



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

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Judgment No. 2023-UNAT-1330

**Ray Steven Millan**

**(Appellant)**

**v.**

**Secretary-General of the United Nations**

**(Respondent)**

**JUDGMENT**

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Before:	Judge Dimitrios Raikos, Presiding Judge Martha Halfeld Judge Gao Xiaoli
Case Nos.:	2022-1659 & 2022-1662
Date of Decision:	24 March 2023
Date of Publication:	26 April 2023
Registrar:	Juliet Johnson

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Counsel for Appellant: Sètondji Roland Adjovi

Counsel for Respondent: Angélique Trouche and Patricia C. Aragonés

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. Ray Steven Millan, current staff member, contested the following actions or decisions of the Administration:
  - (a) A 30 June 2020 decision to seize his personal smartphone for the purposes of the investigation (seizure decision).
  - (b) A 1 July 2020 decision by the Under Secretary-General of the Department for Management Strategy, Policy and Compliance (USG/DMSPC and DMSPC, respectively) to place him on Administrative Leave Without Pay (ALWOP) (ALWOP decision).
  - (c) A 22 June 2021 decision by the Acting Head of Mission, United Nations Truce Supervision Organization (UNTSO), to extend his placement on administrative leave with pay (ALWP) for an additional three months or pending completion of an investigation and any disciplinary process by DMSPC (ALWP extension decision).
2. By Judgment No. UNDT/2021/152 (impugned Judgment No. UNDT/2021/152), the United Nations Dispute Tribunal (UNDT) dismissed Mr. Millan's application contesting the seizure decision and the ALWOP decision in their entirety. By Judgment No. UNDT/2021/145 (impugned Judgment No. UNDT/2021/145), the United Nations Dispute Tribunal (UNDT) dismissed his application contesting the ALWP extension decision in its entirety.
3. Mr. Millan lodged appeals of the impugned Judgments with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set out below, we dismiss the appeals and uphold the impugned Judgments of the UNDT.

**Facts and Procedure<sup>1</sup>**

5. Mr. Millan has been serving with the Organization since 1997.<sup>2</sup> At the time of the events in question, he held the position of Security Officer, at the FS-5 level, in the Department of Safety and Security, UNTSO, in Jerusalem.<sup>3</sup>

6. On 24 June 2020, the Investigations Division of the Office of Internal Oversight Services (ID/OIOS) received a report of possible unsatisfactory conduct implicating staff members of UNTSO in Jerusalem.<sup>4</sup> Evidence submitted in support of the report included a video clip. On 25 June 2020, Mr. S., the Director of IO/OIOS, sent an e-mail to UNTSO's Acting Head of Mission informing him of the report and the clip. The clip showed two male individuals and a female individual driving through a busy street in a clearly-marked United Nations vehicle. The male individual seen in the back seat and the female were allegedly engaging in an act of a sexual nature as the vehicle was driven along a heavily trafficked street. The UNTSO staff members implicated in the report were the Appellant and another staff member.

7. On 30 June 2020, Mr. Millan was interviewed by OIOS and was asked to surrender his personal smartphone, operative with a SIM card issued by the United Nations, to OIOS for forensic analysis for purposes of the investigation into his possible misconduct.<sup>5</sup> He objected but complied with the request.<sup>6</sup>

8. On 2 July 2020, he received notification of the ALWOP decision.<sup>7</sup>

9. On 14 July 2020, Mr. Millan filed a management evaluation request challenging the seizure decision and the ALWOP decision.<sup>8</sup> On 1 October 2020, he received a response upholding the ALWOP decision and finding that his request in respect of the seizure decision was not receivable, considering that the seizure of his smartphone had been part of the ongoing OIOS investigation

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<sup>1</sup> Summarized from the impugned Judgments as relevant to the appeals.

<sup>2</sup> The Secretary-General's answers to the appeals, para. 2.

<sup>3</sup> *Ibid.*; impugned Judgment No. UNDT/2021/145, para. 1.

<sup>4</sup> Impugned Judgment No. UNDT/2021/152, para. 8; impugned Judgment No. UNDT/2021/145, para. 6.

<sup>5</sup> The Secretary-General's answer to the appeal in respect of the seizure decision and the ALWOP decision, para. 5.

<sup>6</sup> Impugned Judgment No. UNDT/2021/152, para. 52.

<sup>7</sup> Impugned Judgment No. UNDT/2021/152, para. 10; impugned Judgment No. UNDT/2021/145, para. 7.

<sup>8</sup> Impugned Judgment No. UNDT/2021/152, para. 11; impugned Judgment No. UNDT/2021/145, para. 8.

and these contentions may only be raised in the context of an appeal against a disciplinary measure taken at the end of the process.<sup>9</sup>

10. On 11 September 2020, Mr. Millan filed an application on the merits contesting the seizure decision and the ALWOP decision.<sup>10</sup> In that application in case No. UNDT/NBI/2020/075, he requested that the UNDT award him the following cumulative remedies.<sup>11</sup>

- a. Rescind the ALWOP decision, restore him to active duty immediately and instruct the Secretary-General to release the payment of his full salary and entitlements since 1 July 2020.
- b. Alternatively, if the UNDT considers that the decision to place him on administrative leave was warranted, rescind the ALWOP decision and instruct the Secretary-General to retroactively place him on ALWP effective 1 July 2020.
- c. Grant him an appropriate remedy for the harm suffered, including for the reputational damage resulting from the defamatory press releases containing false statements.
- d. Retract press statements by issuance of a statement which corrects them and respects the presumption of innocence.
- e. Grant him an apology from the Secretary-General and the USG/DMSPC acknowledging that his rights have been violated.
- f. Enforce accountability for the misconduct/unsatisfactory conduct by the Spokesman for the Secretary-General, the UNTSO Senior Advisor and a member of the Strategic Communications Section in the United Nations Department of Peace Operations for abuse of authority under Secretary-General's Bulletin ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) and violations of Staff Regulations 1.2(a)–(b) and Staff Rule 1.2(f) for knowingly issuing the false and defamatory press statements.

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<sup>9</sup> Annex 13 to the application contesting the ALWP extension decision in case No. UNDT/NBI/2021/079.

<sup>10</sup> UNDT Order No. 193 (NBI/2021), para. 1.

<sup>11</sup> Impugned Judgment No. UNDT/2021/152, para. 16.

- g. Immediately return his smartphone and grant an apology from the USG/OIOS for violating his rights.
- h. Grant him an appropriate remedy for being unlawfully deprived of his personal property which had not been returned to him.
- i. Instruct the Secretary-General to immediately destroy any forensic analysis and data extracted from the Appellant's unlawfully seized personal smartphone.
- j. Instruct that the Secretary-General be prevented from using/referring to the seizure of the personal smartphone, any data/analysis or any further facts/witness testimony against him/any third party resulting from the data/analysis of his unlawfully seized phone, in any forum. This includes, but is not limited to, any investigation report submitted by OIOS in accordance with sections 6.15-6.16 of ST/AI/2017/1<sup>12</sup>, the disciplinary process in accordance with section 8 of ST/AI/2017/1 or in any future proceedings in front of the United Nations Tribunals beyond the instant case.
- k. Guarantee that OIOS immediately revise any "internal policy" documents contradicting ST/SGB/2004/15 used by OIOS which falsely state that OIOS has the legal authority to seize any staff personal devices "under the control of the staff member".
- l. Order that the Administration issue a fully reasoned supported legal position in consultation with the Office of Legal Affairs (OLA) and the Staff Unions on the use of personal devices and the extent of the authority of the United Nations in its investigations vis-à-vis those personal devices.
- m. Enforce accountability for the misconduct/unsatisfactory conduct of Mr. S. and his staff for abuse of authority under ST/SGB/2019/8 and violations of Staff Regulations 1.2(a)–(b) and Staff Rule 1.2(f) for instructing two investigators to lie to the Appellant so as to seize his personal smartphone, as well as not providing the required signed memorandum to him from Mr. S. containing the explanation in writing as to why the smartphone was needed at the time of seizure.

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<sup>12</sup> Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).

11. On 23 September 2020, the UNDT issued Order No. 185 (NBI/2020) partially granting Mr. Millan's motion for interim measures and suspended the decision to place him on ALWOP "(...) with respect to [his] leave being "without pay".<sup>13</sup>

12. On 24 September 2020, Mr. Millan was placed on ALWP for an initial period of three months by the Acting Head of Mission, UNTSO.<sup>14</sup> By letters dated 22 December 2020 and 22 March 2021, the Acting Head of Mission informed him that his placement on ALWP was being extended.<sup>15</sup>

13. On 22 June 2021, Mr. Millan received the ALWP extension decision.<sup>16</sup>

14. On 29 June 2021, Mr. Millan submitted a request for management evaluation of the ALWP extension decision.<sup>17</sup> On 12 August 2021, he was informed that the USG/DMSPC had decided to uphold the decision.

15. On 7 September 2021, Mr. Millan filed an application with the UNDT contesting the ALWP extension decision.<sup>18</sup> In that application in case No. UNDT/NBI/2021/079, he requested that the UNDT award him the following cumulative remedies<sup>19</sup>:

- a. Rescind the ALWP extension decision in order for him to be immediately restored to active duty.
- b. Compensate damage to his reputation and career prospects in being forced to stay away from duty for such an extended period.
- c. Retract press statements by issuance of a statement which corrects them and respects the presumption of innocence.
- d. Enforce accountability for the misconduct/unsatisfactory conduct by the Spokesman for the Secretary-General, the UNTSO Senior Advisor and a member of the Strategic Communications Section in the United Nations Department of Peace Operations

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<sup>13</sup> UNDT Order No. 185 (NBI/2020)Corr.1, para. 39.

<sup>14</sup> Impugned Judgment No. UNDT/2021/145, para. 12.

<sup>15</sup> *Ibid.*, para. 13.

<sup>16</sup> *Ibid.*, para. 14.

<sup>17</sup> The Secretary-General's answer to the appeal of Judgment No. 2021/145, para. 9.

<sup>18</sup> *Ibid.*

<sup>19</sup> Impugned Judgment No. UNDT/2021/145, para. 17.

for abuse of authority under ST/SGB/2019/8 and violations of Staff Regulations 1.2(a)–(b) and Staff Rule 1.2(f) for knowingly issuing the false and defamatory press statements.

e. Enforce accountability for the misconduct/unsatisfactory conduct by the Director, ID/OIOS, the Chief ID/OIOS Vienna, Chief of Section, ID/OIOS Vienna and the USG/DMSPC for abuse of authority under ST/SGB/2019/8, violating his rights under ST/AI/2017/1 and violations of Staff Regulations 1.2(a)–(b) and Staff Rule 1.2(f) so the Organization could be seen to be taking action in response to negative press coverage.

*Impugned Judgment No. UNDT/2021/152*

16. On 9 December 2021, the UNDT rendered impugned Judgment No. UNDT/2021/152 dismissing the application in respect of the seizure decision and the ALWOP decision.

17. The UNDT ruled Annexes 11, 13, 34, 37 and 44 to that application inadmissible on the grounds that their authenticity and probative value could not be guaranteed.<sup>20</sup>

18. The UNDT found that Mr. Millan’s assertions about the Administration’s motives being inappropriate, were merely speculative.<sup>21</sup> Based on the nature of the allegations and its gravity (a combination of its nature and reputational effect to the Organization), it cannot be said that the decision was disproportionate. Further, based on established legal principles, it cannot be said that the decision was punitive and that it violated the presumption of innocence.

19. The UNDT was of the view that since the occurrence of unsatisfactory conduct was evidenced by a video clip which had been circulated widely, depicting Mr. Millan travelling in a clearly-marked United Nations vehicle, UNTSO “205”, on HaYarkon Street in Tel Aviv, showing a woman, reported as possibly being a sex worker, in a red dress, sitting astride a male individual, engaged in an act of a sexual nature, the information which was before the authorized official made it more likely than not (preponderance of evidence) that he engaged in the unsatisfactory conduct.<sup>22</sup>

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<sup>20</sup> Impugned Judgment No. UNDT/2021/152, para. 21.

<sup>21</sup> *Ibid.*, para. 31.

<sup>22</sup> *Ibid.*, para. 42.

20. The UNDT maintained that there was no legal requirement that the ALWOP notification decision should explicitly indicate that consideration was taken about what constitutes “exceptional circumstances”, or about the actual definition of “exceptional circumstances”.<sup>23</sup> The above evidence points to the existence of exceptional circumstances within the meaning of section 11.4 of ST/AI/2017/1, and therefore that the decision to place Mr. Millan on ALWOP was lawful and rational.

21. The UNDT found that there was no evidence that Mr. R., one of the investigators, did not act independently.<sup>24</sup> Mr. S.’s evidence that OIOS engaged Mr. R. in conducting the investigation under the remote management of Ms. G-J., OIOS Investigator, in Vienna was not controverted and that evidence is credible. The UNDT rejected the allegation that Mr. R. was conflicted.

22. The UNDT was of the view that Mr. Millan’s contentions that the investigators had failed to conduct the interview in an impartial manner, remained speculative and unsubstantiated.<sup>25</sup> Since it is on record that at the time of the interview, he did not acknowledge being the male passenger in the vehicle, he could not have been asked about the woman in the clip.

23. The UNDT noted that Mr. Millan’s assertion that the information published in the media was “leaked from inside the Organization either from UNTSO and/or OIOS” was not backed by evidence.<sup>26</sup>

24. The UNDT found that, all factors considered, the ALWOP decision was lawful.<sup>27</sup>

25. Turning to the seizure decision, the UNDT, adopting its reasoning in Order No. 172 (NBI/2020), was not convinced that the case involved an administrative decision at all.<sup>28</sup> There might have been a decision refusing to return the smartphone, after Mr. Millan withdrew his consent.<sup>29</sup> However, since the smartphone was returned to him on 16 September 2020, his main claim was now moot. There was no evidence that the investigators had lied to Mr. Millan.<sup>30</sup> He handed over his smartphone to the investigators voluntarily albeit with some hesitance, after they

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<sup>23</sup> *Ibid.*, para. 32.

<sup>24</sup> *Ibid.*, para. 46.

<sup>25</sup> *Ibid.*, para. 48.

<sup>26</sup> *Ibid.*, para. 50.

<sup>27</sup> *Ibid.*, para. 51.

<sup>28</sup> *Ibid.*, para. 53.

<sup>29</sup> The UNDT refers to the Secretary-General’s reply in a different case where Mr. Millan was not a party, Case No. UNDT/NBI/2020/053.

<sup>30</sup> Impugned Judgement No. UNDT/2021/152, para. 54.

asserted that they had authority to request it because of the Organization's SIM card. The pertinent communication was vague, no legal basis and/or sanction was invoked. Altogether, both sides appear to have acted without a clear or common concept of authorizations and obligations involved, which is not surprising, given that the issue of requesting to turn over a private smartphone has been largely unexplored.

*Impugned Judgment No. UNDT/2021/145*

26. On 30 November 2021, the UNDT rendered impugned Judgment No. UNDT/2021/145 dismissing the application in respect of the ALWOP decision.

27. The UNDT held that Annex 18 to that application, comprised of a publicly released commentary and analysis of the case, was inadmissible.<sup>31</sup> Such commentary has no value, evidential or otherwise, being that whoever compiled it was not subject to the jurisdiction of the UNDT and the veracity of the comments was not and cannot be tested. What is more, the comments were made way before this matter arose.

28. The UNDT noted that ALWP had been extended on the basis that the circumstances which warranted Mr. Millan's initial placement on ALWP still existed.<sup>32</sup> At the time he was contacted by OIOS for a third subject interview in March and April 2021 to provide additional information, he was no longer on certified sick leave. The duty to cooperate with the investigation cannot be delegated. He refused to participate in the follow-up interview, which amounted to refusal to cooperate with the investigation. He contributed in no small measure to the delays in the process and to the failure to charge him.

29. The UNDT concluded that the ALWP extension decision was fully consonant with appellate jurisdiction guidance that the length of time an investigation may take will depend on the circumstances, including any practical challenges at the duty station, the nature of the allegations, the complexity of the investigation and the need to follow due process, and was therefore not abusive, did not violate due process rights and did not amount to abuse of discretion, and was lawful and rational.<sup>33</sup>

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<sup>31</sup> Impugned Judgment No. UNDT/2021/145, para. 21.

<sup>32</sup> *Ibid.*, para. 27.

<sup>33</sup> *Ibid.*, paras. 28–34.

30. The UNDT found that Mr. Millan was properly informed of the facts underpinning the decision to place him on ALWP and the ALWP extension decision.<sup>34</sup>

*Procedure before the Appeals Tribunal*

31. On 30 January 2022, Mr. Millan filed an appeal against impugned Judgment No. UNDT/2021/145 with the Appeals Tribunal, to which the Secretary-General responded on 4 April 2022.

32. On 7 February 2022, he filed an appeal against impugned Judgment No. UNDT/2021/152, to which the Secretary-General responded on 11 April 2022.

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

**Submissions**

**Mr. Millan's Appeals**

34. Mr. Millan requests the Appeals Tribunal to reverse impugned Judgments No. UNDT/2021/152 and No. UNDT/2021/145 and grant the following:

- a. Rescind the ALWOP decision, restore him to active duty immediately and instruct the Secretary-General to release the payment of his full salary and entitlements since 1 July 2020 until 24 September 2020.
- b. Alternatively, if the UNAT considers that the decision to place him on administrative leave was warranted, rescind the ALWOP decision and instruct the Secretary-General to retroactively place him on ALWP effective 1 July 2020 and to release the payment of his full salary and entitlements since 1 July 2020 until 24 September 2020.
- c. Grant him an appropriate remedy for being unlawfully deprived of his personal property for two months.
- d. Enforce accountability for the misconduct/unsatisfactory conduct of Mr. S. and his staff for abuse of authority under ST/SGB/2019/8 and violations of Staff Regulations 1.2(a)–(b) and Staff Rule 1.2(f) for instructing the two investigators to lie to the Appellant

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<sup>34</sup> *Ibid.*, para. 38.

so as to seize his personal smartphone, as well as not providing the required signed memorandum to him from Mr. S. containing the explanation in writing as to why the smartphone was needed at the time of seizure.

- e. Rescind the ALWP extension decision and restore him to active duty immediately.
- f. Award compensation for the damage to his reputation and career prospects in being forced to stay away from duty for such an extended period.

35. As regards impugned Judgment No. UNDT/2021/152, the Appellant submits that the UNDT exceeded its jurisdiction or competence by improperly reviewing Order No. 185 (NBI/2020) without any authority to do so.

36. Mr. Millan argues that a reasoned explanation supported by facts and evidence of what constitute “exceptional circumstances” supporting the decision to place a staff member on ALWOP had to be provided. The UNDT erred on a question of law by failing to appreciate this. The UNDT also committed an error by not recognizing that there was no evidence of an act of sexual nature by him, contrary to the reasons of the ALWOP decision, and that he was drowsy and asleep in the front seat of the vehicle.

37. Mr. Millan maintains that the UNDT erred in law in ruling inadmissible the documents which he had obtained outside the UNDT process. There was no challenge to their authenticity; Mr. S., the Director of IO/OIOS, recognized the documents in his 2 November 2021 testimony. At the same time, the video clip which the entire case is based on, was admitted as evidence without any test of its authenticity with the person who took the video and remains unknown.

38. Mr. Millan submits that the UNDT erred on several questions of fact. The Respondent knew for a fact that he was not being charged with misconduct for engaging in acts of a sexual nature and yet continued to use it as justification for the ALWOP decision. The UNDT’s conclusion as to what the facts of the misconduct were, differed from those of the ALWOP decision.

39. Mr. Millan puts forth that there is no evidence that the woman in the vehicle was “possibly” a sex worker, that an act of a sexual nature was occurring in the back seat of the vehicle, that he was aware of what was going on in the back seat, or that he contributed in any way to the possible misconduct occurring in the back seat.

40. Mr. Millan argues that it is unclear how the investigator and the UNDT could expect that he could have honestly answered the investigators' questions in an informed manner without having been provided the date of the alleged incident and the fact that his driver's license had been used to start the vehicle. On 30 June 2020, the investigators refused to share the date with him and on 2 July 2020, he first learned that the video clip was made on 21 May 2020. Only then was he able to determine being an occupant of the vehicle in the video clip.

41. Mr. Millan submits that, as the fact that he was in the vehicle was confirmed upon the submission of his 13 July 2020 statement, the ALWOP decision was made without establishing this basic fact. The motivation for rushing to place him on ALWOP was placating the press. The investigators failed to wait to obtain the correct carlog data from the Transport Section and the ICT data from the United Nations Office of Information and Communications Technology. The press releases violated the presumption of innocence.

42. Mr. Millan asserts that the UNDT ignored his submissions on Mr. R.'s improper participation in the interview process as an agent of the Administration. Among other points of Mr. R.'s conflict of interest, he had been one of the persons who submitted a report of possible misconduct and the video clip to OIOS. The statements about Mr. R.'s credibility by Mr. S., being aware of this, were false. The UNDT erred in the assessment of Mr. S.'s credibility.

43. Mr. Millan maintains that the UNDT erred in that, contrary to the statement by the UNDT about photographic evidence identifying him as a passenger in the rear seat, he was not. The UNDT committed another error by stating that there was no evidence that the information published in the media had been leaked from within the Organization. The Judge ignored the evidence and displayed bias in favour of the Respondent.

44. Mr. Millan points out that, as the allegations have not resulted in any disciplinary charges, there is no basis for concluding that ALWOP was warranted.

45. Turning to the seizure of the personal smartphone, Mr. Millan argues that the UNDT erred on several questions of fact. He never stated that the investigators had referred to ST/AI/2017/1. The investigators lied by claiming that they had the right to take the smartphone and that he had no choice in the matter. Guidelines on ICT material are provided in ST/SGB/2004/15 and can only apply to the ICT equipment owned by the Organization. The UNDT ignored the evidence and demonstrated bias in favour of the Respondent.

46. As regards impugned Judgment No. UNDT/2021/145, Mr. Millan submits that the UNDT erred on several questions of fact.

47. Mr. Millan argues that the UNDT incorrectly relied upon the 1 April 2021 e-mail request for an interview, sent to his United Nations e-mail address.<sup>35</sup> The e-mail did not show in the subject line that it was a time-critical request. Its status “Delivered” does not mean that the recipient has opened and read the e-mail. He was on ALWP and had been on certified sick leave since August 2020 and under medical care. He was not reading his United Nations e-mail and did not read the request at the material time. He was not contacted by other appropriate means.

48. Mr. Millan asserts that the Administration’s medical service, stating that he was medically fit to attend a follow-up interview, could not make such a claim without consultation with his medical professionals and conducting an examination on him. In addition, one request—on 1 April 2021—after the first request two days earlier hardly constitute “repeated requests”, as mischaracterized by the Respondent.

49. Mr. Millan puts forth that the argument that he provided comments to the allegations is disingenuous. He received the allegations on 6 August 2021, more than four months after the second request for the follow-up interview. His counsel prepared the comments.

50. Mr. Millan further points out that the allegation of him not being cooperative was not mentioned in the original 24 September 2020 ALWP decision nor the extension decision and was invented as a justification for the ALWP extension decision after he had brought the application before the UNDT. Neither was he charged in the 12 August 2021 letter with refusing to participate in a follow-up interview.

51. Mr. Millan argues that the UNDT erred on a question of law by ruling that Annex 18 to the application was not admissible. Its probative value was not undermined. The same test of admissibility was not applied to the video clip which the entire case is based on. Unlike the video clip, Annex 18 was produced by a known person, Mr. G., a former OIOS investigator, who would have testified if asked by the UNDT.

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<sup>35</sup> Appellant refers to R/24 of the Respondent’s reply to the application.

**Respondent's Answers**

52. The Secretary-General requests that the Appeals Tribunal dismiss the appeals.

53. As to impugned Judgment No. UNDT/2021/152, the Secretary-General argues that the UNDT correctly concluded that the OIOS request to surrender Mr. Millan's smartphone for investigation and the ALWOP decision were lawful. The Appellant fails to establish any error by the UNDT warranting a reversal of impugned Judgment No. UNDT/2021/152.

54. The Respondent submits that in *Gisage*<sup>36</sup>, the UNAT did not require that an ALWOP decision "define" exceptional circumstances or explain why the administrative leave was without pay. The Administration did not rely on the possibility that the woman in the vehicle was a sex worker.

55. The Secretary-General points out that the claim that Mr. Millan was not aware of the conduct in the back seat is not credible. Nor is the submission that he did not recognize himself in the video clip. He was shown the video clip in good quality, multiple times, including in slow motion, and was presented matching photographic evidence. The Respondent had challenged the admissibility of the evidence which Mr. Millan submitted and the UNDT found inadmissible.

56. The Respondent maintains that the UNDT did not exceed its jurisdiction or competence when it reversed the conclusion in the interim order<sup>37</sup> and upheld the ALWOP decision.

57. As to impugned Judgment No. UNDT/2021/145, the Secretary-General argues that the UNDT correctly concluded that the ALWP extension decision was within the discretion of the Administration. Mr. Millan fails to establish any error by the UNDT warranting a reversal of the Judgment. His arguments relate mainly to his failure to cooperate with the investigation, which was not material to the ALWP extension decision. None of the alleged errors, even if they had any merit, could be deemed to have resulted in a manifestly unreasonable decision.

58. The Respondent submits that the ALWP extension decision was compliant with Staff Rule 10.4 and Section 11.3 of ST/AI/2017/1, which is not contested on appeal. No other conditions for the maximum length of ALWP are provided. Even so, the length of the investigation was not

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<sup>36</sup> *Gisage v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-973, dated 25 October 2019.

<sup>37</sup> The Respondent refers to Order No. 185 (NBI/2020)/Corr.1 (Order on an application for suspension of action during the proceedings), dated 23 September 2020.

abusive. The UNDT was correct to conclude that Mr. Millan was properly informed of the facts underpinning the decision to place him on ALWP and the ALWP extension decision. The ALWP extension decision was not excessive nor arbitrary.

59. The Secretary-General points out that the UNDT found that Mr. Millan was not on certified sick leave when he was contacted for a follow-up interview. He filed no evidence that he was sick. The UNDT established, following Section 6.20 of ST/AI/2017/1, that UNTSO Medical Services had cleared his interview. He could not legally require to be contacted through his counsel. He cannot impose his own additional communication requirements. The follow-up e-mail was marked with “high” importance.

### **Considerations**

#### **I. Appeal of Judgment No. UNDT/2021/152**

60. The main issues for determination in this appeal are whether the UNDT erred in law and fact by finding that: (i) the ALWOP decision was lawful, and (ii) the seizure of Mr. Millan’s smartphone for the purposes of the investigation was not an administrative decision subject to judicial review.

61. The Appeals Tribunal will examine these matters in turn.

#### *Whether the UNDT erred in finding that the ALWOP decision was lawful*

62. On the issue of the lawfulness of the administrative decision to place Mr. Millan on ALWOP, the key question before the UNDT was whether exceptional circumstances warranted the Secretary-General’s decision that the administrative leave be without pay.

#### *Legal Framework*

63. Staff Rule 10.4 provides as follows:

(a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time after an allegation of misconduct and pending the completion of a disciplinary process. Administrative leave may continue until the completion of the disciplinary process.

(b) A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration.

I Administrative leave shall be with full pay except (i) in cases in which there is probable cause that a staff member has engaged in sexual exploitation and sexual abuse, or (ii) when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.

64. ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) sets out the following:

11.4 A staff member may be placed on administrative leave without pay by an authorized official when at least one of the following conditions is met:

(a) There are reasonable grounds to believe (probable cause) that the staff member engaged in sexual exploitation and sexual abuse, in which case the placement of the staff member on administrative leave shall be without pay;

(b) There are exceptional circumstances that warrant the placement of the staff member on administrative leave without pay because the unsatisfactory conduct is of such gravity that it would, if established, warrant separation or dismissal under staff Rule 10.2 (a) (viii) or (ix), and there is information before the authorized official about the unsatisfactory conduct that makes it more likely than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct.

65. In *Muteeganda*<sup>38</sup>, the Appeals Tribunal found in terms of the “exceptional circumstances”, as follows:

(...) A qualification of a discretionary power, by way of a condition precedent requiring “exceptional circumstances” before it can be lawfully exercised, is intended to confer a more restricted power in order to alleviate or mitigate hardship that may otherwise arise, were the power permitted to be exercised conventionally or in the ordinary course. The constraint demands proof of surrounding circumstances that are extraordinary, thus justifying exceptional use of the power.

(...) The requirement of “exceptional circumstances” is thus reviewable and the existence of the circumstances upon which the claim of exceptionality rests must be capable of objective determination, especially when the power which they qualify is drastic or burdensome, as in this case. The limitation upon the power to place a staff member on ALWOP, if it is to provide some relatively objective guarantee against arbitrary or capricious deprivation, cannot be founded exclusively on the subjective opinion of the decision-maker. The actuality of the alleged circumstances is objectively justiciable and therefore not dependent singularly on the opinion of the Secretary-General regarding their existence. Likewise, there must be a rational basis for the categorization by the Secretary-General of the circumstances as exceptional.

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<sup>38</sup> *Muteeganda v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-869, paras. 28–29.

Moreover, given the hardship caused by ALWOP, the onus is on the Administration to prove the objective existence or factual basis of the exceptional circumstances.

66. Under the applicable legal framework, in cases of misconduct the Secretary-General is not at complete liberty to place a staff member on ALWOP, as his discretion to do so is conditioned upon the existence of exceptional circumstances. In instances of misconduct other than those concerning sexual exploitation and sexual abuse—for which the applicable standard of proof to determine whether exceptional circumstances warranting the placement of a staff member on ALWOP existed is that of probable cause<sup>39</sup>—the applicable legal framework prescribes that such exercise of discretionary authority is warranted if, cumulatively: (i) the unsatisfactory conduct is of such gravity that it would, if established, warrant separation or dismissal under Staff Rule 10.2(a)(viii) or (ix), and (ii) there is information before the authorized official about the unsatisfactory conduct that makes it more likely than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct.

67. We have gone through the record of the case, examined the grounds of appeal, the Respondent’s answer, and hold that the UNDT did not err in its approach to the disputed legal and factual issues of the case at bar. It is also the considered view of this Tribunal that, under the specific circumstances of this case, as established by the UNDT, and on the basis of the overall assessment of the record on file, the UNDT correctly determined per the applicable law and our pertinent jurisprudence that the available information established, by a preponderance of evidence, that Mr. Millan had engaged in misconduct justifying his placement on ALWOP by the Administration.

68. We begin by underscoring that, as stated in the impugned ALWOP decision, given the available information, there was a preponderance of evidence that Mr. Millan was a passenger in a clearly-marked United Nations vehicle (UNTSO “205”) in which acts of a sexual nature took place as it circulated in a heavily-trafficked area.

69. Notably, the Administration based its decisions to place Mr. Millan on ALWOP on a memorandum of the Director, ID/OIOS, dated 30 June 2020, and a report received by OIOS on 24 June 2020, of possible unsatisfactory conduct implicating UNTSO staff members captured on a video clip which was apparently circulated on social media and elsewhere.

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<sup>39</sup> *Gisage, op. cit.*, para. 35, citing *Muteeganda, op. cit.*

70. The video clip shows a United-Nations-marked vehicle on a busy street. A male passenger, identified as Mr. Millan, is visible in the front passenger seat. Another male passenger, identified as Mr. A., Administrative Officer, UNTSO, is seated in the back seat with a female passenger in a red dress (FO1), who reportedly was a sex worker, sitting astride him while he has his right hand on FO1's left buttock. The driver was later identified as Mr. C., Procurement Assistant, UNTSO. At 00:00:05 seconds of the video clip, the driver's hand appears to reach out towards the passengers in the back seat. FO1 then starts gyrating on Mr. A. in a sexually suggestive manner for the following approximately 10 seconds of the video clip. The vehicle then starts moving forward, briefly showing a registration number ("205") and disappears from the video clip. As set out in these documents, OIOS' inquiries showed that the vehicle had been filmed on the evening of 21 May 2020 and that the footage had likely been taken from the Opera Building on HaYarkon Street in TelAviv. At the material time, the 'carlogger' device fitted to the vehicle was being operated by Mr. Millan, although he was not driving.

71. Moreover, according to media reports, the direction the car was travelling was from the general direction of an area known for the presence of street-based sex workers and the vehicle usage showed that the distance it travelled that day was consistent with a round trip from Jerusalem to Tel-Aviv; the vehicle's GPS system indicated that the vehicle had been in HaYarkon Street. In addition, Mr. Millan later admitted that on 21 May 2020, he was the occupant of the front passenger seat of UNTSO vehicle "205" in the video clip. On 13 July 2020, he submitted a written statement by which he apologized "for any embarrassment caused to the organization".

72. In these circumstances, there was thus undoubtedly a preponderance of evidence, i.e. it was more likely than not that Mr. Millan had committed the alleged misconduct and his act of misconduct found itself at the antipode of the conduct befitting an international civil servant. Much more importantly, Mr. Millan's conduct constituted an exceptional circumstance in terms of Section 11.4(b) of ST/AI/2017/1, especially considering the serious and grave nature of the conduct captured on the widely-circulated video clip, in which he was involved, and which caused significant harm to the reputation and credibility of the Organization.

73. Further, against that background, which, seen objectively, raises concerns about the Organization's credibility, exposing it to wide criticism from the public, Mr. Millan's placement on ALWOP was a reasonable exercise of the Administration's discretion and it was not excessive or arbitrary. Mr. Millan's act of misconduct was grave enough for the Administration to contemplate separation or dismissal, as it was irretrievably damaging the trust relationship between the staff member and the Organization. There is no gainsaying that the nature of the alleged misconduct and its unfortunate publicity were factors that called for Mr. Millan's removal from service pending investigation. This was necessary to control the damage to the trust in the Organization by showing that members of the host population would not be exposed to individuals who willfully and publicly offended mores and may have engaged in sexual exploitation. Hence, there were exceptional circumstances warranting Mr. Millan's placement on ALWOP.

74. Consequently, the UNDT did not err in concluding that Mr. Millan's placement on ALWOP by the impugned ALWOP decision was lawful because there was a preponderance of evidence that he had engaged in serious acts of misconduct warranting separation or dismissal.

75. For these reasons, the appeal fails on this ground.

*Whether the UNDT erred in law and fact by finding that the seizure of Mr. Millan's personal smartphone was not an administrative decision receivable ratione materiae before it*

76. Turning to the issue of the seizure of Mr. Millan's smartphone, the UNDT found that the case did not involve an administrative decision at all and, further, that the main claim had been rendered moot by the Administration's returning the asset.

77. In this respect, the UNDT alluded to its Order No. 172 (NBI/2020) where similar issues were addressed, in which it had reasoned as follows:

Turning to the present case, the Tribunal is not convinced whether the case involved an administrative decision at all. The record shows that the Applicant handed over his phone to the investigators voluntarily albeit with some hesitance, after they asserted that they had authority to request it because of the Organization's SIM card. The pertinent communication was vague, no legal basis and/or sanction were invoked. Altogether, both sides of the table appear to have acted without a clear or common concept of authorizations and obligations involved, which is not surprising, given that the issue has been largely unexplored. If anything, there might have been a decision refusing to return the phone, after the Applicant withdrew his consent, as evidenced by

the Respondent's reply in Case No. UNDT/NBI/2020/05323. However, the main claim has been rendered moot by the Respondent's returning the asset.

78. Mr. Millan submits that the UNDT erred in fact in stating that “the Applicant maintains that the investigators lied to him when they referred to ST/AI/2017/1 yet such seizure is not supported by ST/SGB/2004/15 which is limited to equipment owned by the Organization” and in stating that “[t]here is no evidence, however, that the investigators lied to the Applicant. The mere fact that the position of the law they advanced differs from what the Applicant perceives it to be isn't evidence of deceit”. In this respect, Mr. Millan argues that he had detailed clearly in the relevant annexes of his application “the outright lies and changing excuses told to him by the investigators in order to trick him to hand over his personal phone”.

79. However, we note that Mr. Millan has failed to specifically identify any of the five grounds of appeal set out in Article 2(1) of the UNAT Statute allegedly committed by the UNDT and therefore, that part of his appeal is defective for that reason alone. Nowhere in his appeal brief does Mr. Millan explain how the UNDT erred in dismissing his application, exceeded or failed to exercise its jurisdiction or competence, erred on a question of law or procedure, or erred on a question of fact, resulting in a manifestly unreasonable decision. In his appeal, Mr. Millan does not attack the UNDT's holding on inadmissibility of and mootness of that specific part of his application. He does not even put forward grounds against that holding or show why the findings or reasoning of the UNDT could have been erroneous. The immaterial matters that he submits in his appeal pertain to the merits of his case and not to the receivability or mootness of this part of his application to the UNDT.

*Due process issues*

80. Mr. Millan raises a variety of challenges to the correctness of the UNDT's conclusions and additionally criticizes the fairness of the UNDT's general approach and determination of his case. In this respect, Mr. Millan submits, *inter alia*, that the UNDT: (i) erred in law when it ruled inadmissible his annexes and failed to accept oral testimony that “stipulated that [they] were good”; (ii) erred in fact when it held that the only basis for the complaint that Mr. R. had a conflict was that he had worked with Mr. Millan before identifying the latter during the investigation; Mr. Millan asserts that he had articulated at length all of the conflicts of interest that Mr. R. had; Mr. R.'s only involvement in this case should have been as a witness to be interviewed by OIOS investigators and not as an investigator; (iii) exceeded its jurisdiction or

competence when it “improperly reviewed” the interim order<sup>40</sup> and found that the UNDT had substituted its own decision for that of the Administration, leading it to uphold the ALWOP administrative decision.

81. It is our settled case-law that the UNDT has broad discretion under its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence.<sup>41</sup> Our jurisprudence has consistently held that the Appeals Tribunal will not lightly interfere with the broad discretion conferred on the first instance tribunal in the management of its cases to enable cases to be judged fairly and expeditiously and for dispensation of justice. We will intervene only in clear cases of denial of due process of law affecting a party’s right to produce evidence.<sup>42</sup>

82. In the instant case, we do not accept Mr. Millan’s argument that this threshold has been met.

83. At the outset, we note that under Article 2(1)(d) of its Statute, the Appeals Tribunal is competent to hear and pass judgment on an appeal filed against a judgment rendered by the Dispute Tribunal in which it is asserted that the latter has committed an error in procedure, such as to affect the decision of the case. It follows that a party, in order to be successful on appeal, not only has to assert and show that the Dispute Tribunal committed an error in procedure but also that this error affected the decision in the case.<sup>43</sup>

84. In the instant case, Mr. Millan fails to specifically identify how the UNDT failed to exercise its jurisdiction or what errors of law or fact were committed. Rather, he makes a series of generalized and vague assertions such as that the “the Tribunal erred in law in ruling these documents inadmissible”, “[t]here was no challenge as to the authenticity of the documents by the Tribunal”, the Secretary-General “also did not show how these documents were not

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<sup>40</sup> The Respondent refers to Order No. 185 (NBI/2020)/Corr.1 (Order on an application for suspension of action during the proceedings), dated 23 September 2020.

<sup>41</sup> *Abdeljalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-960, para. 43; *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, para. 37, citing *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 26.

<sup>42</sup> *Abdeljalil*, *op. cit.*, para. 43; *Uwais v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-675, para. 27, citing *Wu v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-597, paras. 34 and 35.

<sup>43</sup> *Nimer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-879, para. 33, citing *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr.1, para. 31.

authentic in any way”, “the Tribunal failed to question how the Applicant obtained the documents” and “[t]his is not logical”, without even identifying the specific documents and their content, while at the same time these assertions are largely made without underlying evidence or support.

85. Further, even if there was a procedural error, Mr. Millan would need to show that this error would have had an impact on the decision of the case, which, in the present case, he has not done.

86. Indeed, we find that Mr. Millan failed to demonstrate in what way the alleged violations of his due process rights prejudiced him within the context of the present case and impacted the outcome of his case. Additionally, we take note that the due process rights of a staff member are complied with as long as s/he has a meaningful opportunity to mount a defense and to question the veracity of the statements against her/him. The Appeals Tribunal is satisfied that the key elements of Mr. Millan’s right to due process were met, and that the interests of justice were served in this case.

87. Moreover, the Appeals Tribunal itself has gone through the evidence on file and found the UNDT’s management of the case at hand correct and that no substantial procedural irregularities have occurred or been substantiated by Mr. Millan.

88. Specifically, an objective review of the impugned Judgment reveals that the UNDT Judge meticulously and carefully examined the existing evidentiary material and weighed its credibility and reliability in a proper way. As evident, on the face of the impugned Judgment, read as a whole, the UNDT Judge took stock of the totality of the evidence and correctly exercised her discretion to determine the admissibility of any evidence and the weight to be attached to such evidence.

89. Next, the Appeals Tribunal does not find merit in Mr. Millan’s allegation that Mr. R. was conflicted because he doubled as an investigator and a witness who identified Mr. Millan for purposes of providing the evidence relied upon by the Administration in placing him on ALWOP. There is no evidence on record showing incontrovertibly that Mr. R. gave any testimony whatsoever in a witness capacity or was called upon to that effect. The mere fact that Mr. R. knew Mr. Millan before the investigation by virtue of serving in the same mission did not pose a conflict of interest on his part, as the UNDT correctly concluded.

90. Finally, we do not find any merit in Mr. Millan's assertion that the UNDT exceeded its jurisdiction or competence when it "improperly reviewed" the interim Order No. 185 (NBI/2020)/Corr.1 which had granted his application for suspension of his placement on ALWOP to the extent that "the impugned decision is henceforth suspended with respect to the Applicant's leave being 'without pay', and found that the UNDT had substituted its own decision for that of the Administration. As the Secretary-General correctly argues, the UNDT acted within its authority in doing so. Contrary to Mr. Millan's claim, the purely interim and temporary nature of that Order did not preclude the UNDT from departing from the views expressed in it when rendering its final decision on the merits. At any rate, this assertion does not assist Mr. Millan as these *obiter dicta* statements of the UNDT cannot be the basis of an appeal of the Judgment.

*Request for damages*

91. Mr. Millan's claim for compensation for the damage to his reputation and career prospects in being forced to stay out of the office for such an extended period of time is rejected. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal has stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".<sup>44</sup>

*Request for referral for accountability*

92. Lastly, Mr. Millan requests that accountability be enforced for the alleged misconduct/unsatisfactory conduct of Mr. S. and his staff for abuse of authority under ST/SGB/2019/8 and violations of Staff Regulation 1.2(a)–(b) and Staff Rule 1.2(f) for instructing the two investigators to lie to him so as to seize his personal smartphone, as well as not providing the required signed memo to him from Mr. S. containing the explanation in writing why the smartphone was needed at the time of seizure.

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<sup>44</sup> *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 34, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, in turn citing *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40 and citations therein; see also *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508, para. 27; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420, para. 20; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095, para. 23.

93. The Appeals Tribunal has repeatedly held that the exercise of the power of referral for accountability in terms of Article 9(5) of the Statute must be exercised sparingly and only where the breach or conduct in question exhibits serious flaws.<sup>45</sup> In light of the strict application of this provision and the specific circumstances of the present case, and especially the lack of evidence that the investigators lied to Mr. Millan, as correctly held by the UNDT<sup>46</sup>, we find that there is no justifiable basis to refer the case for accountability. Therefore, we reject the request for referral for accountability in this case.

94. It follows that the appeal must fail.

## **II. Appeal of Judgment No. UNDT/2021/145**

95. The main issue for determination in this appeal is whether the UNDT erred in law or in fact by finding that the ALWP extension decision was lawful.

### *Legal Framework*

96. Staff Rule 10.4 provides as follows:

(a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time after an allegation of misconduct and pending the completion of a disciplinary process. Administrative leave may continue until the completion of the disciplinary process.

(b) A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration.

...

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.

...

97. Section 11.3 (Administrative leave with pay) of ST/AI/2017/1 sets out the following:

The decision to place a staff member on administrative leave with pay may be made by the authorized official at any time following a report of suspected unsatisfactory conduct

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<sup>45</sup> *Gorelova v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2017-UNAT-805, para. 50; *Cohen v. Registrar of the International Court of Justice*, Judgment No. 2017-UNAT-716, para. 46.

<sup>46</sup> Impugned Judgment, para. 54.

and following the authorized official's determination that at least one of the following circumstances is met:

(a) The staff member is unable to continue effectively performing the staff member's functions, given the nature of those functions;

(c) The continued presence of the staff member on the Organization's premises or at the duty station could constitute a security or financial risk to the Organization and/or its personnel, or could otherwise prejudice the interests or reputation of the Organization;

...

98. Turning to the second appeal, we note that Mr. Millan's appeal brief altogether fails to identify which of the grounds of appeal set out in Article 2(1) of the Appeals Tribunal Statute he relies upon in challenging the Judgment on the merits. Mr. Millan's appeal brief solely expresses disagreement with the Judgment and repeats arguments already thoroughly considered and rejected by the UNDT. The appeal thus constitutes an impermissible attempt to reargue the merits of his case.

99. Specifically, his arguments raised in the appeal are essentially identical to those raised before the UNDT. He has not identified any specific error made by the UNDT. The Appeals Tribunal has consistently stated that the appeals procedure is of a corrective nature and is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed in the lower court. Rather, he or she must demonstrate that the court below has committed an error of fact or law warranting intervention by the Appeals Tribunal.<sup>47</sup> Hence, we are not disposed to examining every single assertion Mr. Millan has made before us or repeating findings in relation to Mr. Millan's submissions with respect to the UNDT's assessment of the evidentiary material.

100. In any event, the UNDT properly reviewed the contested ALWP extension decision in accordance with the applicable law and found it to be lawful. Under the specific circumstances of the case at bar and considering the seriousness and nature of the allegations against Mr. Millan, i.e. that he was a passenger in a clearly-marked United Nations vehicle in which acts of sexual nature of the kind detailed above took place, as it circulated in a heavily-trafficked area of Tel-Aviv, we agree with and uphold the UNDT's holding that the extension of Mr. Millan's placement on ALWP was not excessive or abusive and it was reasonable for the

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<sup>47</sup> *Abu Salah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-974, para. 33; *Kongba, op. cit.*, para. 19.

Administration to conclude that having Mr. Millan assume the exercise of his functions at UNTSO could potentially further damage the Organization's reputation.<sup>48</sup>

101. Further, as correctly held by the UNDT Judge<sup>49</sup>, the 22 June 2021 decision of the Administration to extend Mr. Millan's placement on ALWP was duly reasoned in compliance with Staff Rule 10.4(b). Notably, the ALWP extension decision updated Mr. Millan on the progress of the extant investigative and disciplinary process, by advising that the investigation report had been completed and that the matter had been referred to the USG/DMSPC. It also informed Mr. Millan, by making a reference to the original justification provided in paragraph 2 of the 24 September 2020 memorandum, that "the factors forming the basis for the initial placement on ALWP continue[d] to exist".

102. Additionally, the UNDT insightfully pointed to the fact that in all ALWP extensions, including the 22 June 2021 one, the Administration stated that the seriousness and nature of the allegations made Mr. Millan unable to continue to effectively perform his functions as a Security Officer and that his continued presence in UNTSO "could otherwise prejudice the interests or reputation of the Organization," in line with Section 11.3(a) and (c) of ST/AI/2017/1.33. Hence, the UNDT was correct in ultimately concluding that Mr. Millan "was therefore properly informed of the facts underpinning the decision to place him on ALWP, and the decision to extend the ALWP."<sup>50</sup>

103. Turning to the remaining part of the appeal, Mr. Millan appears to challenge (though in an incoherent and not easily comprehensible way as to the relevance and the impact of the alleged errors on the outcome of the instant case)<sup>51</sup> the UNDT's findings in terms of his lack of cooperation with the investigation and the duration of the investigation. The Appeals Tribunal finds no reason to differ from the final conclusion reached by the UNDT that "the impugned decision is fully consonant with appellate jurisdiction guidance that the length of time an investigation may take will depend on the circumstances including any practical challenges at the duty station, the nature of the allegations, the complexity of the investigation and the need

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<sup>48</sup> Impugned Judgment, para. 34.

<sup>49</sup> *Ibid.*, paras. 36–38.

<sup>50</sup> *Ibid.*, para. 38.

<sup>51</sup> We understand Mr. Millan to be arguing that the ALWP extension decision was abusive and thus unlawful.

to follow due process and was therefore not abusive, did not violate due process rights and did not amount to abuse of discretion”.<sup>52</sup>

104. At first, Staff Rule 10.4 and Section 11.3 of ST/AI/2017/1 do not include a provision limiting the duration of ALWP. The Appeals Tribunal, however, recalls its jurisprudence that the discretionary power of the Administration is not unfettered. The Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee are implied in every contract of employment. Both parties must act reasonably and in good faith.<sup>53</sup>

105. As we have stated in *Yasin*<sup>54</sup>, with regard to the examination of the Administration’s exercise of discretion:

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

106. In *Gisage*,<sup>55</sup> we pronounced, in respect of any extension of administrative leave, the following:

(...) any decision to extend ALWOP must be reasonable and proportional. A decision to extend ALWOP is a drastic administrative measure and normally should be of short duration. That said, there was no basis for the UNDT to set an arbitrary time limit of three months to complete the investigation and the disciplinary process. Much will depend on the circumstances, including any practical challenges at the duty station, the nature of the allegations, the complexity of the investigation and the need to follow due process.

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<sup>52</sup> *Ibid.*, para. 28.

<sup>53</sup> *Yasin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-915, para. 43; *Abu Lehia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-814, para. 17, citing, *inter alia*, *Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-798, para. 24.

<sup>54</sup> *Op. cit.*, para. 44; *Kongba, op. cit.*, para. 27.

<sup>55</sup> *Op. cit.*, para. 40.

107. The same legal criteria and rationale apply for the UNDT determining the lawfulness of the placement of a staff member on ALWP. Though ALWP is not as drastic an administrative measure as ALWOP, it nevertheless impacts on the staff member's employment status and personal circumstances, requiring judicial scrutiny of the propriety of the Administrations discretionary decision.

108. In the present case, the UNDT found that the length of the OIOS' investigation was not abusive or unreasonable. We agree. It is common knowledge that an investigation into allegations of unsatisfactory conduct of a sexual nature by United Nations personnel in a sensitive peacekeeping mission is serious and requires thorough investigation. The investigative and disciplinary process also took place in the midst of the COVID-19 pandemic while OIOS initiated its investigation in June 2020. OIOS interviewed multiple witnesses and subjects.

109. Moreover, per the evidence on file, as thoroughly established by the UNDT, Mr. Millan refused to cooperate with the investigation and thus he contributed to delays in the process. Contrary to Mr. Millan's allegations, he refused to participate in a follow-up interview to provide additional information to the investigation, although at the time when he was contacted by OIOS for a third subject interview in March and April 2021, he was no longer on certified sick leave, and it was his duty to do so. He could not delegate this duty to his counsel.

110. Consequently, we find no reasons to differ from the conclusion drawn by the UNDT. The findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision. That is not the case here. We have noted Mr. Millan's submissions challenging the UNDT findings, but submissions are not evidence. Mr. Millan fails to point to any relevant evidence which the UNDT overlooked in coming to its decision.

111. In light of the foregoing, the appeals fail.

**Judgment**

112. The Appellant's appeal is dismissed, and Judgments No. UNDT/2021/152 and No. UNDT/2021/145 are hereby affirmed.

Original and Authoritative Version: English

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

*(Signed)*

Judge Raikos, Presiding

*(Signed)*

Judge Halfeld

*(Signed)*

Judge Gao

Judgment published and entered into the Register on this 26<sup>th</sup> day of April 2023 in New York, United States.

*(Signed)*

Juliet Johnson, Registrar