UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2024/006
Judgment No.: UNDT/2025/039
Date: 27 June 2025
Original: English

Before: Judge Francis Belle

Registry: New York

Registrar: Isaac Endeley

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

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

Introduction

1. On 6 February 2024, the Applicant, a former Senior Investment Officer with the United Nations Joint Staff Pension Fund ("UNJSPF" or "the Pension Fund"), filed an application in which he challenges his "separation from service with compensation in lieu of notice and without termination indemnity".

2. On 7 March 2024, the Respondent filed a reply in which he contends that the application is without merit.

3. On 24 January 2025, a hearing was held at which the Applicant provided his testimony.

4. For the reasons set out below, the application is upheld.

Fact

5. The Appeals Tribunal has held that if the parties have agreed to certain facts "it is not open to [the Dispute Tribunal] to conduct its own evaluation and then to substitute its view for that of the parties" (see *Ogorodnikov* 2015-UNAT-549, para. 28). In the present case, the parties agreed on the following facts (emphasis and footnotes in original omitted):

> … In 2008, the Applicant joined the Organization. At the time of the contested decision, he was serving at the P-5 level as Senior Investment Officer, Fixed Income with a continuing appointment in the Office of Investment Management ["OIM"] of [UNJSPF].
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> … Effective 1 January 2018, [SR, name redacted for privacy reasons] was appointed as Representative of the Secretary-General ["the former RSG'] for the investment of the UNJSPF assets.
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> … On 19 July 2019, [EH, name redacted for privacy reasons], then Senior Investment Officer, filed with Office of Internal Oversight Services ["OIOS"] on behalf of the Applicant as well as on behalf of [TH, name redacted for privacy reasons], Senior Investment Officer, Private Equity; [MS, name redacted for privacy reasons], then Senior Investment Officer, Asia-Pacific; [EC, name redacted for privacy reasons], Investment Officer, Private Equity; [TB, name redacted for privacy reasons], then Senior Investment Officer; and [AR, name redacted for privacy reasons], then Deputy Director, Investment Management, a complaint against [SR], then

> RSG, and [HB, name redacted for privacy reasons] then OIM Director, (D-2).
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> … On 13 March 2020, [EH] on behalf of the Applicant and on behalf of [TS, name redacted for privacy reasons], Deputy Director, Equities; [WW, name redacted for privacy reasons], Chief Operating Officer; [AR, TH, MS, and EC], filed a written complaint to the Secretary-General about "concerns regarding actions taken by [SR] over the past two years" and in the context of issues at that time in financial markets. [EH] referred to a "toxic culture … created by the OIM leadership," and the absence of professional collaboration and retaliation. This led to a second review by Internal Audit Division, OIOS ["IAD"].
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> … On 30 March 2020, [SR] resigned, and the Secretary-General appointed ["the new RSG", name redacted for privacy reasons] as the Acting RSG.
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> … On 31 July 2023, the Applicant was requested to respond to formal allegations of misconduct.
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> … On 29 September 2023, the Applicant responded with comments.
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> … On 17 January 2024, the Applicant received the contested decision.

Parties' submissions

6. The Applicant's submissions may be summarized as follows (references to footnotes omitted):

> a. After "consistently achieving returns on Pension Fund investments in excess of industry benchmarks over many years, controversial and reckless policies implemented by the newly appointed [the former RSG] resulted in a 20% loss of the value of the Fund by early 2020". The Applicant, "together with a number of the senior investment officers of the Office of lnvestment Management (OIM) voiced their concerns first to [the Office of Internal Oversight Services, "OIOS"] (with no response) and later directly to the Secretary-General. This "courageous action to protect the Pension Fund is at the center of this case".
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> b. The Applicant "explained in his testimony how in 2017 his role as Senior Investment Officer and Portfolio Manager for the entire Fixed Income portfolio was restricted by his newly appointed supervisor, W01

[this person is referred to as "W01" by the parties throughout their submissions in the present case, which is therefore maintained in this Judgment, noting that despite this reference, she did, however, not appear before the Tribunal as a witness)], to [the United States] Treasuries component which was approximately 35% of Fixed Income investments but nevertheless an important part of the total investment portfolio given its stability and liquidity". The "benchmark for Fixed Income was changed in 2019 without a proper external study, leading to the selling of [the United States] Treasuries in favor of mortgage-backed securities and emerging market debt (which both became illiquid and lost money in the [ensuing] financial crisis of 2020)". These same issues "were raised with OIOS and with the Secretary-General and were recognized as valid in the later OIOS Governance Report". The Applicant became "increasingly concerned over these changes, especially after [W01] told him using expletives that were heard by others in the office to follow instructions and do what you're told".

c. The Applicant was "never the subject of any complaint of harassment or any other form of misconduct", and the "allegations against him arose solely from the unexplained creation of an OIOS Division of Investigations Task Force and its blanket seizure of [Information Technology] equipment of OIM staff and the retrieval of private email or text communications between colleagues involved in reporting possible misconduct/whistle blowing". It is "a classic case of retaliation against those who challenge higher authority". Moreover, "although the OIOS Report found no direct evidence of any wrongdoing by the Applicant, a case was manufactured from retrieving other people's private communications and holding him responsible for their thoughts and words". "Implicit in this approach, which is unprecedented as a case of misconduct, is the Respondent's obvious hostility towards whistleblowers".

d. The Respondent's argument that "this case has nothing to do with whistleblowing is fundamentally wrong and appears calculated to avoid addressing his own institutional failures". There is "a fiduciary duty for those in OIM to protect the pension fund of participants and a more general

duty for staff to report possible misconduct". If "the reporting of possible misconduct through established channels is a protected activity under [United Nations] rules, as the Respondent seems to concede, then those communications done pursuant to this activity were also a protected activity and therefore authorized".

e. The "charge of misconduct imposes on the Respondent the requirement to identify the conduct it deems improper and to cite the statutory basis for this conclusion". Instead of doing this, the Respondent "simply makes broad generalizations about private communications implying that words are equivalent to conduct". The Applicant's actions "have been categorized in the decision letter as 'in opposition to the former RSG … [he] participated in discussions suggestive of collaborative efforts to disclose without authorization sensitive information relating to the OIM ...' and 'engaged with other OIM staff members ... in building opposition to the instructions and/or directives of the OIM leadership ...'". What is "striking about these formulations is that rather than citing actual conduct by the Applicant, the charges cite responsibility for the private actions, words and even the thoughts of others simply by virtue of being copied on an email, whether or not the conduct took place".

f. The Respondent's case "has continually shifted because of an inability to" identify "the conduct deem[ed] improper and to cite the statutory basis for this conclusion". "It began with allegations of failing to cooperate by destroying evidence, disclosing confidential information to blogs and Permanent Missions, opposing OIM management and engaging in abusive behavior towards W01". The "later charges consisted of participating in 'discussions' using personal email to share sensitive information, failure to report colleagues for misconduct, desiring the removal of W0l and failing to provide personal and private financial data to OIOS". In "these proceedings, the Respondent has engaged in cherry picking emails or parts of emails from other staff while arguing that 'contemplations' and 'discussions' are acts of misconduct, and that personal concerns expressed to the elected staff representative were not 'public

information'". His argument is "now reduced to claiming, without citing any authority, that anything that is not already 'public information' is confidential although he is unable to cite any such information disclosed by the Applicant to external sources".

g. The Respondent has "gone to considerable and unprecedented lengths during the hearings to cite excerpts of private communications, often incomplete and without any context, to imply that the actions of the Applicant and his colleagues in exposing possible corruption, were improperly motivated". All of the Applicant's cited communications were "from his private email or WhatsApp". "None involved official OIM business he was conducting, yet the Respondent has persisted in trying to infer wrongdoing in the use of private email to express personal opinions and disagreement with the misguided policies that were being improperly imposed".

h. What "is completely absent from the Respondent's analysis is how any of the private communications or personal views cited in the charges had any negative effect on the Applicant's work or on the work of OIM as outlined in Staff Rule 1.2 (f) (2018)". On the contrary, "the Applicant's efforts were instrumental in safeguarding the Pension Fund, for which he was commended including for his recommendations for remedial action, all of which were eventually implemented". "All this is absent from the Respondent's analysis".

i. All "the communications and activities that took place prior to [the former RSG's] departure in March 2020 were justified as legitimate efforts to protect those who were carrying out their fiduciary responsibilities to protect the assets of the Pension Fund and, as a protected activity, all these actions and communications were authorized". It "may also be inferred that the Applicant and his colleagues were the subjects of retaliation by [the former RSG] that justified further exchanges on what could be done and recourse to the Staff Union representative". In addition, the "communications that took place after [the former RSG's] departure were

done pursuant to consultations approved by the new OIM leadership under [the new RSG], who engaged in consultations himself with [MR, name redacted for privacy reasons], the Staff Representative, on the Culture Transformation program recommended by OIOS Audit and agreed to by the Secretary-General.

j. In support of the charge that "the Applicant participated in discussions suggestive of collaborative efforts to disclose sensitive information, the Respondent cites an article that appeared in [a media outlet] dealing with an infrastructure investment that was not even within the Applicant's domain". The other evidence cited is that he was copied on some email exchanges between other OIM staff members on ideas they were discussing on possible steps in light of the refusal of the Respondent to address their concerns". Although "OIOS found no evidence whatsoever that the Applicant engaged in disseminating any sensitive information to any external source, the Respondent cites communications in July 2019 and later on issues to be raised with [MR], the Staff Representative and Pension Board Participant's Representative (chosen in accordance with electoral regulations approved by the Secretary-General)". MR was "authorized under Staff Regulation 8.1 to undertake communications in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare". The Applicant testified that "his exchanges with [MR] were primarily concerned with his own conditions of work and in particular his mistreatment by W01". At the same time, the former RSG, the new RSG, TS, the Under-Secretary-General for Management Strategy, Policy and Compliance ("the USG"), the Assistant Secretary-General for Human Resources ("the ASG") (all names redacted for privacy reasons) and the Secretary-General "met with [MR] or welcomed her input on matters concerning the governance of OIM".

k. Regarding these "discussions suggestive of collaborative efforts to disclose sensitive information", all that the Respondent cites is "the Applicant's having been copied on internal emails". The Respondent "refuses to address the fact that all these communications were done

pursuant to a protected activity in order to protect the Pension Fund, not for any personal gain". For instance, "the email of 14 March 2020 to [MR] cited the same policy issues and concerns raised in the misconduct complaint to the Secretary-General over the former RSG". "Issues such as budget, asset allocation, benchmarks and other policy questions like outsourcing are transparently reported on the Pension Fund website and discussed in open fora with staff and their representatives". "Every time the Applicant attempted in his testimony to explain the context behind the emails that were cited and that his input was limited to facts about Fixed Income, the Respondent interrupted, forcing his counsel to object".

l. It is "unclear why the Applicant is being singled out for interacting with her, even after [MR] affirmed that she received no sensitive documents from him at any time". The "specific allegation of disclosing sensitive information to [MR] is particularly ill-formulated" and "[n]owhere is the information in question identified or defined". In cross-examining the Applicant, the Respondent "pressed him on whether what he shared with [MR] was 'a public document' meaning available to everyone". "This argument is misplaced" as "[p]rivate notes and comments are not publicly available but that does not make them either sensitive or confidential". MR "affirmed, and it was not disputed, that she was given no confidential or privileged documents by the Applicant".

m. The Pension Fund "is dedicated to transparency vis-a-vis the participants and beneficiaries" and "provides detailed information on investment policy on its public website so that members can see exactly how their money is invested and what results are achieved". This is "the essence of the information that was shared by the Applicant along with explaining the basis for his personal views on issues being discussed".

n. The Respondent has "not shown how any of the communications cited violated any specific directive or policy". The "instruction cited in the Decision Letter (ST/SGB/2007/6 on Information sensitivity, classification and handling) provides sensitive information is either considered

'confidential' or 'strictly confidential' when it could reasonably be expected to cause damage to the work of the United Nations and specifies it should be marked as such". This "has never been demonstrated for any of the Applicant's communications". ST/SGB/2004/15 (Use of information and communication technology resources and data) "defines 'sensitive data' as data that is classified or the use and distribution of which is otherwise restricted pursuant to applicable administrative issuances". The Respondent has "not shown how any of the views expressed by the Applicant involved classified or restricted information".

o. The "poorly thought-out formulation of this charge is reflected in the fact that it originally emphasized discussion of the issue of outsourcing of some Fixed Income investment categories until it was dropped after realizing that this policy issue had been public for years and widely discussed with the staff and their representatives".

p. Although MR "affirmed that the Applicant had shared no confidential or privileged information with her, [the Applicant] is charged with listing issues that were not related to staff welfare, again failing to explain how investment policy issues, which are publicly and transparently disseminated by the Pension Fund on its website could be considered sensitive information or how discussing them could become the subject of misconduct".

q. The Respondent "claims that the explanation for use of private emails to avoid the RSG's monitoring of official email has no evidentiary basis". Such "monitoring is not denied and the Respondent never bothered to ask the question either of OIOS Audit which had recommended using private emails (not disputed), or of anyone in OIM". The "subsequent actions by the RSG to retaliate against the Applicant and his colleagues, information about which the Respondent has tried to suppress, is further evidence of the hostile atmosphere in which the Applicant and his colleagues had to operate, and for which the Administration offered no assistance". Although "it was never an allegation, the Respondent further

suggests that the Applicant should have reported his colleagues' misconduct, without addressing whether it was a protected activity pursuant to the instruction on whistleblowing [ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations)]". In this regard, it "is interesting to note that several of those who, like the Applicant, were recipients of the same private emails and engaged in the same conduct were not charged with any wrongdoing".

r. The Applicant has "testified that these discussions and exchanges took place immediately prior to or pursuant to discussions leading to the complaints made to OIOS and to the Secretary-General, which [MR] helped facilitate, or were done pursuant to the requests from the new RSG". This "effort was not to mobilize support for or against OIM leadership (of which they were a part) but to report possible misconduct and abuse of authority and to try to rectify the toxic working atmosphere the Respondent had permitted to exist in OIM". The Applicant's "'participation' was limited to expressing his views on the Fixed Income portfolio of which he was knowledgeable and which eventually formed a part of the complaint to OIOS". The suggestion that "he participated in giving sensitive information to the media, blogs and Missions is totally unsupported with any real evidence". The Respondent's "interpretation that being copied on the various email exchanges between colleagues on how to be protected from retaliation is somehow engaging in misconduct has no basis in law". It "appears to have been formulated this way because the OIOS Report found no evidence that the Applicant personally shared confidential or sensitive OIM information with journalists, blogs, Permanent Missions to the United Nations or any external parties". "Consequently, the allegation was re-worded to consist of contributing to possible violations by others. It appears the Administration was annoyed by [MR's] discussion of these issues in a public forum even though dissemination of information to her constituents as a Participants Representative on the Pension Board has not been shown to be improper". The "connection with all this to the Applicant, however,

remains tenuous". The "major evidence cited is [MR's] letter to the Secretary-General to which she appended some notes he had drafted on policy issues two years before", and "[w]riting to the Secretary-General is an internal and authorized communication". The Applicant "explained in his testimony that he was unaware of this and was never asked in advance if [MR] could use it". The "testimony of [WS and KH (names redacted for privacy reasons) is essentially hearsay (as is W01's) that the Applicant had had some discussions with [MR] prior to the media publications". The Applicant "disputes the accuracy of these statements but in any case, the testimony is too vague to be of importance". The Respondent "has again been unable to identify what information is considered confidential or sensitive, coming two years after it was already in the public domain". The Respondent "claims that later, between March 2020 and May 2022, the Applicant disclosed sensitive information to [MR] to build opposition to the OIM leadership, presumably [the new] RSG". The "absurdity of this charge is reflected in the fact that [the new RSG] and his Deputy, [TS], (the Applicant's supervisor) both consulted with [MR] on OIM matters themselves and encouraged the Applicant to interact with her".

s. "Further exchanges were done pursuant to meetings he and [MR] had with [the new RSG] on the steps to be taken to address the issues raised in the letter to the Secretary-General and later in the Governance Audit Report, particularly concerning the need to address the toxic atmosphere that had prevailed in OIM under [the] former RSG". He "communicated occasionally" with MR "on the Culture Transformation recommended in the OIOS Governance Audit Report and accepted by the Secretary-General, as directed by his supervisor, [TS], who did the same".

t. "The email in October 2020 asking for suggestions for questions was pursuant to a Town Hall meeting in which these matters were intended to be discussed publicly with the participants and their representatives". It "should be recalled that this is not the [United Nations'] money but belongs to [United Nations] participants and pensioners". These "issues were a follow up to the Governance Audit Report (a public document) and the steps

to be taken to address the issues raised with the Secretary-General". It "should be recalled in this regard that the Applicant and his colleagues were staff members too and entitled to the same rights as all staff to discuss their working conditions".

u. It "needs to be emphasized that the issues the Applicant was raising with respect to the change in benchmarks was proven correct". "OIM conducts an Asset Liability Management ["ALM"] Study every four years". The "ALM study selects benchmarks for OIM, and this exercise is done with the heavy involvement of OIM's front office". The former RSG and HB "changed the benchmark for Fixed Income without following any of the required procedures". The Applicant "presented the resulting losses to the Fund as a result of the new benchmark in his reply to the allegations of misconduct". Following the former RSG's "departure and the recommendations of the OIOS Governance Audit, there was an ALM study done by an external provider and as a result, allocation of [United States] Treasuries investments was increased by 12 % as had been recommended by the Applicant". The "less secure [mortgage-backed security] allocation as well as the Emerging Markets allocation were deceased". "Everything the Applicant had been proposing was adopted and the investments resumed their prior rates of return".

v. Regarding W01, the Applicant "explained in his testimony that he approached [MR] primarily to help address W01's abusive behavior", confirmed by [MC, name redacted for privacy reasons] and others to OIOS". The Applicant's "own conduct towards W01 was never in question".

w. The Applicant's "30 March 2020 email regarding W01 was merely factual for follow up with [the new RSG], who confirmed in his own testimony that he and [W01's] supervisors had recognized these same issues with her performance resulting in her later separation from service". They "were not charged with misconduct for having similar negative views of W01's performance".

x. The Respondent "also emphasizes several emails and WhatsApp messages with a colleague, MS, discussing W01". These "are purely private exchanges that were never shared with [W01] or anyone else in OIM". It "remains unclear on what basis the Respondent considers these private views to constitute misconduct simply because they contain criticism of W01 that was well-founded".

y. One question that "remains unaddressed is why after ousting [the former RSG] and accepting the need for reform highlighted in the OIOS Governance Report, the Respondent has embarked on an unprecedented effort to punish the principal whistleblowers who brought this to his attention". The "only possible answer is that the case touches on the integrity and competence of too many high officials who want to send a message to staff not to challenge them". "How else can you explain the inaction of OIOS on such a serious complaint against the head of OIM, its later refusal to interview [MR] on the charges against the whistleblowers, the formulation of allegations of harassment by [the Office of Human Resources] in spite of the conflicting views of the new head of OIM, and the fact that it took nearly two years for [the USG] to respond to the Applicant's joint complaint of 19 July 2019, telling him the matter was now moot". "After this, the disciplinary process leading to the separation of the Applicant and several of his colleagues as well as an OIOS Auditor was launched".

z. "Special attention needs to be paid to the Respondent's egregious refusal to comply with the Order of the Tribunal on disclosure of documentation". "What we know from the circumstances surrounding these reports is that [the former RSG], who reportedly knew about the complaint to OIOS, made claims of under-performance against the Applicant and two of his colleagues that were not sustained (although two of them were later terminated and one resigned)". "We also know that the OIOS/IAD inquiry into the complaint made to the Secretary-General by the Applicant and his colleagues found sufficient evidence of wrongdoing to result in [the former RSG's] immediate resignation, i.e., dismissal".

aa. "Special Review I dealt with the former RSG's accusations of under-performance against the Applicant and his colleagues". While "neither the complaint nor the report was shared with the Applicant, the lack of any further action in this regard speaks for itself". It "may be inferred that the toxic atmosphere that permeated OIM after the complaint to OIOS was filed warranted the Applicant's need to protect himself from retaliation".

bb. "Special Review II reported on the substance of the Applicant's and his colleagues' concerns about the former RSG's investment decisions and their effect on the health of the Pension Fund". "On information and belief, it recommended the former RSG be replaced" and was "followed immediately by his resignation". It "may be inferred from this that the Applicant's 'participation' was a legitimate exercise of his duty to report possible misconduct".

cc. The "egregious refusal to comply with the Tribunal's Order for Production of Documentation related to Special Reviews 1 and 2 is all the more reprehensible because of the false reasoning given". The "reports, which are within the purview of the Secretary-General as Chief Administrative Officer (who both ordered them and is in possession of them), has nothing to do with the operational independence of OIOS".

dd. The Respondent's "suppression of the two Special Audit Reports showing that it was [the former RSG] who was engaged in misconduct should be sufficient to warrant rejection of the Respondent's case". The "communications and activities that took place prior to [the former RSG's] departure in March 2020 were legitimate efforts to protect those who were carrying out their fiduciary responsibilities". "The Applicant and his colleagues were the subjects of on-going retaliation by [the former RSG] that justified further exchanges on what could be done, including filing a further formal complaint and having recourse to the Staff Union representative". The "communications that took place after [the former RSG's] departure were done pursuant to consultations approved by the new OIM leadership under [the new RSG], who engaged himself in consultations

with [MR] as part of the Culture Transformation process that had been approved".

ee. "W01 never claimed any harassment by the Applicant because all of his exchanges were either private opinions that never entered the workplace or were views being officially solicited by the new OIM management as part of an effort to address the toxic work environment that had been found in the three OIOS Audits". The new RSG and TS "were not penalized for expressing the same opinions as the Applicant on W01's weak performance even though she filed complaints against both of them".

ff. The Applicant has "already addressed the charge of not cooperating which appears to have been added as an afterthought to justify dismissal". There was "no direction given prior to handing over his iPhone, all applications and passwords to applications were provided, other than WhatsApp due to the sensitive personal information it contained".

gg. "The Respondent created a bogus case of privilege by enlisting OIOS to claim these were internal working documents that OIOS could not be forced to disclose". This was "clearly a false argument since OIOS was not being asked to disclose anything". These "reports were requested by and in the possession of the Respondent, i.e., the Office of the Secretary-General and [the USG]". There "was no rationale offered for refusing to provide them at least on an *ex parte* basis to the Tribunal". The Tribunal may "consequently wish to draw adverse inferences from this decision to cover up critical evidence exonerating the actions of the Applicant and his colleagues and to consider an award of costs for abuse of process".

hh. This "case is highly unusual in that crucial evidence that the actions of the Applicant and his OIM colleagues were fully justified and that they suffered retaliation for reporting wrongdoing has been suppressed by the Respondent in order to further their narrative that these communications took place in a vacuum and for some ulterior motive". The Tribunal "may also infer that the suppression of evidence is being done to cover up an

institutional failure on the part of the Administration to respond to the serious issues that had been raised".

ii. The "penalty imposed was entirely disproportionate". In reviewing the charges "it is difficult to see a breach of any rules warranting separation from service, particularly since several staff who engaged in the same behavior have never been charged with any wrongdoing". Even "assuming strong words in private communications call for admonition, this is generally accomplished through non-disciplinary action". The "only issue that seems to have engendered such a strong response is the Applicant's private criticism of not only the former RSG but also of his immediate supervisor". There is "no administrative issuance directing that holding or expressing disagreements with one's supervisor or even criticism of a manager is an act of misconduct". The Respondent will "be hard pressed to find any comparable case". There is "no indication that any mitigating factors were seriously considered in arriving at the harsh decision imposed". In *Samamdarov* 2018-UNAT-859, the Appeals Tribunal has held that, "[t]he purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability". The Tribunal "is vested with the authority to overturn a prescribed penalty if it is regarded as too excessive in the circumstances of the case", referring to *Rajan* 2017- UNAT-781. There is "no indication that the Respondent has given any consideration to the Applicant's long record of excellent service or his courageous efforts to protect the Pension Fund as mitigating factors before imposing separation from service, given the devastating personal and professional consequences this decision has had on a staff member who has devoted his career to [United Nations] service. The Applicant has "testified as to the motivation behind his actions and his belief that he was acting in the best interests of the Pension Fund" and for "this his [United Nations]

career has been ended, his professional reputation has been harmed and his personal life irreparably damaged".

jj. The Respondent "has failed to sustain the charges with clear and convincing evidence". The "decision on separation from service" should "be rescinded with appropriate compensation for the resulting harm and abuse of process".

7. The Respondent's submissions may be summarized as follows (references to footnotes omitted):

Facts

a. The Applicant "participated, via use of personal e-mail address, in discussions of the Group's contemplations to supply internal (non-public) information to journalists, including [FF, name redacted for privacy reasons], bloggers/staff associations, including [MR], and visiting Permanent Missions, including the Permanent Mission of [a specific United Nations Member State]". These "facts are based on e-mail evidence, the authenticity of which is not disputed". The Applicant "knew the purpose and progress of such collaborative efforts, and that there was no authorization given to disclosing the internal information". "Yet, the Applicant continued to collaborate with members of the Group because he shared the goals and desired to benefit from the collaboration". He "cannot now disown the consequence of it by saying that he did not [speak] with the external entities".

b. During "the cross-examination, when confronted with the evidence, the Applicant denied his participation in the aforesaid discussions by stating that he did not read those e-mails". "Yet, those e-mails concerned the very issues that the Applicant and the Group reportedly found so distressful as to lead them to file multiple complaints against their then head of entity". It "is difficult to believe that he simply ignored them". When "confronted with evidence of his own e-mails reacting to the discussions, the Applicant retracted his previous denial and said that he was not participating in the

discussion but merely highlighting the challenges within the scope of his duties and responsibilities at the Fixed Income. The Applicant "effectively acknowledged his involvement in [the] discussion by saying that he 'only engaged when there was something in relation to the field [he] was working [in]'". This "statement is not consistent with the evidence". The Applicant "responded to [EH's] 13 July 2019 e-mail which had no reference to Fixed Income and, in that e-mail, [EH] only asked recipients to send their 'comments and additions' 'on questions on the organization chart and budget'". When "confronted with this evidence, the Applicant changed his statement and argued that 'organization chart and budget has embedded Fixed Income in it'". This "essentially means his participation covered all management issues of the OIM as Fixed Income is [a] portfolio managed in the OIM". "The contrast between this and his initial blank denial is obvious". The Applicant's "ever-changing testimony is not credible".

c. The Applicant "disclosed sensitive information to [MR] through his 14 March 2020 and 30 March 2020 e-mails, as well as his write-up of April 2020 that [MR] attached to her 8 March 2022 open letter to the Secretary-General". During "the cross-examination, when asked why he first forwarded his 14 March 2020 e-mail to his private e-mail account before sharing the exchange with [MR], the Applicant argued that it was to 'keep the history of the exchange'". Then, "when asked why he had to use his private e-mail account in conveying the information to [MR], the Applicant responded: 'immediately, [W01] would know, all the emails were scrutinized by the management' and added that he knew this because 'people from the IT said that they were asked by [the former RSG] to read people's communications'". However, the Applicant "refused to provide specifics in support of such serious accusation". He "did not disclose the name of 'one of the IT guys' who allegedly reported this information because he 'did not want this person to be in trouble'". The Applicant "also did not recall whether he or the Group reported the unauthorized 'reading some people's emails' to the Office of Internal Oversight Services".

d. During the cross-examination, the Applicant "was also confronted with the fact that the information that he had disclosed to [MR] was not public". The Applicant "remained evasive and did not answer the question whether the information was known to the public". "At the outset, he responded that the information was not sensitive because he 'forwarded after the fact' and 'it could not affect the Fund'". When "it was pointed out that he disclosed to [MR] W01's work-related e-mail including sensitive information, the Applicant became defensive and said that '[MR] is not an outsider'". When "probed, the Applicant acknowledged that he could not control what [MR] would do with that information and did not ask her to keep the information confidential". The Applicant "did not answer the straight-forward question whether the information he had shared with her was known to the public". There "was no ambiguity in the question, contrary to the Applicant's professed inability to understand it". The "work related e-mail exchange was between him and W01 and he knew that the work discussion was not in public". In "his closing statement, the Applicant admitted that his 'private notes and comments' were not publicly available at the time of his conduct, yet he argued that it was not 'sensitive or confidential'". However, "this argument does not make sense". "The fact that the Applicant felt the need to disclose the information to [MR] can only mean that it was sensitive information, otherwise she would have easily accessed it". Furthermore, "whether the information was sensitive or confidential is not up to him to decide". "Under staff regulation 1.2(i), he needed prior authorization to disclose any non-public information". After the former RSG's "departure, in his 26 October 2020 e-mail on record, the Applicant discussed with the other members of the Group, and proposed possible questions that [MR] should ask the new RSG". During "the cross-examination, the Applicant conceded to this fact". The Applicant "argues in his closing statement that "[he] and his colleagues were staff members too and entitled to the same rights as all staff to discuss their working conditions". The Applicant's "statement does not find support on record". The "questions he crafted for [MR] largely consist of his criticisms of Fixed Income's performance and W01's qualification focusing on personalized

attacks on her, e.g., 'is [W01] qualified to lead Fixed Income? How to repair the damage she has done'". This "has nothing to do with staff welfare or general working conditions at OIM".

e. Even after the former RSG's "departure, between March 2020 and February 2021, the Applicant engaged in collaborative efforts with [MR] and the other members of the Group to have W01 'fired' from OIM". The "record contains the Applicant's messages to [MR] aimed at removing W01 from her post for which the Applicant had applied but was not successful". During "the cross-examination, the Applicant admitted being disappointed at his non-selection for the post for which W01 was selected". He "also admitted to covertly recording several meetings he had with her".

f. The Applicant "also denied discussing work related matters, including about his issues relating to W01, with his colleagues and [MR]". According to him, "the documented discussions he had with those individuals were not work-related matters and he only 'shared [his] opinion about how horrible [W01] was to [him]' and added that it was 'probably one text message, one discussion". "In fact, between March 2020 and February 2021, the Applicant exchanged a number of messages/e-mails with various OIM senior managers and [MR], in which he raised various allegations of wrongdoings against W01, degraded W01's professional standing at OIM, and attempted to garner support for her removal from OIM".

g. When "asked about his 21 March 2020 message stating that 'all future contracts that [W01 and the former RSG entered] should be suspended now—in these hands they will be misused to leverage and to play artificially with Asset Allocation', he denied instilling animosity and hostility against W01 among his colleagues". He added that "it was his recommendation to suspend 'highly speculative' contracts". However, "the message refers to 'all future contracts' that did not materialize at the moment, and there was no basis to conclude they would be 'speculative'. The "attack on W01's integrity ('in these hands', 'misused', 'play artificially') is obvious in his own message".

h. When "asked what he meant in the beginning of his 31 March 2020 e-mail, following [the former RSG's] resignation, by stating that 'the best option is to bring back the situation that existed before [the former RSG, HB and W01] arrived', the Applicant responded that he meant 'the fixed income portfolios […] the way they were before the management at the time changed them'". Then, "when asked about his comment in the same e-mail that, for instance, '[W01] divided the team, operated like [the former RSG], bribing people with promotion, excluding some, talking only to those who say only yes to her', he stated: 'I just stated facts'". Then, "when highlighted that, at the end of the same e-mail, he wrote that W01 'should be asked to leave asap' for having supported [the former RSG] 'by helping him to create this terror culture in the office', the Applicant said: 'exactly what it means'". He "added: '[His] only intention was to get control of the portfolios so [he] could improve performance' and denied wanting W01's separation from OIM following [the former RSG's' departure". However, "such denial is not consistent with the record including his own messages". When "confronted with those, he wavered in his testimony".

i. Regarding "his 8 June 2020 WhatsApp exchange" with MS where the Applicant "wrote 'So, [HB] stays… that was only way to see him [the former RSG] gone", the Applicant "first could not recall his message to [MS] saying, 'I don't think this is the right transcript'". He "then recalled 'typing [HB] stays' but not the rest of his message". Later, he "admitted his message by stating: 'clearly I typed it' but denied again that the word 'him' referred to [the former RSG]".

j. After being "confronted with his 6 November 2020 WhatsApp message to [MS] in which he had hoped that W01 was 'done' like another staff member whose temporary appointment was to expire and was to leave OIM, the Applicant said he 'did not know how [he] felt on that particular day' before conceding that one 'can draw the conclusion' that he had hoped that W01 would leave the OIM".

k. When "asked about his WhatsApp message" to MS stating that "'[W01] will never change', '[W01] needs to go', 'Now', the Applicant did not answer and said he could only 'speculate' what he meant four years ago before attempting to discount his message to the effect that W01 'needs to stop managing portfolios'".

l. In his closing submission, the Applicant "suggested that his conduct was an expression of 'private views […] that [were] well-founded'. However, "whether his views were correct or not is not at issue". "His 'views' had not been channelled to those under the framework of the performance management or accountability". He "spread his 'views' to those outside the established mechanisms for the goal of pressuring [W01] out of the OIM". The Applicant's "remarks captured in record, such as W01 'should be asked to leave asap'; 'Hope [W01 is done] too'; 'Never hated anyone but I hate [HB and W01] dearly with passion'; suggest hatred and aggression towards W01, the targeted individual". Such a "high degree of animosity permeates the work environment and W01 felt such high degree of animosity from the Applicant as evident from her statements on record".

m. The Applicant "failed to cooperate with an authorised investigation by deleting from his official [United Nations-issued] iPhone the WhatsApp application before submitting it to OIOS". "Evidence obtained through forensic analysis of [MS's United Nations] iPhone revealed that the Applicant used WhatsApp in communicating on work matters". "During the hearing, the Applicant confirmed his WhatsApp messages that were recovered from [MS's United Nations] iPhone. "By deleting it, the Applicant prevented OIOS from recovering all relevant information from his official [United Nations] iPhone and failed to cooperate with an authorised investigation".

n. "In conclusion, during the oral hearing of the Applicant, no reliable or relevant evidence emerged to overcome the documentary evidence that formed the basis of the factual findings of the Respondent resulting in the Contested Decision". The "testimony given by the Applicant rather

underscored the lack of credibility in his evidence". Notably, "the Applicant could not consistently explain his own messages during the cross-examination", and "contradiction and evasiveness were prevalent throughout his testimony".

o. "Consequently, the Respondent submits that the Applicant's testimony does not change the facts of this case that are established by the clear and convincing evidence on the record".

The established conduct amounts to serious misconduct

p. The Applicant's "established conduct violates Staff Regulations 1.2(a), 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(i), and 1.2(q), Staff Rules 1.2(c), 1.2(f), and 1.2(j), section 6.2 of ST/AI/2017/1, sections 4.1 and 5.1 of ST/SGB/2004/15, and OIM 'Information sensitivity, Classification of Documents and Records Management Policy'".

q. The Applicant "engaged in compound and serious misconduct in violation of multiple obligations". His "conduct exhibits a pattern of behaviour of pursuing his personal agenda at the expense of the Organization's interests". He "betrayed the Organization's trust in him as a senior manager".

r. During the proceedings, "without any meaningful efforts to address the evidence on record, the Applicant entirely focused on speculating that he was separated because he was a 'whistleblower'". However, "there is no legal or factual basis for his speculation" as his "complaints against [the former RSG] were addressed in a separate process the outcome of which was given to him". The Applicant's "conduct at issue, does not fall under the definition of protected activities under ST/SGB/2017/2/Rev.1" (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations). The Ethics Office "never found the conduct at issue in this case to be protected activities". The Applicant "arbitrarily expands the scope of protected activities to avoid liability for his unlawful behaviour". "His argument finds no support in

ST/SGB/2017/2/Rev.1 which does not prejudice the 'legitimate application of regulations, rules and administrative procedures' (see section 2.2.)". ST/SGB/2017/2/Rev.1 does "not provide blanket immunity to the Applicant or shield him from accountability for his own misconduct". The Applicant "essentially argues that he is free to mobilize external entities of his choice to further his disagreement with the OIM management, and to target other staff members who were not onboard with his position". This "not only carries danger of misuse but also upends the Organization's internal mechanisms in place to address misconduct and accountability".

s. OIOS is "not operationally subject to the Respondent's instructions". The Applicant's "closing statement referring to the OIOS investigation as retaliatory action by the Administration is without basis". This "only highlights his disregard to the Organization's internal process based on his unfounded belief that OIOS or the Administration falsely accused him of wrongdoing". Also, the Applicant's "insinuation that OIOS improperly accessed the [United Nations] Information Communications Technology ["ICT"] resources is baseless". Under ST/SGB/2004/15 (Use of information and communication technology resources and data) and ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), OIOS is "authorized to access all [United Nations] ICT resources".

t. The General Assembly "explicitly recognized OIOS' discretion to determine the scope of access to its reports". The Respondent "cannot compel OIOS to agree to the production of its reports". There is "no abuse of proceedings, therefore, the Applicant's request for award of costs should be dismissed".

u. "Contrary to the Applicant's contention, Staff Regulation 1.2(f) does not require a negative effect on the Applicant's work or on the work of OIM to be held accountable for its violation".

The disciplinary measure is proportionate

v. The "imposed disciplinary measure is proportionate to the Applicant's misconduct and in line with the Organization's obligation to hold senior managers accountable for misconduct and to ensure consistency of treatment in similar cases". "All relevant circumstances were considered in reaching the Contested Decision". "Contrary to the Applicant's contention, a toxic work environment at the time at OIM as well as the Applicant's long service with the Organization were taken towards mitigation in the Contested Decision". Those factors "were weighed against multiple aggravating factors present in this case".

w. The Applicant's "claimed impact of the disciplinary sanction on his personal circumstances, including his familial or financial situation has no bearing on the proportionality of the Contested Decision". "Such circumstances do not have a 'rational connection or suitable relationship' to the evidence of misconduct and the purpose of the discipline".

x. Likewise, "there is no basis for the Applicant's claim that the Contested Decision is arbitrary because W01's 'supervisors had recognized these same issues with her performance' are treated differently from him". W01's "supervisors were not involved in the same conduct as the Applicant".

Consideration

The issues of the present case

8. The Appeals Tribunal has consistently held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

9. Accordingly, the basic issues of the present case can be defined as follows:

a. Did the USG lawfully exercise her discretion when imposing the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity, in accordance with staff rule 10.2(a)(viii), against the Applicant?

b. If not, to what remedies, if any, is the Applicant entitled?

The Tribunal's limited scope of review of disciplinary cases

10. Under art. 9.4 of the Dispute Tribunal's Statute, in conducting a judicial review of a disciplinary case, the Dispute Tribunal is required to examine (a) whether the facts on which the disciplinary measure is based have been established; (b) whether the established facts amount to misconduct; (c) whether the sanction is proportionate to the offence; and (d) whether the staff member's due process rights were respected. When 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. (In line herewith, see the Appeals Tribunal in para. 51 of *Karkara* 2021-UNAT-1172, and similarly in, for instance, *Modey-Ebi* 2021-UNAT-1177, para. 34, *Khamis* 2021-UNAT-1178, para. 80, *Wakid* 2022-UNAT-1194, para. 58, *Nsabimana* 2022-UNAT-1254, para. 62, and *Bamba* 2022-UNAT-1259, para. 37). The Appeals Tribunal has further explained that clear and convincing proof "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable" (see para. 30 of *Molari* 2011-UNAT-164). In this regard, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred" (see para. 32 of *Turkey* 2019-UNAT-955).

11. The Appeals Tribunal, however, underlined that "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" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi* 2010-UNAT-084, para. 40). In this regard, "the Dispute Tribunal is not conducting a 'merit-based

review, but a judicial review'" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

12. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

Whether the facts on which the disciplinary measure is based have been established

13. In the letter dated 17 January 2024 from the ASG to the Applicant in which the contested decision was stated ("the sanction letter"), the ASG, on behalf of the USG, indicated the basic findings of misconduct against the Applicant. Rather than explicitly stating what these findings were, reference was instead made to a letter dated 31 July 2023 from the Director of the Administrative Law Division to the Applicant by which he was informed of the allegations of misconduct ("the allegations letter"). In the sanction letter, it was then stated that the USG had decided to drop some specific allegations, which, however, were stated together with the other allegations. This made it difficult to identify the actual misconduct findings. For the sake of clarity and access to justice, the Tribunal encourages the Administration to set out the misconduct findings a more direct straightforward manner in the future.

14. When comparing the allegations letter with the sanction letter, the basic misconduct findings therefore appear to be the following:

> a. "Together with other Office of Investment Management (OIM) staff members, and in opposition to the then [RSG], [the Applicant] participated in discussions suggestive of collaborative efforts to disclose without authorisation sensitive information relating to the OIM to the media, blogs and/or Permanent Missions";

b. "In doing so, used [his] personal e-mail address in violation of the OIM policy 'Information sensitivity, classification of documents and records management policy' ["the OIM policy"], which [he] had undertaken to comply with";

c. "In doing so supported and/or contributed to possible violation of the Staff Regulations and Rules and the Organization's policies arising from unauthorized disclosure of sensitive information concerning the OIM to external parties, including the media, a blog and/or Permanent Missions; and failed to report the possible misconduct of the staff members".

d. Between October 2020 and May 2022:

i. "Knowing that [MR] posted information critical of the OIM leadership on blogs and social media, [he] disclosed to [MR] without authorisation sensitive information about official OIM matters";

ii. "[He] engaged with other OIM staff members and/or external parties, including [MR], in building opposition to the instructions and/or directives of the OIM leadership, including disclosing, without authorisation, sensitive information, or drafting possible questions to be asked of the OIM leadership in an attempt to further [his] position on official OIM matters, including [his] personal desire to remove [W01] from her post at the OIM".

e. "On 13 May 2022, before submitting [his] official [United Nations] iPhone to [the] Office of Internal Oversight Services (OIOS) for its authorized investigation, [he] deleted from [his] official [United Nations] iPhone applications, including WhatsApp, which [he] had used to exchange messages about official OIM matters".

15. In the Applicant's testimony to the Tribunal, he explained as follows of relevance:

a. The Applicant joined UNJSPF in 2008 in the midst of one of the worst crises in the history of the financial markets to work on the fixed-income portfolios as the head portfolio manager. After the former RSG assumed office, he, however, changed the organizational chart and limited the Applicant's areas of responsibility as a Director at the D-1 level was appointed, namely W01. Some other staff members encouraged the Applicant to file a management evaluation complaint against the appointment of W01 claiming that she did not have the required skills as per the job opening in accordance with her LinkedIn profile. The Applicant therefore filed a request for management evaluation. Whereas the Applicant testified that he was personally disappointed not to be selected, his main concern was that someone unqualified had been selected for the job.

b. The Applicant never tried to have W01 removed from her post. The Applicant did not select her as his manager and his main concern was the fixed-income performance. The team was very divided, and it was impossible to work together. According to the Applicant, W01 had used the "f-word" at him several times, and a person, who was interviewed by OIOS, had said that she had overheard W01 using the "f-word" towards the Applicant and told him just to follow instructions (this is confirmed by the investigation report; the person was MC, name redacted for privacy reasons). The Applicant had recorded conversations with W01 on his private phone for his personal use for notetaking purposes. This was common practice in the office, and he had checked that there was no rule against it. In conversations with the new RSG, the Applicant had brought up the situation with W01, and while the new RSG said that she was incompetent, he eventually also tried to mediate between them. Via WhatsApp, the Applicant had also shared texts with a colleague in which he criticized W01. This included telling him that he wanted to see her punished, which he explained that he had indicated in response to the terror, mistreatment, disrespect and humiliation that he had experienced. After the former RSG

resigned from his job, the Applicant also intended to have his former tasks and responsibilities restored in the office, which gradually also occurred.

c. The Applicant did not recall being at a meeting with the head of OIOS with some OIM colleagues. He was not informed about the outcome of the meeting but knew that it concerned mismanagement of the office and that nothing eventually came out of it. Together with some OIM colleagues, the Applicant, however, wrote a joint complaint against the former RSG to report possible misconduct. His reason was that the former RSG had singlehandedly changed the benchmark for the fixed-income portfolio several times, and when the Applicant had raised issue therewith, he had been told this was not his concern, even if it was dramatically losing its value. The Applicant had been invited to participate in the complaint in his capacity as fixed-income portfolio manager, and he only provided information thereabout to the complaint. The meetings with the other complaints had been verbal, and they had met after meetings with the former RSG.

d. The complainants had used their private emails for exchanges, since it was common knowledge that the former RSG was checking and scrutinizing their office emails. Someone from the information technology department had told him this, but the Applicant did not want to reveal the person's name as he feared that this person would get into trouble. The Applicant had sent an email exchange which he had had with W01 on his office email to his private email because he had wanted to share it with MR to show her how W01 mistreated him.

e. In meetings with the former RSG, the Applicant would often raise his hand to share his opinion. OIM was divided in two: those who were supporting the former RSG and were promoted and the others who were instead punished, humiliated and disrespected. The rumor was that the former RSG had found out about the complaint and was trying to have it withdrawn. The former RSG also filed a report against the Applicant for underperformance.

f. The Applicant contacted MR concerning his work situation after having unsuccessfully proposed to W01, to mediate their differences through the Ombudsman: she basically would not talk to him, and he felt that his supervisors were abusive and incorrect. He therefore wanted to explore his options, and MR was also talking to other OIM colleagues. In addition, she was in contact with the USG with whom, MR organized a meeting at which the ASG also participated in March 2020. The USG and the ASG recommended the complainants write an official letter to the Secretary-General, which they did the following date. In result, an audit was effectuated and the former RSG eventually decided to resign from his post.

g. The Applicant had then shared information with MR, including his abovementioned email exchange with W01, since MR was working with the new RSG to improve the situation in OIM. When the Applicant reached out to MR, he did not know about her posting on a blog or social media, and MR only used the relevant information in her 8 May 2022 open letter to the Secretary-General two years later. Even if some of the shared information was not public, especially his recommendations (all UNJSPF transactions could, on the other hand, be seen on its website), it concerned non-sensitive and insignificant matters of the past. Also, since MR was a UNJSPF staff member and the UNJSPF Staff Representative, he did not consider her an external party. They had not discussed her possibly disclosing the information, and he could not control what she then did. The Applicant had also emailed and prepared some questions to MR for her to ask the OIM leadership, which concerned the same issues as the other information that he had shared with her. The Applicant had also shared his request for management evaluation with MR, as well as some information regarding the alleged inconsistencies in W01's job application for the D-1 level job and failures in performing her job.

h. The Applicant never spoke to any media or governments. Even if he had access to confidential information, he never disclosed a single document to any external actor; he only did so with colleagues. Even though the Applicant was copied into an email exchange between some OIM

colleagues discussing an article, he did not recall having read many of the emails, and he was not aware that one of the colleagues was in contact with a journalist. Rather, he only engaged in the email exchange when questions came up regarding his area of expertise, namely fixed-income. The Applicant did recall that one of the colleagues had spoken about visiting a Member State's mission to the United Nations and had apparently done so. The Applicant also recalled that he had been approached to speak to the United Nations Permanent Mission of his country, but he never did it.

i. The Applicant had installed WhatsApp applications on both his work and private phones for the same WhatsApp account. When he was asked to submit his work phone as part of the investigation, nothing was said to him about not deleting the WhatsApp application on the work phone. Since the WhatsApp account contained private matters, he therefore deleted it before he handed his work phone over to the investigators and the WhatsApp application remained on his private phone. Similarly, he also deleted his bank account application (although in the investigation report reference is made to a medical application). Also, nothing was lost as the investigators got access to his WhatsApp messages with MS from her phone.

16. When comparing the Applicant's testimony before the Tribunal against the interview record with OIOS, no material inconsistencies are detected. Also, while the Applicant's testimony served his own best interest, the Tribunal sees no reason to doubt his general credibility and genuineness.

17. In the sanction letter, regarding the Applicant allegedly "[p]articipating in discussions suggestive of collaborative efforts to disclose sensitive information", it was highlighted that EH had started different email exchanges in 2019 in which the Applicant was copied in together with some other OIM colleagues. In these email exchanges, EH wrote about gathering information for questions to be asked by MR, referring to the former RSG as a "very dangerous man", and EH proposed contacting Permanent Missions to the United Nations and a journalist. The Applicant provided some comments on the staffing situation in the fixed-income

team and information on the fixed-income portfolio. In the investigation report, OIOS emphasized that "[n]o evidence was found that [the Applicant] himself spoke to journalist or attempted to meet his Permanent Mission".

18. Concerning the Applicant's alleged failure to report his OIM colleagues for misconduct, it is stated in the sanction letter that the Applicant was "aware that [his] colleagues were interacting with the media, blogs and Permanent Missions" and "knew the context and outcome of [his] colleagues' visit to [the Permanent Mission of a Member State] because [EH] shared with [him] and the rest of the Group feedbacks after the visit". Also, it was found that there "was sufficient information at [the Applicant's] disposal that [his] colleagues might have engaged in misconduct" but he "omitted to report the possible misconduct of [his] colleagues and continued to collaborate and discuss with them".

19. As for the Applicant's alleged "disclosure of sensitive information to MR and engaging with others in building opposition to the then OIM leadership to further [his] position on official matters", the following communications were highlighted in the sanction letter:

> a. "[A] lengthy exchange of emails" of 14 March 2020 concerning "OIM's senior management's decision to sell UNJSPF's [United States Treasuries] holding in which the Applicant gave certain detailed specific information;
>
> b. An email of 31 March 2020 by which the Applicant provided some additional specific information about W01's handling certain "OIM internal matters".
>
> c. A document that the Applicant shared with MR in April 2020, including "sensitive and confidential information about OIM, namely, [his] strategic recommendations concerning the future of Fixed Income".

20. OIOS also found that the Applicant had shared with MR "after she had separated from the Organization … internal OIM information … and was likely aware of her posts on blogs and social media, around the same period, critical of the RSG and his decision, and containing internal OIM information not made

public". OIOS, however, also noted that "it could not be confirmed exactly what information [the Applicant] may have shared with her [although] [c]oncerns raised by OIM senior managers … suggest that [MR] was provided information on Fixed Income that was not officially sanctioned". Reference was made to the Applicant having confirmed during his interview that he was aware that MR "posted information to blogs and social media", although at the same time, he "denied that she ever posted any information that came from him.

21. With regard to the Applicant "drafting possible questions to be asked of the OIM leadership" by MR to the new RSG, reference was made in the sanction letter to some specific questions proposed by the Applicant in response to an email of 26 October 2020 from EH.

22. Concerning the Applicant's alleged "engagement with others to further [his] personal desire to remove W01", mention was made in the sanction letter to a number of exchanges that the Applicant had had with OIM colleagues and MR via email and WhatsApp. For instance, in response to an email of 30 March 2020 from MR, in which she requested feedback regarding W01 before her meeting with the new RSG, the Applicant had provided her with a list of different specific failures and flaws of W01. In another email of 18 June 2020 from the Applicant to MR with the subject title "Things on [W01]", the Applicant provided a list of concrete examples of W01's alleged failures and wrongdoings. Also, in a private WhatsApp text message to MS, the Applicant stated that W01 (and HB) should be "punished … [n]ever hated anyone but I hate them dearly with passion", that W01 "needs to go" and that the Applicant "spoke to [the new RSG] a few times".

23. In the same vein, OIOS found in the investigation report that the Applicant's conduct towards W01 was "objectively questionable and unbecoming in a senior United Nations official" and that he held "a disproportionately negative and adversarial attitude towards her, which contributed significantly to undermining any harmonious working environment". At the same time, OIOS described the relationship between the Applicant and W01 as "acrimonious" and "terse", and it was noted that the "communication" between them was "poor". Also, the "working environment" in the Applicant's office was described as "disharmonious" and "staff

members were generally divided between those supportive of [the Applicant] and those supportive of W01".

24. In regard to the Applicant's alleged "[f]ailure to cooperate with an authorised investigation", it was stated in the sanction letter that "before submitting [his] official [United Nations] iPhone to OIOS for its authorized investigation, [he] deleted WhatsApp from [this] iPhone, which [he] had used to exchange messages about official OIM matters". It is, however, not specified what these official OIM matters were other than reference is made to his WhatsApp exchanges with MS.

25. Concerning OIOS's decision not to interview MR, it was stated in the investigation report that this was due to "her documented propensity towards posting information on widely accessible blogs and social media, including commentary critical of the OIM management and OIOS investigations, and to parties with whom she was known to communicate". In addition to its negative undertone, the Tribunal is surprised by this finding. The Applicant's interactions with MR were evidently central to the misconduct findings and MR's perspectives could be significant. Also, if interviewed, MR would not have gained access to any new information concerning OIM to post on blogs and social media, so the risk of her doing so would seem minimal.

26. In Order No. 050 (NY/2024) dated 9 May 2024, the Tribunal instructed parties to identify witnesses they wished to call and provide a "written statement [that] may also be adopted as the examination-in-chief at a potential hearing if the party leading the witness should wish to do so".

27. At the Tribunal, the Applicant initially requested to call MR as a witness in his 27 June 2024 response to Order No. 050 (NY/2024). As an annex to the application, the Applicant, however, appended a "witness statement" dated 8 September 2023 and signed by MR. At the 17 December 2024 case management discussion, his Counsel stated that since this "affirmed witness statement" had already been submitted, he saw no reason to further question MR unless the Respondent wished to hear her in cross-examination. Counsel for the Respondent confirmed that she did not wish to cross-examine MR and did not contest the authenticity of the statement.

28. Accordingly, since the Respondent did not object against MR's witness statement, the Tribunal will therefore consider it a valid and genuine expression of her views and knowledge about the present case.

29. In the witness statement, MR stated that she was "employed by [UNJSPF] Pension Secretariat-from 1992 to 2002 … and returned to the Pension Administration from 2010 to 2021". She further acted as "the Alternate Staff Representative" from June 2014 to 2019 and then "the only Staff Representative for the UNJSPF Pension Administration, Pension Secretariat and Office of Investments Management (OIM)" from 2019 to 2021. In these capacities, she (a) "participated in meetings of the Staff-Management Committee (SMC) as a pension expert", (b) "traveled year after year to [the Coordinating Committee for International Staff Unions and Associations ["the CCISUA"] General Assembly as the pension expert and adviser on pension matters", and [c) "traveled to the Pension Board as adviser to the CCISUA observer in 2015 and 2016".

30. At the outset of the written statement, MR noted that:

a. She "was entitled to any and all information shared with [her by the Applicant] and any other staff of OIM including the [former] RSG";

b. "OIOS did not interview [her] as a witness in this case—not because of a fear of exposure—but because they probably knew that [she] could provide evidence that would enlighten or disprove the allegations which appear purely political and retaliatory"; and

c. The Applicant "was not responsible for nor aware prior to publication of any of [her] opinions shared via social media posts or open letters".

31. Of relevance, MR further explained that:

a. "Since the UNJSPF is a public pension fund and its funds belong to the participants and retirees, [MR has] been writing opinions (since 2016 at least), in private groups created for former and Current [United Nations]

Staff and International Civil Servants on Facebook … and on the [United Nations] pension Blog as a fundamental right as a shareholder".

b. "As Staff Representative for OIM and as a member of the Pension Board, [MR] became aware of certain issues regarding investments in that office in June 2019 under the former RSG … [She] was initially approached for support by 2 staff members (separately), one of whom was [the Applicant], quite distraught about certain decisions made by his Deputy Director and [the former] RSG, actively implementing them prior to vetting by the Investment Committee and Pension Board, actions that could ultimately cost the Fund millions of dollars. He was also distressed because his role as the Senior Investment Officer (SIO) for the Fixed-Income portfolio, had been severely diminished when compared to the six (6) other SIOs in OIM. He had been excluded from these decisions, for which he had been responsible since he was hired in 2008".

c. "[The Applicant's role as a P5 Senior Investment Officer was a topic of several meetings in 2020 with the new RSG … starting in April 2020. As staff representative [MR] tried to have [the Applicant's] role normalized in an attempt to resolve the hostile work environment created by the D-1 supervisor's actions (*inter alia* undermining, sidelining and excluding the P5, and creating 'competition' versus teamwork with less experienced officers)".

d. "Unfortunately, even though [they] were given assurances on several occasions, on or around 3rd June 2020 (including a new organization chart) where the new RSG showed that this matter was resolved, it was in fact never really implemented. Indeed, in a discussion with [the Chief Investment Officer, "the CIO"] on 18 February 2022 he still talked about normalizing [the Applicant's] role by restoring his supervisory responsibilities, but only after [W01] (the D-1) had resigned in January 2022, and [the Applicant] was made Officer-in-Charge of the Fixed Income portfolio".

e. W01 "resigned due to actions of the new RSG not [the Applicant], who was a victim of the prior hostile working environment".

f. On 8 March 2022, MR "wrote an 'open letter' to the Secretary-General, criticizing the decision of his RSG to outsource the Fixed Income portfolio in 2022 when he had been provided recommendations by [the Applicant]—the expert—in 2020 which were not implemented. [MR] included details which [she] had received when [she] was a staff representative two years prior on 29 April 2020".

g. MR "did not consult with [the Applicant] or anyone else prior to writing [her] letter of 8 March or any other open letter or posts [she has] made throughout the years, and therefore [the Applicant] could not be culpable in any way for [her] action. In most cases the information is already published and clearly referenced in [her] posts. Additionally, 'commercially sensitive' information mentioned in the letter had been shared by the RSG and CIO in a meeting with Union Federations on 23rd February 2022 and had been shared with [her] by a staff representative of one of the Unions that same day. Therefore the information was already public".

h. "To [MR's] recollection, [the Applicant] has never shared information with [her] that was classified as 'confidential' or could even be defined as confidential or commercially sensitive".

32. Regarding the information shared by MR on Facebook, OIOS quoted the new RSG in the investigation report as having responded to a 30 March 2022 email that "we only shared the presentations to CCISUA". OIOS further stated that at the interview on 20 May 2022, the new RSG also "raised concerns regarding the publishing of commercially sensitive information on Facebook by [MR]", and it is further noted that following MR's retirement in October 2021, she became "an unpaid advisor to CCISUA". OIOS did not consider the possibility that, apart from the Applicant, MR also could have gained access to the relevant information reproduced on blogs and social media from her work with CCISUA.

33. Consequently, based on the evidence on record, the Tribunal finds that the Respondent has established with clear and convincing evidence that:

a. The Applicant participated in private group discussions with other OIM staff members in opposition to the former RSG during which he provided information regarding his field of expertise, namely fixed-income and the OIM organizational structure. The Respondent has, however, not established that the Applicant aimed at disclosing "without authorisation sensitive information" regarding OIM to the "media, blogs and/or Permanent Missions". Even if the Applicant was copied into email exchanges by EH, EH's possible opinions and actions cannot, as a matter of fact, be attributed to the Applicant.

b. The Applicant used his personal email address during these group discussions.

c. Regarding the Applicant's alleged failure to report "possible misconduct" of the other OIM staff members, the Tribunal notes that in the sanction letter reference is only made to this constituting a "possible violation" of the Staff Regulation and Rules and other unspecified policies. Indeed, one of the charges brought against the Applicant was that he failed to bring the activities of the others to the attention of the relevant leadership in the office where he worked, an allegation that is probably true. Due to the vagueness of the charge and the lack of specificity, the Tribunal, however, finds the Respondent has failed to establish that the Applicant committed any wrongdoing in this context.

d. Between October 2002 and May 2022, the Applicant:

i. Without authorisation, provided MR with sensitive information about official OIM matters.

ii. With the purpose of having W01 removed from her D-1 level post and restoring the situation before the former RSG, HB and W01 joined OIM, provided negative information about W01

to MR. In private WhatsApp text messages with MS, he also expressed animosity against W01.

e. He deleted the WhatsApp application from his official cellular phone before handing it over to OIOS. This WhatsApp application was, however, linked to his private WhatsApp account, which the Applicant used to communicate with MS concerning W01, and the Respondent has not established that these WhatsApp text messages concerned "official OIM matters".

Whether the established facts amount to misconduct and the sanction is proportionate to the offence

The legal provisions that the Applicant was found to have violated

34. In the sanction letter, when finding that the Applicant's wrongdoings amounted to "serious misconduct", the Applicant was held to have violated the following provisions of the Staff Regulations and Rules:

> [Staff regulation 1.2(a)]
>
> … Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them
>
> [Staff regulation l.2(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
>
> [Staff regulation 1.2(e)]
>
> … By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants
>
> [Staff regulation l.2(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

[Staff regulation l.2(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

[Staff regulation l.2(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;

[Staff regulation 1.2(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 1.2(c)]

Staff members have a duty to report any breach of the Organization's regulations and rules to the officials who are responsible for taking appropriate action. Staff members shall cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties

[Staff Rule 1.2(f)]

Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited

[Staff Rule 1.2(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 the Organization's activities, 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

35. In addition, the Applicant was found to have breached the following provisions:

> [ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process)]
>
> 6.2 Pursuant to staff regulation 1.2 (r) and staff rule 1.2 (c), staff members are required to fully cooperate with all duly authorized investigations and to provide any records, documents, information and communications technology equipment or other information under the control of the Organization or under the staff member's control, as requested. Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct.
>
> [ST/SGB/2004/15 (Use of information and communication technology resources and data)]
>
> 4.1 Authorized users shall be permitted limited personal use of ICT resources, provided such use:
>
> (a) Is consistent with the highest standard of conduct for international civil servants (among the uses which would clearly not meet this standard are use of ICT resources for purposes of obtaining or distributing pornography, engaging in gambling, or downloading audio or video files to which a staff member is not legally entitled to have access);
>
> (b) Would not reasonably be expected to compromise the interests or the reputation of the Organization;
>
> (c) Involves minimal additional expense to the Organization;
>
> (d) Takes place during personal time or, if during working hours, does not significantly impinge on such working hours;
>
> (e) Does not adversely affect the ability of the authorized user or any other authorized user to perform his or her official functions;
>
> (f) Does not interfere with the activities or operations of the Organization or adversely affect the performance of ICT resources
>
> …

> 5.1 Users of ICT resources and ICT data shall not engage in any of the following actions:
>
> (a) Knowingly, or through gross negligence, creating false or misleading ICT data;
>
> (b) Knowingly, or through gross negligence, making ICT resources or ICT data available to persons who have not been authorized to access them;
>
> (c) Knowingly, or through gross negligence, using ICT resources or ICT data in a manner contrary to the rights and obligations of staff members;
>
> (d) Knowingly and without justification or authorization, or through gross negligence, damaging, deleting, deteriorating, altering, extending, concealing, or suppressing ICT resources or ICT data, including connecting or loading any non ICT resources or ICT data onto any ICT resources or ICT data;
>
> (e) Knowingly accessing, without authorization, ICT data or the whole or any part of an ICT resource, including electromagnetic transmissions;
>
> (f) Knowingly, or through gross negligence, using ICT resources or ICT data in violation of United Nations contracts or other licensing agreements for use of such ICT resources or ICT data or in violation of international copyright law;
>
> (g) Knowingly, or through gross negligence, attempting, aiding or abetting the commission of any of the activities prohibited by this section.

36. Finally, it was held that the Applicant had violated OIM's "Information sensitivity, Classification of Documents and Records Management Policy" ("the OIM policy").

The Tribunal's assessment of the established factual findings

37. With reference to the basic findings of misconduct against the Applicant and the facts established after the Tribunal's above review, the judicial assessment is as follows:

> *The Applicant's participation in private group discussions with other OIM colleagues in opposition to the former RSG*

38. The Tribunal recalls that under staff rule 1.2(c), staff members have "a duty to report any breach of the Organization's regulations and rules to the officials who

are responsible for taking appropriate action". Similarly, it is stipulated in para. 1.1 of ST/SGB/2017/2/Rev.1 that "[i]t is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation".

39. When participating in private group discussions the Applicant essentially provided information and opinions concerning his field of expertise, namely fixed-income and OIM's organizational structure, to report on what he believed was the former RSG's mismanagement of OIM. This led to two complaints, with (a) OIOS and (b) the USG and the Secretary-General. Whereas the OIOS complaint did not lead to any further action, after the group of OIM colleagues reported the issue to the USG (and the ASG) and the Secretary-General, an OIOS audit was launched and subsequently both the former RSG and W01 resigned.

40. Despite the Applicant's apparent strong personal dislike of the former RSG and W01, it also follows from the evidence that he genuinely believed that due to some strategic decisions of the former RSG and W01 with which he strongly disagreed, the value of OIM's investment portfolio was decreasing dramatically. The Applicant was therefore, at least, not acting in bad faith when sharing the relevant information with the group of OIM colleagues.

41. The formation of the discussion group, who criticized the policies being adopted by the former RSG and warned of the possible damaging consequences is at the center of the Applicant's case. These discussions were subsequently followed up by stated intentions to communicate with various persons, some within and some outside of the United Nation framework in an effort to obtain results in changing the policies they opposed.

42. The allegation against the former RSG was that the policies he had adopted in the post he held may have been costing many millions of dollars in losses to the pensions investment fund and this came to pass. The group which could be described as "a protest group" filed the two complaints (first with OISO and then directly with the Secretary-General). The former RSG also filed a complaint against the Applicant and other persons because of their activities and criticisms. OIOS

followed up with the former RSG's complaint and proceeded to seize the Applicant's devices along with the devices of other persons involved.

43. OIOS found information on the devices implicating the Applicant in a plan to speak to several persons and disclose what the Respondent would refer to as confidential information. One of the allegations was about a plan to disclose the relevant information to United Nations Permanent Missions of various Member States.

44. It is based generally on this scenario that charges were brought against the Applicant and several other persons for misconduct. However, the Applicant argues that he was not involved in taking the information to the relevant Permanent Missions or members of the public.

45. However, one aspect of the case is that there appears to be a dilemma for the persons involved in what could be referred to as the "protest action" for those who were complaining about the change of policy in OIM and its possible impact as against the danger involved in the steps being planned to disclose this information to various persons.

46. To state it differently, the "protestors" were hoping to reverse the mistakes of senior management based on the decisions the said senior management at OIM were taking. There would also be an obligation to report or complain about what was happening to senior managers, including the mistakes being made by other senior managers in their office. This report would include the policies which were under scrutiny.

47. Had the Applicant disclosed his participation in the activity, he would then have been seen as a traitor to the espoused cause and this in turn would lead to the demise of the efforts to change the polices which triggered the protests. In this context, the proportionality of the decision to separate the Applicant from service of the Organization may seem questionable since the damage which may have been done had the protest action not been embarked upon may have been partially averted by his action.

48. The question whether the Applicant put his own agenda above that of the Organization is highly debatable. There were other people involved in what can be called "protest action" in relation to some policies that were being adopted in OIM.

49. Indeed, it would not have shown integrity to allow the impact of misguided policies to continue. By standing up to the policies that may have cost the United Nations great loss, the Applicant also made a positive contribution to the Organization. He may have gone about it in the wrong way. But his effort to stop the policies would have helped to institute change before the losses to the relevant funds reaped much greater damage to the Organization.

50. The Respondent alleges a breach of the public trust. But as professionals, the group including the Applicant had a duty to agitate against policies which they correctly predicted would cost the pension investment fund severe losses. The allegation of a duty to exercise utmost discretion about all matters of official business faces the same kind of scrutiny that could also have been levelled against the Applicant based on the group's complaint filed by EH, and the contention of acting as a "whistleblower" is given some evaluation.

51. It is not possible to get around the Applicant's contention that he was acting as a "whistleblower" by referring to the Secretary-General's discretion to impose different sanctions, especially in relation to EH's separation with termination indemnity. While the Secretary-General may have discretion, there should still be a basis for explaining the differences in sanction. If this is not done, then the allegation of arbitrariness would hold water.

52. While it is accepted that there was procedural fairness in the administrative act taken against the Applicant, the Tribunal is of the view that ignoring the Applicant's assertion that he was a "whistleblower" made the process unfair**.** The issue is not whether the outcome would have been different. But the issue is that it is not known whether there would have been a different outcome had the Applicant's assertion of being a "whistleblower" and the group's complaint been handled in an objective and professional way which afforded an assessment of the basis of the complaint rather than dismissing it without even a comment.

53. Accordingly, the Tribunal finds that the Applicant did not violate any provisions of the legal framework governing the United Nations when participating in the group. Rather, it can reasonably be argued that in his interactions with the group, he did nothing but comply with his reporting duties to the best of his abilities. Also, the Applicant cannot be held responsible for other group members' possible ulterior motives and/or wrongdoings.

The Applicant's use of his personal email address

54. The Applicant did indeed use his personal email address during these group discussions, but he did not thereby breach the OIM policy—his concern that his office email was compromised indeed appears as genuine. Also, it is not stated in the sanction letter what specific provision of the policy the Applicant actually violated by using his personal email address.

55. The use of personal email, which is one of the means of discussion of gathered material, should not usually end in termination and mandatory training would have been more useful.

56. Accordingly, the Applicant committed no misconduct in this regard.

The Applicant's interaction and communication with MR

57. When MR was a UNJSPF staff member and served as the UNJSPF staff representative, even though she did not work in OIM and might possibly also have overstepped the terms of her mandate and/or job description, she cannot be regarded as an external party. MR organised the meeting with the USG (and the ASG) regarding the former RSG's possible mismanagement of OIM, and she subsequently cooperated with the new RSG on improving the workplace situation at OIM after the former RSG had resigned. In these contexts, neither the USG nor the new RSG instructed the Applicant not to share any information with MR.

58. When providing MR with the relevant information, the Applicant therefore did not commit any misconduct; if anything, it would rather appear as if he fulfilled his reporting duties under staff rule 1.2(c) and para. 1.1 of ST/SGB/2017/2/Rev.1.

59. Also, the Applicant could not have anticipated that, after MR's retirement, she would use some of this information in her 8 March 2022 open letter to the Secretary-General. Rather, given MR's cooperation with the USG, it was only reasonable for the Applicant to trust her integrity and professionalism, even if he knew that she posted on blogs and social media. Also, MR made it clear that she had not discussed the disclosure of the information with him and that this was hers, and not his, full responsibility. The charge of sharing sensitive information with MR, a staff representative, is out of context; going back to March 2020, as specific information shared has been identified. The Respondent's decision makes no reference to the sworn statement of MR refuting the unsubstantiated statement that the Applicant shared sensitive information with her.

60. Accordingly, the Applicant committed no misconduct when communicating with MR

The Applicant intending to have W01 removed from her post and restoring the situation before the former RSG, HB and W01 joined OIM

61. Whereas the Applicant's WhatsApp texts messages to MS were very hostile, they were also private and, in and of themselves, do not appear to be intended for any other purpose. At the same time, W01 also used unforgiving language against the Applicant as, for instance, explained by MC, who in the investigation report is quoted as having overheard a disagreement in raised voices between W01 and the Applicant where W01 said: "What the F***? You just have to follow instructions. Do what you're told".

62. In the Applicant's email messages to MR, he provided strong criticism of W01's professional skill and competencies. The idea was for MR to use this information in her interactions with the new RSG with whom she worked to improve the workplace situation in OIM after the resignation of the former RSG. Other than expressing personal animosity, these messages therefore also have to be seen in the general context of the Applicant's intending to turn around what he perceived to be a serious decline of the value of OIM's fixed-income portfolio that was caused by the former RSG's and W01's alleged mismanagement of OIM. According to the Applicant's own testimony, he indeed wanted to restore the

situation from before the former RSG, HB and W01 joined OIM to go back to previous investment strategies and evidently found that W01 was the wrong person to lead the fixed-income portfolio. Also, when addressing the new RSG, the Applicant did not hide behind MR when expressing his disagreement with W01—the new RSG knew that the Applicant did not agree with or like W01, and after she resigned, the new RSG decided to gradually restore the Applicant's former tasks and responsibilities and even made him Officer-in-Charge of the fixed-income portfolio according to MR's written statement.

63. At least partly, OIOS blames the Applicant for the negative atmosphere in the office of fixed-income but does not necessarily place the entire responsibility on him. Considering W01's demonstrated heavy-handed attitude towards him as his supervisor, this would also have been unfair and imbalanced. Even though the Applicant's WhatsApp messages to MS were written in harsh and unfavourable terms, a staff member should, at the same time, also be allowed to privately express his or her frustrations concerning a supervisor with a colleague—otherwise, the dissatisfaction risks festering and may further damage an already difficult work relationship. In addition, according to MR's written statement, the Applicant did not cause W01's eventual resignation, which resulted from other circumstances related to the new RSG.

64. To bridge the differences between the Applicant and his supervisor, W01, outside intervention such as informal conflict resolution would therefore have been beneficial in the circumstances, even though, as stated by the Applicant in his testimony, W01 resisted this. In line herewith, the Tribunal refers to ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) in which it is provided that:

> a. "The Organization shall … [t]ake appropriate measures to promote a harmonious work environment and protect personnel from prohibited conduct through preventive measures" (para. 3.2(a)); and
>
> b. "Heads of entities shall, in addition to their obligations as staff members … [e]ndeavour to create an atmosphere in which personnel in their entities may express concerns about possible prohibited conduct, including

by maintaining open dialogues and an open-door policy with concerned personnel in their entities".

65. Also, rather than, as a first step, addressing the issues related to the Applicant through a disciplinary process, the situation could also more appropriately have been tackled through performance management measures by, for instance, working on his teamwork and communication competencies.

66. Thus, under para. 2.3 of ST/AI/2021/4/Rev.1 (Performance management and development system), "[t]he purpose of the Performance Management and Development System is … to improve the delivery of programmes by optimizing individual performance at all levels, which it will achieve by:

a. "Promoting a culture of accountability and adherence to the standards of conduct of international civil servants";

b. "Promoting a culture of high performance, personal and professional development and continuous learning";

c. "Empowering managers and holding them responsible and accountable for managing their staff";

d. "Encouraging a high level of staff participation in the planning, delivery and evaluation of work";

e. "Recognizing successful performance and addressing underperformance fairly and equitably".

67. Further, in accordance with ST/AI/2021/4/Rev.1, "[t]he function of the Performance Management and Development System is to promote communication between staff members and supervisors throughout the performance management and development cycle, including on the goals and key results to be achieved and the success criteria by which individual performance will be assessed". The objective of the "Performance Management and Development System" is to "enable a culture that promotes continuous learning and personal and professional development, recognizes successful performance and addresses

performance shortcomings". Also, "[i]n the performance of their functions, staff members are expected to demonstrate the values and behaviours of the Organization, which will be considered in the evaluation of the staff member's performance" (see para. 2.5).

68. To address a staff member's performance shortcoming, ST/AI/2021/4/Rev.1 sets out some options. Henceforth, "the first reporting officer, in consultation with the second reporting officer, should inform the staff member and proactively assist the staff member in remedying the shortcoming". Remedial measures "may include additional training, counselling, the institution of a time-bound performance improvement plan or assignment to other suitable functions". According to the Applicant, no such remedial measures were, however, implemented in his case.

69. Consequently, while the Applicant's relationship with W01 was strained and negatively affected the workplace of the fixed-income office, the situation could not solely be attributed to him. W01, but to some degree also her supervisors, including the former and the new RSG, shared this responsibility, also in the performance of their managerial duties in accordance with the cited legal framework. The Applicant's acts to have W01 removed from her post and restoring situation before the former RSG, HB and W01 joined OIM, in particular his WhatsApp text messages to MS and emails to MR, did therefore not amount to misconduct. The Applicant's steps to expose what he perceived as W01's incompetence cannot be improper when she was removed from the fixed-income portfolio by the new RSG. The Applicant was not given her post.

The Applicant deleting the WhatsApp application from his official cellular phone

70. In the absence of any contrary instructions from OIOS, since the WhatsApp application on the Applicant's official cellular phone was connected to his private WhatsApp account, the Tribunal finds no wrongdoing in him deleting it. If OIOS wanted to retrieve any messages from it, it could simply have requested him to hand over his private cellular phone where the WhatsApp account remained. This was

apparently not done, but in any event, there was no need for OIOS to do so, since the relevant text exchanges were found on MS' phone.

Conclusion

71. Based on the Tribunal's above findings, the Applicant did not commit any misconduct. Since the Applicant was found not to have committed any misconduct, there also were no grounds for imposing a disciplinary sanction against him, and it is not necessary to further assess the proportionality of the sanction and due process of the present case. It is also important to note that in stark contrast to the Applicant's own circumstances of separation, EH, the leader of the protest action, was separated but with full separation indemnity (see, the Dispute Tribunal's judgment in *Hunt* UNDT/2024/056, para. 1) while the Applicant was dismissed without such indemnity.

Remedies

72. As remedies in the present case the Applicant claims "reinstatement of [his] continuing appointment until 2038 when it expires or alternatively appropriate compensation for loss of salary and benefits, including education grant, for this period" and "[c]ompensation for moral damages in the amount of three years' net base pay".

Reinstatement or compensation *in lieu* under art. 10.5 of the Statute of the Dispute Tribunal

73. Since the Tribunal finds the contested decision to be materially wrong, the most appropriate remedy would be to rescind it in accordance with art. 10.5(a) of its Statute. The Applicant is therefore, in principle, to be reinstated in his previous position in OIM. Since the contested decision concerns "termination", also under art. 10.5(a), the Tribunal "shall also set an amount of compensation that the

respondent may elect to pay as an alternative to the rescission of the contested administrative decision". This is regularly also referred to as compensation *in lieu*.

74. The Appeals Tribunal has held that the general purpose of compensation is "to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations" (see para. 10 of *Warren* 2010-UNAT-059, as affirmed, for instance, in *Kilauri* 2022-UNAT-1304, para. 25 with regard to compensation *in lieu*).

75. In *Wakid* 2024-UNAT-1417, the Appeals Tribunal further explained that "the consistent jurisprudence of this Tribunal considers compensation *in lieu* as the economic equivalent of rescission". As for the "economic or pecuniary value of rescission", this is "calculated by the appropriate assessment of past, and possibly future, financial entitlements that would normally result from retrospective reinstatement". In "receiving this package of alternative compensation, the staff member, although not effectively reinstated, is treated financially as if he/she has pursued his/her employment with the Organization until the end of his/her appointment". (See paras. 81 – 82).

76. In *Laasri* 2021-UNAT-1122, the Appeals Tribunal also held that "the elements which can be considered are, among others, the nature and the level of the post formerly occupied by the staff member (i.e., continuous, provisional, fixed-term), the remaining time on the contract, and chances of renewal". It must further "also be taken into account that the two-year limit imposed by the [Dispute Tribunal] Statute constitutes a maximum, as a general rule, albeit with exceptions. As such, it cannot be the average 'in lieu compensation' established by the Tribunal".

77. At the same time, *Zachariah* 2017-UNAT-764, the Appeals Tribunal found that there is no need for an applicant to prove mitigation of loss since *in lieu* compensation "is not compensatory damages based on economic loss" (see para. 36). Also, in *Cohen* 2011-UNAT-131, it found that "when the Administration elects to pay compensation in lieu of the performance of a specific obligation ordered by the Tribunal … within the meaning of article 10(5)(b), of the Statute of the Dispute

Tribunal … the Tribunal is not bound to give specific reasons to explain what makes the circumstances of the case exceptional".

78. In the present case, at the time of the Applicant's separation from the Organization, he held a continuing appointment and nothing in the casefile indicates that this appointment would have been terminated had it not been for the contested decision. At the same time, the Tribunal notes that although a continuing appointment, per definition, is open ended, it cannot be assumed that the Applicant would necessarily continue his employment with the Organization until his retirement in 2038. Considering the Appeals Tribunal's compensation award in *Lucchini* 2021-UNAT-1121 (although the applicant in this case held a fixed-term appointment), the Tribunal will award the Applicant two years of net-base salary in compensation *in lieu*.

Compensation for harm in accordance with art. 10.5(b) of the Dispute Tribunal's Statute

79. During the hearing, the Applicant testified that due to the loss of his employment with the United Nations, he also lost his G-4 visa. Within 30 days of the termination of his continuing appointment, he was therefore forced to depart the United States where his teenage son continues to live with his mother. The Applicant further lost the education grant entitlement for which reason he spent all his savings on his son's education, but this schooling is jeopardized by the loss of the anticipated education grant. Also, as the Applicant has not been able to find new employment, he currently resides with his parents in his home country. The Applicant displayed significant stress when providing his testimony on these matters.

80. The Applicant's testimony is, in part, corroborated by a medical note dated 25 January 2024 from a Medical Doctor in New York, which was submitted in evidence by the Applicant. Therein, the Medical Doctor certified that the Applicant was "under [his] medical care" and further indicated that:

> This is to inform you that [the Applicant] was seen by me on 01/25/2024 and found to have a severe mental stress and unable to

> sleep since he was discharged from his job at the United Nations this month. He is being forced to leave the United State of America since his visa will expire after being fired from [the United Nations]. Unfortunately, he has a young son lives with his mother in [New York City] and he would not be able to see him for a long time.
>
> He was referred to a therapist for his mental stress.

81. In *Kallon* 2017-UNAT-742, the Appeals Tribunal found that considering "the nature and extent of the moral injury sustained by Mr. Kallon over a long period of time as a consequence of the unreasonable and unfair conduct of the Organization" and "the manner in which [Mr. Kallon] had been treated, the impact of the treatment on his career and state of well-being", the compensation award of USD50,000 of the Dispute Tribunal "was appropriate" (see para. 82).

82. Considering these circumstances, the Tribunal orders that the Applicant is to be awarded USD40,000.00 in compensation for harm in accordance with art. 10.5(b).

The Respondent's refusal to comply with the Tribunal's Order No. 002 (NY/2025)

83. By Order No. 002 (NY/2025) dated 16 January 2025, the Tribunal ordered the Respondent to file certain documents that the Applicant had requested to be disclosed, namely two OIOS "special review" reports. If the Respondent did not do so, the Tribunal stated that it might, as appropriate, draw adverse inferences, which, in the affirmative case, would be reflected in the final judgment, referring to the Appeals Tribunal in *Zhao, Zhuang and Xie* 2015-UNAT-536, para. 49.

84. In response to Order No, 002 (NY/2025), Counsel for the Respondent submitted that he was "unable to provide the requested documents", referring the OIOS's alleged "operational independence" of the Respondent.

85. Considering the Tribunal's findings in the instant Judgment, since the relevant documents were not relevant to the adjudication of the present case, the Tribunal will not elaborate any further on this matter.

Conclusion

86. The Application is successful, and the Applicant is to be reinstated forthwith with 24 months of net-base salary in compensation *in lieu* under art. 10.5 (a) and compensation for harm in accordance with art. 10.5 (b) in the sum of USD40,000.

(Signed)

Judge Francis Belle
Dated this 27th day of June 2025

Entered in the Register on this 27th day of June 2025

(Signed)

Isaac Endeley, Registrar, New York