and

(b) The use of internal mechanisms is not possible because:

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

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

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

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

96. Proceeding from the premise that the PaR policy provides protection against retaliation for reporting misconduct, the Respondent raises a critical issue: whether the Applicant in fact reported misconduct to an external party. He claims that instead, the Applicant mounted an active public campaign in the media, including social media, to vilify and denigrate the Organization. The Respondent further asserts that the Applicant merely made very serious public allegations of misconduct, cover ups and complicity in genocide against the Organization and its officials, which is not comparable to reporting misconduct.

97. It is not disputed that the external communications that the Applicant engaged in included allegations that the UN and its officials were involved in serious acts of misconduct and crimes of international law, including complicity in genocide, and that the Applicant also campaigned that donors should withhold their contributions to the Organization.

98. Based on the Applicant's own categorization of her activities, and on the nature of those activities, the Tribunal is persuaded by the argument that she did not externally report misconduct when engaging with media outlets and posting accusations on social media. Indeed, she mounted an active public campaign in the media and social media to vilify and denigrate the Organization, which sec. 4 of the PaR policy is not intended to authorize.

99. When it comes to the letters the Applicant sent to Member States and the EU, however, the Tribunal accepts that the Applicant's intention was indeed to report what she considered misconduct to an external party connected to the issues. Hence, the Tribunal views this conduct as a form of reporting misconduct through external mechanisms in keeping with sec. 4 of the PaR policy.

100. For the Applicant to qualify for protection against retaliation she had to meet the cumulative criteria under subparagraphs (a), (b), and (c) of sec. 4 of the PaR policy.

Subparagraph (a)

101. To meet the criteria under subparagraph (a), the Applicant's reporting must be deemed necessary to avoid:

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

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

c. Violations of national and international law.

102. The Applicant testified that the human rights activists whose names were confirmed to a Member State's delegation were at high risk of being intimidated to not appear at or change statements ahead of HRC sessions. According to her, by "providing" the names of accredited individuals ahead of HRC sessions, the UN was essentially assisting in targeting them.[46]

[46] See audio recording of the hearing on the merits, first part, starting at 1:19:25.

103. The Applicant's testimony is corroborated by the evidence of a human rights activist ("W01") with respect to the threat that this practice potentially posed to the safety of activists and their immediate families. W01 cited a few personal examples to illustrate the situation. In 2012, Government authorities used its influence against his brother to try to intimidate W01 into stopping his activism and to stop him from attending an HRC session where he would testify. In 2018, when W01 was due to speak at the HRC again, his brother called him multiple times showing concern about his safety and asking why W01 could not find another job. Lastly, in 2019, his brother was put under city arrest from February to June.[47]

104. When W01 was shown an email from a government authority seeking confirmation about accreditation/attendance of the people listed therein for the HRC 22nd session in 2013, he confirmed the serious risks that this practice presented to activists, and whose families were vulnerable to pressure and intimidation from Government authorities.

105. Testifying about the HRC Secretariat confirming the attendance of several activists, including one whose husband was imprisoned at the time, W01 said that this was a moral issue that put in jeopardy the lives of activists and their families.[48]

106. Addressing the fact that HRC sessions are transparent, and that the names of activists who attend sessions are part of the public domain, W01 stated that he would only publish his activities, including participating at the HRC, after the sessions. This was done to minimize exposure and to limit his family's knowledge of his plans and, consequently, the ability of others to leverage on this information.[49]

107. It is noted that the above evidence was neither controverted nor challenged in any substantial manner by the Respondent.

[47] See audio recording of the hearing on the merits, third part, starting at 14:30.
[48] Ibid., starting at 26:30.
[49] Ibid., starting at 20:00.

108. The available evidence including the human rights activists' testimony permits a conclusion that at the time of her letters and in the Applicant's perception, reporting the practice in issue was necessary to avoid a significant threat to public health and safety.

109. Based on the foregoing, the Tribunal accepts the Applicant's explanation and concludes that the Applicant's letters to Member States and the EU reporting an allegedly dangerous practice constituted external reporting, which, in the Applicant's perception, was necessary at the time to avoid a significant threat to the safety of human rights activists and their families.

110. Accordingly, the Applicant's letters to representatives of the EU and of Member States, detailed in para. 36.a above, meets the criteria under sec. 4(a)(i) of the PaR policy.

Subparagraph (b)

111. The Respondent's position on the issue of whether the Applicant ever reported the matter internally is contradictory. On the one hand, he argues that there is no evidence that the Applicant had previously reported the same information through the established internal mechanisms. On the other hand, he asserts that the Applicant reported her concerns internally and that she was even informed of the outcome of her report by letter dated 10 June 2020.[50]

112. That the Respondent bases his argument on the 10 June 2020 letter, which relates to completely different issues from the one at hand, can only mean that he did not fully understand his own case.

113. The Applicant, seeking to meet the cumulative criteria of sec. 4, claims that she was positive that she had already reported the practice internally. She testified that she first raised the matter with her First Reporting Officer ("FRO"), the then Chief, Human Rights Council Branch ("HRCB"), OHCHR, who kept on avoiding her.[51] She appealed to OIOS in 2013 and in 2015 but they refused to investigate the

[50] Case file, p. 360.

[51] See audio recording of the hearing on the merits, first part, starting at 1:29:08.

matter. She reported the matter to the FRO of her FRO, who told her to trust the political judgment of her FRO.[52] She made several calls to the then Secretary to the High Commissioner for Human Rights and sought to meet the High Commissioner. She informed her about the issue, but the High Commissioner told her that she did not meet officers of her level.

114. She made several other reports to several other officers, including the DHC for Human Rights in 2014, the new High Commissioner for Human Rights in June 2015, the new DHC for Human Rights in 2016, and the Secretary-General in 2018, but no action was taken.[53]

115. The Applicant's unchallenged evidence counters the assertion that she had not previously reported the information about the alleged practice of confirming names through the established internal mechanisms.

116. The Tribunal thus finds that the Organization has failed to inform her in writing of the status of the matter within six months of her reports concerning *inter alia* the practice in accordance with sec. 4 (b)(iii) of the PaR policy.

117. The Respondent seeks to confine this judicial review to the events that took place after the Applicant was instructed to stop her activities on 10 June 2020. This position is not tenable since the law neither recognizes such intervention nor provides for such an ultimatum. As was argued by the Applicant, the Administration's position does not control the issue of whether such external report is permitted.

118. The Respondent's argument that the Applicant was able to use the internal mechanisms to report misconduct, which would in turn mean that the Applicant does not meet the cumulative criteria under sec. 4(b) of the PaR policy, but rather that she simply did not agree with the decisions that were made following her usage of these internal mechanisms is not supported by evidence. There is no evidence

[52] Ibid., starting at 2:06:15.

[53] See audio recording of the hearing on the merits, first part, starting at 2:06:42.

that any decisions were made in connexion with her reports on the practice of confirming names.

119. In fact, there is evidence that the issue was never investigated at all. An email dated 2 December 2019 from one of the members of the fact-finding panel appointed to investigate the Applicant's complaints (see para. 5.a above) reads as follows in its relevant part (emphasis added):[54]

> Regarding the scope of the work, we understand that your complaints of 13 March 2017 and 30 September 2019 covered two areas of concern:
>
> - allegations of prohibited conduct in the workplace by two members of OHCHR management (namely, the former High Commission[er] … and [the Chief, HRCB]), particularly in connection with abuse of authority and harassment; and
>
> - allegations of misconduct in connection with providing of certain information to the Chinese delegation.
>
> **[The USG/DMSPC] clarified that the current fact-finding investigation with which we are charged will not deal with your allegation**, initially made in February 2013 and then reiterated more recently, **concerning the provision of confidential information to the Chinese delegation**. It was decided by [the USG/DMSPC], and included in our terms of reference, that our investigation should have a more limited scope and cover your complaints about harassment and abuse of authority, even with the understanding that your allegations relate to two individuals and were made in two separate complaints, separated in time by approximately two and one-half years. As part of our review with a more limited scope, we will be looking at the events and actions surrounding the press release by the Office of the High Commissioner in February 2017, and the alleged consequent reprisals. As there will be two "subjects of investigation" ([the former High Commissioner and the Chief, HRCB]), our findings and conclusions will deal with each of these two separately, but in one report.

120. There could therefore not have been a response, written or otherwise, to the Applicant.

[54] Case file, p. 15.

121. Based on the evidence that the Applicant reported the matter, and no written response was made within six months, the Tribunal finds that she meets the criteria under sec. 4(b)(iii) of the PaR policy.

Subparagraph (c)

122. Finally, the criterion of subparagraph (c) is also met, since there is no evidence or record, nor is it challenged by the Respondent, that the Applicant did not accept payment or any other benefit from any party for the external reporting.

123. Accordingly, the Tribunal finds that the Applicant has met the three cumulative criteria under sec. 4 of the PaR policy in relation to the letters she sent to Member States and members of the EU delegation denouncing the alleged practice, and that this particular conduct is protected against retaliation.

The allegations/charges

124. As has been found, the Applicant had a right to report what she considered misconduct to an external party, which she did when she denounced the practice to Member States and the EU. Her action in this regard is protected.

125. The Applicant, however, illegally externally communicated to the public at large via social media and media outlets despite being instructed not to do so. She knowingly continued to defy the Organization's rules and instructions by giving unauthorized interviews and posting on social media about not only the practice that she aimed to denounce, but also attributing serious allegations of misconduct, including that of crimes under international law, to several officials and vilifying the Organization to the public at large.

126. The Applicant's submission that there was no wrongdoing in her conduct on social media and engagement with media outlets, or that she was legally allowed to do so is without basis.

127. Save for the conduct which has been found to have been external reporting, the Tribunal finds that there is no justification for the Applicant's conduct on social media and through media outlets and reiterates its finding in para. 38 above that,

based on the Applicant's own admissions, the facts on which the disciplinary measure was based have been established by clear and convincing evidence.

Whether the established facts legally amount to misconduct

128. Under staff regulation 10.1 and staff rule 10.1 (see ST/SGB/2018/1/Rev.1), as well as paras. 3.4 and 3.5(a) of ST/AI/2017/1, the Secretary-General has the discretionary authority to impose disciplinary measures on any staff member who has committed misconduct:

> **Regulation 10.1**
>
> (a) The Secretary-General may impose disciplinary measures on staff members who engage in misconduct.
>
> **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.
>
> …
>
> (c) The decision to investigate allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.
>
> **Misconduct (ST/AI/2017/1)**
>
> 3.4 Staff rule 10.1 (a) provides that "failure by a staff member to comply with [the staff member's] 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".
>
> 3.5 Misconduct for which disciplinary measures may be imposed includes, but is not limited to:

(a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it.

129. In connexion, staff rules 1.2(a), (j), and (t), staff regulation 1.2(f) (g), and (i), as well as sec. 4 of ST/AI/2000/13 in its relevant part, describe the basic rights and obligations of staff members, regulate outside employment and activities, and define the specific instances of prohibited conduct as follows:

Rule 1.2
Basic rights and obligations of staff

General

(a) Staff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors.

…

Specific instances of prohibited conduct

…

(j) Staff members shall not seek to influence Member States, principal or subsidiary organs of the United Nations or expert groups in order to obtain a change from a position or decision taken by the Secretary-General, including decisions relating to the financing of Secretariat programmes or units, or in order to secure support for improving their personal situation or the personal situation of other staff members or for blocking or reversing unfavourable decisions regarding their status or their colleagues' status.

Outside employment and activities

…

(t) Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any outside activities that relate to the purpose, activities or interests of the United Nations. Outside activities include but are not limited to:

(i) Issuing statements to the press, radio or other agencies of public information;

(ii) Accepting speaking engagements;

(iii) Taking part in film, theatre, radio or television productions;

(iv) Submitting articles, books or other material for publication, or for any electronic dissemination.

Approval may be granted in accordance with staff regulation 1.2 (p).

Regulation 1.2
Basic rights and obligations of staff
…

General rights and obligations

…

(f) While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

(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;

…

(i) Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service;

Section 4 (ST/AI/2000/13)
Activities related to the United Nations

4.1 Under staff rules 101.2 (p), 201.2 (p) and 301.3 (p), except in the normal course of official duties, prior authorization is required to engage in any of the following acts, if such act relates to the purpose, activities or interests of the United Nations:

(a) Issuance of statements to the press, radio or other agencies of public information;

(b) Acceptance of speaking engagements;

(c) Taking part in film, theatre, radio or television productions;

(d) Submitting articles, books or other material for publication.

4.2 Outside activities that are of benefit to the Organization or the achievement of its goals and/or contribute to the development of professional skills of staff members are usually not only permitted but encouraged, provided staff members exercise the utmost discretion with regard to all matters of official business and avoid any public statement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

130. In this case, it is established that the Applicant violated staff rules 1.2(a) and (t), and sec. 4 of ST/AI/2000/13, by knowingly and intently engaging in unauthorized outside activities with external parties concerning the official activities of the Organization.

131. Furthermore, the Applicant violated staff regulation 1.2(f) and staff rule 1.2(j) by engaging in actions that adversely affected the interests of the Organization by publicly campaigning for the withholding of funding to the UN and accusing the Organization and some of its senior officials of international crimes.[55]

132. Her overall conduct was fundamentally incompatible and irreconcilable with the proper discharge of her duties as an international civil servant.

[55] Case file, pp. 1284-1415.

133. Based on the foregoing, the Tribunal finds that the established facts legally amount to serious misconduct under the applicable rules and regulations.

Whether the disciplinary measure applied is proportionate to the offence

134. Staff rule 10.2 provides the following:

> **Disciplinary measures**
>
> (a) 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.

135. In its seminal judgment *Sanwidi* 2010-UNAT-084, the Appeals Tribunal held that:

> 39. In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to

> achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.
>
> 40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.
>
> …
>
> 42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate.

136. In *Cheikh-Thiare* 2021-UNAT-1167 (para. 33), the Appeals Tribunal held that

> The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the specific actions and conduct of the staff member involved. […] [T]ribunals 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.

137. While the Applicant did not address this issue, the Respondent submits that considering the unprecedented amount and breadth of unauthorized external communications that the Applicant has engaged in, in combination with the harmful, damaging and vexatious content of those communications, which have adversely affected the reputation of the Organization, as well as of its senior

officials who the Applicant mentioned by name, the sanction imposed is reasonable and far from excessive, abusive, or absurd.

138. The Tribunal is convinced that the Applicant mounted a public degradation campaign against the Organization and some of its senior officials, attributing to them complicity in international crimes through hundreds of social media posts and, at least, ten unauthorized interviews to various media outlets. She also called for funding cuts.

139. The Applicant's actions reverberated to an unknown number of other news articles and social media posts damaging the Organization's reputation.

140. The Tribunal agrees with the Respondent that the manner in which the Applicant conducted herself supports the conclusion that she systematically, knowingly, and wilfully intended to damage the reputation and the programmatic capacity of the Organization.

141. In the face of all of that, it is reasonable for the decision-maker to consider that the Applicant's actions were so damaging to the employment relationship of mutual trust between her and the Organization, that it became untenable to continue with it.

142. Based on the foregoing, the Tribunal finds that the sanction imposed, i.e., separation from service with compensation in lieu of notice and half termination indemnity, is reasonable, lawful, and proportionate to the misconduct.

Whether the Applicant's due process rights were respected

143. The Applicant maintains that the investigation and disciplinary process were conducted *ultra vires,* which vitiated the contested decision. She contends that the High Commissioner was the lawful authority to investigate her under the rules, and not the USG/DMSPC, who was allegedly her primary retaliator and intimately involved in her unilateral transfer in October 2019.

144. Pursuant to para. 2.1(v) of ST/AI/2017/1, the High Commissioner would be the "responsible official" and "authorized official" to investigate a complaint of possible unsatisfactory conduct against the Applicant. However, that does not vacate the applicability of the administrative law principle of delegation of authority.

145. There is evidence on record that the High Commissioner recused herself from acting as the responsible official on the two complaints against the Applicant because she had filed them. Upon recusal of the High Commissioner, the authority reverted to the Secretary-General, who, on 17 December 2020, delegated it to the USG/DMSPC.[56]

146. Accordingly, the appointment of the USG/DMSPC as responsible official was a regular exercise of discretion under the relevant provisions of delegation of authority.

147. The allegation that the USG/DMSPC had a conflict of interest to act as responsible official is equally without merit.

148. The Applicant contends that the USG/DMSPC had been "intimately involved in the Applicant's unilateral transfer in October 2019", and that this fact would render her biased and unable to act as the responsible official.

149. The Tribunal is aware that the issues relating to the Applicant's unilateral transfer in October 2019 and the involvement of the USG/DMSPC, if any, are the subject of Case No. UNDT/GVA/2020/059 (Reilly). Accordingly, it will not pronounce itself in this regard at the instant stage.

150. However, as explained by the Respondent in Case No. UNDT/GVA/2020/059 (Reilly), and not disputed by the Applicant, the primary involvement of the USG/DMSPC in the Applicant's transfer was clarification of the issue of reassignment authority. She was not "intimately involved"

[56] Case file, p. 1420.

in the process. Rather, the authority and primary responsibility for the Applicant's reassignment was exercised by the then High Commissioner.

151. The Tribunal accepts this explanation and determines that there is no evidence of a conflict of interest of the USG/DMSPC to act as the responsible official in this case.

152. Furthermore, the Applicant argues that the investigation panel included a former staff member who had been found by the Joint Appeals Board to have abused a disciplinary investigation for the purposes of retaliating against a staff member. The Applicant added that this Tribunal has referred said investigation panel member for accountability relating to a separate instance of misconduct in 2014 (see *Flaetgen* UNDT/2014/102), which came after his retirement and made him ineligible for future employment. Despite this, he was hired as a consultant to lead the investigation into the Applicant's conduct without any competitive process or justification.

153. The Respondent did not respond to this assertion. Based on this, the Tribunal accepts the facts as laid by the Applicant, except for the allegation that the investigation panel member in question was ineligible for future UN employment, as there is no evidence on record, including in the *Flaetgen* Judgment that the Applicant refers to, actually supporting this assertion.

154. Consequently, the Tribunal concludes that the Applicant's due process rights were not respected in this particular regard.

155. Moreover, the Applicant maintains that the investigation panel members were biased against her and should have recused themselves. There is evidence, however, that the investigation panel verified and declared that it had no conflict of interest in this matter.[57]

[57] Case file p. 720.

156. She further asserts that reasonable apprehension of bias was carried into the investigation in that, while the rules require that the investigation panel examine exculpatory evidence, it did not consider the evidence she provided. The panel failed to interview any of her witnesses and did not consider her justification for the impugned actions, such as the need to make external reports due to her discovery of an allegedly dangerous practice, and the failure by OHCHR to investigate her report, establish facts or address the practice.

157. The Respondent does not explain the investigation panel's failure to interview the Applicant's witnesses and to consider her explanations. The Tribunal therefore concludes that the Applicant's due process rights were not respected in this regard.

158. The investigation panel invited the Applicant to an interview on multiple occasions (eight times). However, she did not accept to participate. She was provided with the memorandum of allegations and all supporting documentation. She was informed of her right to seek the assistance of counsel and was given the opportunity to comment on the allegations against her. She was then afforded a one-month extension of time to submit her comments on the allegations of misconduct, which she provided on 30 September 2021, and her communications during the investigation and her comments during the disciplinary process were duly considered.

159. The Applicant points to one of the investigation panel member's statement about "another meeting coming up with our colleagues in New York", as evidence of positive action from a position of conflict of interest to impact the investigation. She asserts that since all witness interviews were conducted in Geneva, this indicates a further undocumented meeting with individuals not amongst the witnesses to discuss the investigation.

160. The Respondent's explanation that the purpose of that undocumented meeting was to seek guidance on how the investigation panel should proceed, given the Applicant's reluctance to participate in the process, and that the meeting had no implication whatsoever on the findings of the investigation report or the outcome

of the disciplinary process was not disputed. Thus, the Tribunal accepts this explanation and finds no illegality in this regard.

161. Finally, the Applicant alleges a violation of her rights. She asserts that the findings of the 2019-2020 fact-finding panel vitiate the instructions from the USG/DMSPC in the 10 June 2020 letter, which the Applicant qualifies as a "warning", and the contested decision.

162. The Applicant argues that the 2019-2020 fact-finding panel (see para. 5.a above) took advantage of its investigation to question her under oath on matters which were outside its terms of reference. Further, that it illegally obtained information which was the basis for the instructions from the USG/DMSPC to her contained in the 10 June 2020 letter (see para. 5.e above). The Applicant contends that the instructions cannot be relied upon to support a finding of misconduct against her.

163. The issue of how the 2019-2020 fact-finding panel conducted its mandate falls outside the scope of the instant judicial review, being that it is the subject of judicial review under Case No. UNDT/GVA/2020/059 (Reilly). The Tribunal will not pronounce itself on the issue in this judgment.

164. The Tribunal determines that the USG/DMSPC did not initiate an investigation into the Applicant's conduct based on the findings of the 2019-2020 fact-finding panel, but rather on two complaints of unsatisfactory conduct regarding the Applicant's actions filed after the issuance of the 10 June 2020 letter (see paras. 7 and 9 above).

165. Contrary to the Applicant's assertion, the instructions from the USG/DMSPC to her to cease her external communications were legally founded. The relevant parts of the 10 June 2020 letter read as follows (emphasis added):

> I note that in your interview with the [2019-2020 fact-finding panel], you revealed that on a number of occasions you shared the matters that are the **subject of your complaints**, **verbally and in writing**, with external parties, including Member States and the press. Further, I note that the Panel observed that you have not been given whistleblower status by the Ethics Office.

> As a staff member, you are bound by your obligations as an international civil servant as set out in the Staff Regulations and Rules, including Staff Regulation 1.2(i) and Staff Rule 1.2(t). Accordingly, **you are not authorized to engage with Member States or contact the media concerning these issues**.

166. The Applicant claims that since the 2019-2020 fact-finding panel informed her that it would not be investigating the practice, the above instructions did not apply to this specific subject. The broad language of the 10 June 2020 letter, however, does not support the Applicant's argument.

167. The Tribunal finds that regardless of whether the practice was investigated or not, the instructions from the USG/DMSPC covered all aspects of the Applicant's complaints and left no room to exclude issues related to the practice. Consequently, the Tribunal rejects the Applicant's argument at para. 159 above.

168. Therefore, the Tribunal has found that the Applicant's due process rights were not respected in two respects:

a. The appointment of an investigation panel member who had been found by the Joint Appeals Board to have abused a disciplinary investigation for the purposes of retaliating against a staff member, and who had been referred for accountability by the Tribunal in relation to a separate instance of misconduct in 2014; and

b. The investigation panel's failure to interview any of the Applicant's witnesses and consider her justification for the impugned actions, such as the need to make external reports and the failure by OHCHR to investigate her report.

169. The foregoing finding requires the Tribunal to determine whether the procedural shortcomings identified impacted in any way the contested decision, and whether the Applicant is entitled to any remedy. The jurisprudence of the Appeals Tribunal relating to award of compensation provides that:

> Not every violation of a staff member's legal rights or due process rights will necessarily lead to an award of compensation (footnote omitted). Where the staff member does not show the procedural defect "had any impact on him, his circumstances or his entitlements, and that he suffered no adverse consequences" or harm from the procedural defect, compensation should not be awarded. (*Nyakossi* 2012-UNAT-254, para. 19)

170. Not every procedural violation of due process during the investigation process will entirely contaminate the findings. There needs to be proof of a direct impact of the procedural defect that would render the result unreasonable, illegal, or absurd.

171. In this case, there is no evidence that the procedural defects found by the Tribunal affected the investigation process in any way. The Tribunal notes that while the investigation panel failed to consider the justifications advanced by the Applicant, the Tribunal fully considered and analysed them, including the testimonial and documentary evidence which was adduced. Any prejudice the Applicant might otherwise have suffered because of the investigation panel's infractions was therefore averted at the judicial review level.

172. The Tribunal therefore finds that the established breaches of due process are immaterial and do not vitiate the contested decision.

Conclusion

173. In view of the foregoing, the Tribunal finds that:

a. The Applicant committed serious misconduct by engaging in several instances of unauthorized outside activities;

b. The Applicant had a right to externally report what she considered misconduct, pursuant to sec. 4 of the PaR policy. The unauthorized contacts with representatives of Member States and the European Union do not constitute misconduct; and

c. The imposed disciplinary sanction is both lawful and proportionate to the offence.

174. Accordingly, the Tribunal DECIDES to reject the application in its entirety.

(*Signed*)
Judge Margaret Tibulya
Dated this 7th day of November 2023

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