



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/060

Judgment No.: UNDT/2023/060

Date: 21 June 2023

Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MILLAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Sétondji Roland Adjovi, *Etudes Vihodé*

Charles A. Adeogun-Phillips, *Charles Anthony* LLP.

Counsel for the Respondent:

Jacob B. van de Velden, DAS/ALD/OHR, UN Secretariat

Andrea Ernst, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Security Officer at the FS-5 level, in the Office of the Deputy Chief Mission Support, in the United Nations Truce Supervision Organization (“UNTSO”), based in Jerusalem, Israel, is challenging before the United Nations Dispute Tribunal (“UNDT/the Tribunal”) in Nairobi, the decision to impose on him a disciplinary measure of separation from service with compensation *in lieu* of notice and without termination indemnity.

Facts

2. On 24 June 2020, the Office of Internal Oversight Services (“OIOS”) received a report of possible misconduct implicating staff members at UNTSO in Jerusalem. The report contained a video-clip (“the clip”) showing a United Nations branded vehicle being driven along a busy street. There were at least four people in the vehicle; in the front was the driver, and another man in the front passenger seat. In the rear passenger area was a man with a female person seated on his lap facing him and gyrating in a sexually suggestive manner.¹

3. Upon receipt of the information, the OIOS conducted formal investigations.² Among others, the OIOS identified the driver of the vehicle to Mr. Juan Carlos Cunillera, while the front passenger was the Applicant and the male in the rear seat was Mr. Michael Antoine.

4. The Applicant concedes that he was the occupant of the front passenger seat. Equally, Mr. Cunillera confirms that he was the driver of the United Nations vehicle captured in the clip.³

5. The Applicant was interviewed on 30 June 2020 and on 6 August 2020.⁴

¹ Reply, annex 1, para. 1.

² *Ibid.*, para. 3.

³ Application, annex A (timeline), para. 8.

⁴ Reply, annex 1, para. 8; Application, annex A, para. 4.

6. On 1 July 2020, the Applicant was placed on Administrative Leave Without Pay (“ALWOP”), which was subsequently changed to Administrative Leave with Pay (“ALWP”) effective 17 September 2020.⁵

7. On 19 May 2021, OIOS transmitted its investigation report to the Office of Human Resources for appropriate action.⁶

8. By a letter dated 12 August 2021, the Assistant Secretary-General, Office of Human Resources (“ASG/OHR”), charged the Applicant with misconduct.⁷ The Applicant was allowed a period of one month to provide comments to the charges.⁸ The Applicant submitted his comments on 17 September 2021.⁹

9. The contested decision was conveyed to the Applicant by a letter dated 11 April 2022.¹⁰

10. Regarding the factual background of the contested decision, the ASG/OHR indicated that based on the memorandum of allegations, the Applicant had:

a. on 21 May 2020, while sitting in the front passenger seat in the United Nations vehicle that was assigned to him and that was clearly visible from a public street in Tel Aviv, Israel, he permitted a female individual, who was not a United Nations personnel and who did not receive prior authorization for United Nations transport, to be transported in the vehicle;

b. in the United Nations vehicle that was assigned to him, and clearly visible from the street, the rear passenger held the female individual closely to his body while she was seated on his lap facing him and gyrating in a sexually suggestive manner. These events were captured in an 18-second video-clip, which was widely disseminated, bringing the Organization into disrepute; and

⁵ *Ibid.*, at annex 1 (Doc 270 and DOC 508).

⁶ *Ibid.*, at annex 2.

⁷ *Ibid.*, at annex 3.

⁸ *Ibid.*

⁹ Application, annex 22; Application, para. 11.

¹⁰ Reply, annex 5.

c. between May 2020 and August 2020, failed to cooperate with the OIOS investigation, by attempting to mislead the OIOS investigation regarding the events of the evening of 21 May 2020, including by deleting data from a mobile phone which he had submitted to the investigators or submitting to OIOS a different/new mobile phone from that used on 21 May 2020 and/or deleting data from a United Nations issued SIM card which he had submitted to the investigators.

Framework of disputes arising from the same facts and procedural history of this case.

11. The facts relevant for this case relate to other applications by the same Applicant and of the following judgments and orders. In particular:

a. On 12 September 2020, the Applicant filed an application challenging two decisions: (i) the 1 July 2020 decision to place him on ALWOP; (ii) the 30 June 2020 decision to seize his personal smartphone for purposes of an investigation. In *Millan* UNDT/2021/152, the application was dismissed.

b. By an application filed on 14 July 2020, the Applicant sought the suspension, pending management evaluation, of two decisions (“the impugned decisions”): (i) the 1 July 2020 decision to place him on ALWOP from 1 July 2020 for a period of three months, or until the completion of an investigation and any disciplinary process, whichever is earlier; (ii) the 30 June 2020 decision by OIOS to seize his personal smartphone for the purposes of the OIOS investigation of the Applicant. By Order No. 138 (NBI/2020), the Tribunal dismissed the application.

c. By a motion dated 20 July 2020, the Applicant requested the Judge President of this Tribunal to order that the Dispute Tribunal Judge assigned to the above-mentioned cases, namely Judge Sikwese, be recused from adjudicating them. The Applicant contended that Judge Sikwese was biased against him and/or his Counsel. By email of 21 July 2020 and Order No.143

(NBI/2020), the Judge President denied that motion for recusal.

d. On 11 September 2020, the Applicant filed an application for suspension of the said contested decisions pursuant to art. 10.2 of the Statute and art. 14.1 of the Rules of Procedure of the Tribunal. By Order No.185 (NBI/2020), the application was granted in part, in that implementation of the impugned decision was suspended with respect to placing the Applicant on ALWOP; in the remaining part, the application was dismissed.

e. On 7 September 2021, the Applicant filed an application contesting the 22 June 2021 decision by the Acting Head of Mission, UNTSO, to extend his placement on ALWP for another three months or until the completion of an investigation and any disciplinary process, whichever earlier. In *Millan* UNDT/2021/145, the application was dismissed.

f. Both judgments, which had been appealed by the Applicant, were affirmed by UNAT in *Millan* 2023-UNAT-1330.

12. In this framework of disputes, on 10 July 2022, the Applicant filed the application mentioned in para. 1.

13. The Respondent filed a reply on 5 September 2022 and requests the Tribunal to reject the application.

14. In his reply, at paragraphs 5, 6 and 7, the Respondent, recalling art. 18 of the UNDT Rules of Procedure, requests the Tribunal to not admit documents already found inadmissible in one of the Applicant's other cases as directed in *Millan* UNDT/2021/152. He further requests the Tribunal to hold the Applicant and his Counsel in contempt of the Court.

15. In paragraph 36 of his application, the Applicant requests for an oral hearing. In paragraph 38, he requests the Tribunal to direct the Respondent to produce the 11 April 2022 sanction letter issued to one Mr. Juan C. Cunillera.

16. By Order No. 042(NBI/2023), issued on 16 February 2023, the Tribunal observed that in the UNDT's Rules of Procedure, there is no prohibition to admit and use in trial documents allegedly confidential and allegedly unlawfully acquired (without prejudice to the possible responsibility, in different proceedings, of the person who acquired them); the Tribunal found it useful to admit the documents referred to in para. 6 of the Respondent's reply, whose evidentiary value would be evaluated with the other collected evidence. The Respondent's motion on this matter was, therefore, dismissed.

17. As to the Applicant's request for a hearing, by the same Order No. 042 (NBI/2023), the Tribunal stated that, on the one hand, the Applicant did not specify the reasons for hearing the witnesses he asked for and that the hearing cannot be a way to allow fishing expeditions on purported due process violations or unspecified facts. It further considered on the other hand that, for example, Mr. Benjamin Swanson, the then Director, Investigations Division, OIOS, already testified on the same issues and matters were determined in *Antoine* UNDT/2021/151 (between the same parties) and his evidence is already on the record (Reply, annex 7). Accordingly, it was not necessary to hear him again. The Tribunal also observed that the Applicant proposed to call F01's lawyer (F01, the lady alleged to have been with the Applicant in the car). The Tribunal took therefore, the view that it was improper to hear from a lawyer of a completely unidentified person not directly called in the proceedings. Finally, the Tribunal was of the view that it is not useful to call for testimonies of persons not directly informed of the material facts at stake. These include staff members and other persons listed in para. 33 of the application.

18. Regarding the Applicant's request to direct the Respondent to produce the 11 April 2022 sanction letter issued to Mr. Cunillera; the Tribunal granted the request. It observed that the sanction issued to Mr. Cunillera, if any, may be relevant for the adjudication of the present case. The Tribunal, accordingly, ordered the Respondent to produce a copy of the said sanction letter by 28 February 2023. The Respondent complied and filed a copy of the sanction letter on 27 February 2023.

19. On 1 March 2023, the Tribunal issued Order No. 059 (NBI/2023), and, among others, decided that no additional documents or motions shall be accepted in this case.

20. On 31 March 2023, together with his closing submissions, the Applicant filed other documents. On the same day, the Respondent filed a motion requesting the Tribunal to strike from the record the documents filed by the Applicant numbered as annexes 41 and 49 to 54 on the ground that they were filed in violation of para. 8 of Order No. 059 (NBI/2023).

21. On 1 April 2023, the Applicant requested leave to respond to the Respondent's motion to strike. He indicated that he did not contest the motion; however, he requested to be heard on this matter and to be granted leave to file a response before the Tribunal issued its ruling.

22. Similarly, on 2 April 2023, the Applicant filed a motion to strike portions of footnote 37 and para. 4 of the Respondent's closing submissions filed on 31 March 2023. In para. 4 of his submissions, the Respondent submits that the United Nations Appeals Tribunal ("UNAT") in its Fortieth Session from 13 to 24 March 2023, dismissed both of the Applicant's appeals in cases 2022-1659 and 2022-1662 against *Millan* UNDT/2021/145 and *Millan* UNDT/2021/152.

23. On his part, the Applicant contended that there were no published UNAT judgments for cases 2022-1659 and 2022-1662 for the Applicant. The Respondent provided no UNAT judgments supporting his claims in para. 4 of his closing submissions. Accordingly, the Applicant requested the Tribunal to strike para. 4 of the Respondent's closing submissions and to consider referring Counsel for the Respondent to the Secretary-General for the enforcement of accountability under art. 10(8) of the Dispute Tribunal's Statute.

24. As to this group of documents numbered annexes 41 and 49-54 to the Applicant's closing submissions, the Tribunal notes that the documents were filed in violation of the Tribunal's Order No. 059 (NBI/2023), which stated at its para. 8, that "no additional documents or motions shall be accepted in this case" and that the

Applicant gave no reason for his late filing (also considering the date of the documents which had been available to the Applicant for long time); being the evidence inadmissible, as contrary to an ordinate and expeditious judicial proceeding, the Tribunal orders these documents to be struck from the record.

25. As to the hearing, having reviewed the parties' submissions, the Tribunal already held that the relevant facts were clear and there was no need to conduct a hearing on the merits as the matter could be determined based on the record. The Tribunal thus directed the parties to submit closing submissions on or before 31 March 2023.

26. On 2 April 2023, the Applicant filed a motion to strike documents provided by the Respondent, and in particular, on one side the additional cases (551, 554, 609, 610, 619) included in footnote 37 of the Respondent's closing submissions and, on the other side, the UNAT judgment not yet published.

27. The Tribunal is of the view that reference to additional cases can be admitted, being only an argument for discussion, also reference to the UNAT judgment is admissible, as related to judgment, although not published, but already assumed by the panel and whose synopsis has been delivered in a public UNAT session.

28. On 19 April 2023, the Applicant filed a motion requesting the Tribunal to take judicial notice of the UNAT Judgment in *Philip van de Graaf* 2023-UNAT-1325. He specifically invited the Tribunal to consider the UNAT's holding that:

In terms of damage to the UNICEF reputation, the false and defamatory online media coverage could not be attributable to Mr. Van de Graaf and as such, cannot be considered as an aggravating factor.

29. The Tribunal will deal with this issue at para. 87.

Standard of review and burden of proof.

30. The Appeals Tribunal's jurisprudence establishes the following principles; When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal,

rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and examine whether the decision is absurd or perverse.¹¹

31. 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”. In this regard, “the Tribunal is not conducting a merit-based review, but a judicial review” explaining that a “judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision”.¹²

32. In disciplinary cases, the Dispute Tribunal examines the following elements:

- a. Whether facts were established by clear and convincing evidence;
- b. Whether the facts amount to misconduct;
- c. Whether the Applicant’s due process rights were respected during the investigation and disciplinary process; and
- d. Whether the sanction is proportionate to the gravity of the offence.¹³

33. The Administration bears the burden of establishing that the misconduct has occurred,¹⁴ and the misconduct must be established by clear and convincing evidence.¹⁵ This has been interpreted to mean that the truth of the facts asserted is highly probable.¹⁶

¹¹ *Sanwidi* 2010-UNAT-084; *Santos* 2014-UNAT-415, para. 30.

¹² *Sanwidi op. cit.*, para. 42.

¹³ *Miyzed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024.

¹⁴ *Diabagate* 2014-UNAT-403.

¹⁵ *Molari* 2011-UNAT-164.

¹⁶ *Appellant* 2013-UNAT-302.

Whether the facts on which the disciplinary measure was based were established by clear and convincing evidence.

34. The Applicant is charged with two different counts of accusations:
- a. Permitting a female individual (“F01”), who was not a United Nations personnel and who did not receive prior authorization for United Nations transport, to be transported in the vehicle, enabling the behavior of Mr. Antoine, the rear passenger of the United Nations vehicle, who held F01 closely to his body while she was seated on top of him and gyrating in a sexually suggestive manner, while Mr. Antoine held F01 with his hand on her buttock and while he pulled her genital area closer to his crotch. These events were captured in an 18-second video-clip that was widely disseminated, bringing the Organization into disrepute.
 - b. Failure to cooperate with the OIOS investigations between May 2020 and August 2020.

Permitting a female individual (“F01”), who was not a United Nations personnel and who did not receive prior authorization for United Nations transport, to be transported in the vehicle, enabling the said behavior of Mr. Antoine, which brought the Organization into disrepute.

Applicant’s submissions

35. The Applicant admits that the vehicle was assigned to him and that he drove it from Jerusalem to Tel Aviv in the company of Mr. Antoine and Mr. Cunillera on 21 May 2020. However, on a return trip, the Applicant states that he fell sick and was unfit to drive. Accordingly, Mr. Cunillera drove the vehicle. The Applicant confirms that he is the one who started the vehicle; thereafter, he handed it over to Mr. Cunillera to drive.¹⁷ The Applicant further admits that no liability waiver was signed on behalf of F01, thereby making her an authorised passenger in the United Nations vehicle. The

¹⁷ Application, annex 22, para. 56-59.

Applicant, however, denies giving consent to have F01 board the vehicle.¹⁸

36. The Applicant emphasizes that since he was drowsy and sick, he did not see nor was he aware of what Mr. Antoine was doing in the rear seat. He maintains that it is impossible to see from the front right passenger's seat what the person sitting in the right rear passenger's seat directly behind is doing without turning around completely, which the clip proved that the Applicant did not (and could not) do.¹⁹

37. The Applicant seeks to draw a comparison and queries that if F01 had not climbed onto Mr. Antoine's lap in the rear right passenger's seat, and he instead was smoking a cigarette which is also a vehicular offence, would the Applicant have been sanctioned for enabling Mr. Antoine's behaviour because he did not prevent it from occurring before it happened? The Applicant had no control over Mr. Antoine's and F01's actions and certainly did not witness them being directly in front of them and drowsy.

38. As a consequence, he opines that the Administration has failed to establish to any legal standard that he had the capability to form the requisite culpable intent to consent to transporting F01 and therefore, cannot be held liable for said transportation of F01 in the United Nations vehicle.²⁰

39. The Applicant, in alternative, avers that pursuant to UNTSO policy²¹, the penalty for the first violation of transportation of non-authorized persons in United Nations vehicles is withdrawal of a driving permit for 30 days.

40. The Applicant further submits that the actions in the clip relate to someone else, but not him. The issue of the clip being widely disseminated and causing disrepute to the Organization, has no relevance to his conduct. In any event, he had nothing to do with the wide dissemination of the video, nor could he control it and therefore, he

¹⁸ *Ibid.*, para. 60.

¹⁹ Application, para. 19.

²⁰ Application, annex 22, para. 63.

²¹ Application, ICF-000261 (COS Directive on procedures applicable to the operation of UNTSO vehicles and related matters, section 10).

cannot be held accountable for said dissemination allegedly causing reputational damage to the Organization.

Respondent's submissions

41. The Respondent submits that it is not contested that the Applicant was the user of the United Nations vehicle in the clip from 7 April 2020 until 22 May 2020.²² Further, the Applicant has admitted that: (i) he is the male in the front passenger seat of the United Nations vehicle in the clip, (ii) he swiped his card so as to start the United Nations vehicle; (iii) he asked Mr. Cunillera to drive the vehicle; (iv) F01 was an unauthorized passenger in the United Nations vehicle, and (v) the 21 May 2020 events “brought unwanted negative publicity to the organization.”²³

42. The Respondent submits that the Applicant consciously allowed F01 to be transported in the United Nations vehicle, which was entrusted to him by the Organization and was under his duty of care. The Respondent seeks to rely on the testimony of Mr. Cunillera who states that, all “*collectively agreed*” to transport F01.²⁴ Moreover, the Applicant himself started the United Nations vehicle using his card after F01 was already inside the vehicle,²⁵ and he himself pulled the vehicle out of the parking lot.²⁶ According to the Applicant’s own statements, he requested Mr. Cunillera to drive the vehicle only after F01 was already inside.²⁷ These actions show that the Applicant consciously enabled the 21 May 2020 events.

43. The Respondent contends that it is further not in dispute that the clip was widely viewed, at a minimum, as sexually suggestive. The Applicant by his conduct brought the Organization into disrepute. If it was not for his misconduct, the harm to the Organization would not have occurred. Around 23 and 24 June 2020, the clip was disseminated online, including by news outlets, thus increasing the reputational harm

²² Reply, para. 12.

²³ R/3, A/2, Doc. 160, Statement of the Applicant of 13 July 2020, p. 2.

²⁴ R/3, A/2, Doc. 156, Juan C. Cunillera’s statement, dated 12 July 2020, p. 2.

²⁵ R/3, A/2, doc. 467, Juan C. Cunillera’s Interview transcript, 6 August 2020, lines 470-476.

²⁶ R/3, A/2, Doc. 156, Juan C. Cunillera’s statement, dated 12 July 2020, p. 2.

²⁷ R/3, A/2, Doc. 468, Transcript of Mr. Millan’s Interview (6 August 2020), lines 594-600.

to the Organization. The incident caused tensions with Israel, UNTSO's Host Member State, and potential backlashes against United Nations staff.

Considerations

44. As to the first count, the facts are clearly demonstrated by the 18-second video-clip of the Applicant's behaviour, which in the Tribunal's assessment, speaks for itself.

45. The Applicant is filmed in a United Nations vehicle that stopped at traffic lights in HaYarkon Street in Tel-Aviv, where a colleague of his, Mr. Antoine, in the rear seat was holding on his lap a female individual, reportedly a prostitute, who faced Mr. Antoine and gyrated on him, while the latter held her with his hands on her buttocks and pulled her genital area close to his crotch.

46. The Applicant confirms that he is the one who started the vehicle; thereafter, handed it over to Mr. Cunillera to drive. The Applicant further admits that no liability waiver was signed on behalf of F01, thereby making her an authorised passenger in the United Nations vehicle.

47. The Applicant was correctly identified by photographic evidence owing to the bald head and two wrist band usually worn, data which were corroborated by the statement of his two colleagues present in the same car. In any case, it is now undisputed that the person depicted in the video is the Applicant.

48. Indeed, the video clip, the equivocal concession (later to become an unequivocal admission) and the identification evidence alone were sufficient to establish the facts (see also *Millan* 2023-UNAT-1330, para. 72).

49. The acts committed by Mr. Antoine had a clear sexual connotation and were indeed perceived as sexual by all people who saw the video on the web and commented on it. Finally, the sexual nature of the activity is also confirmed by *Millan* 2023-UNAT-1330, para. 68.

50. The Respondent raised a suspicion of sexual activity with prostitutes, recalling on the one hand that the car was filmed in a place known as a prostitution area in Tel

Aviv, and on the other hand that the Carlog locator, the Global Positioning System (“GPS”) registered that the car soon after the moment depicted in the video, moved to a hotel parking, where it remained stationary for more than three hours (precisely from from 9.48 p.m. to 1.14 a.m. of the following day), certainly not for official reasons and in any case without the Applicant and his colleagues giving any reasonable explanation for.

51. The Tribunal notes that in the record two emails on 23 and 24 June 2020 from the address Barmitza7@protonmail.com referred to OIOS the details of the events, specifying the plate number of the vehicle belonging to UNTSO, the name of the people on board (and the objective way to identify them), of the place (specifying it was prostitution area) and of the transported woman (defined as a local prostitute), also expressing disagreement for the behaviour in public space and for the frequency of this kind of events too.

52. None of the parties questioned the existence and veracity of the emails, although their author has not been identified (or revealed), which has the evidentiary value of a document. Moreover, many of the details of the facts denounced in the emails have been confirmed by the investigation; the Tribunal, therefore, finds that the emails are reliable in their full content.

53. In the said circumstances, the Applicant’s statements to investigators that two other females had joined the group before (Millan transcript, line 336-585, doc. 468 of the investigation report), the details indicated in the above recalled emails, the long stop in the hotel parking area resulting from the Carlog system, all this can raise the heavy suspicion that the real scope of the trip out of business hours in that area of Tel-Aviv (a trip that last after midnight with no given reason could be other than a simple lift to F01 (as it was said to investigators). However, the Tribunal will assess only the sanction letter and the facts specifically indicated in it, which solely have to be verified in these proceedings.

54. In any case, the Tribunal considers that the said facts corroborate the assessment of the nature of the activity depicted in the video as sexual.

55. On this point, the Tribunal notes that the United Nations vehicle was entrusted to the Applicant by the Organization and was under his duty of care and that the Applicant consciously allowed F01 to be transported in it.

56. The Applicant failed to use the United Nations vehicle for official purposes and to exercise reasonable care with it.

57. Whether or not aware of Mr. Antoine's actions, the Applicant was responsible for the use of vehicle entrusted to him; he started the engine and, allowing a person on board, he took the responsibility of any activity that person could do, in connection with the transportation. The Applicant did not control that the vehicle was used properly by all passengers, and so he took responsibility for what happened.

58. Apart from any doubt of the fact that the Applicant did not realize what happened in the rear seat and the lack of credibility of the Applicant while saying that his headache did not let him understand the situation, the purported ignorance of what was happening in the back seat did not exclude his responsibility. Indeed, the impact on the Organization's image and reputation was only possible because of the use of the marked car with the United Nations logo, the use of which he was exclusively responsible for.

59. While it results from the record (see email on 24 June 2020 by Mr. David Rajkumar, Chief of UNTSO Special Investigations Unit, in record) that the video clip surfaced from a United Nations staff in Iraq, it is undisputed that the video spread on the web, attracting many negative comments from the public (see documents annexed to the Reply). In particular, it is worth recalling the article in *The New Humanitarian*, "UN launches sexual misconduct probe after incriminating car video emerges", on 25 June 2020; the article by Matthew Russell Lee on 28 June 2020 in *Inner City Press*, "More Inner City Press Scoop on UN Prostitution Video As Asked June 25 Trinidad and Puerto Rico" (and others by the same author). The attention to the event remained for long as demonstrated by the article, "The UNTSO Sex Video investigation" by Peter Gallo on 11 October 2020, and by the article on 3 June 2021 by Maurizio

Guerrero, “A year later, a sex-video inquiry tied to the UN Mission in Israel remains a mystery”, on Pass Blue, Independent coverage of the United Nations.

60. The video and the mass media attention which followed, undoubtedly pushed the Organisation into disrepute and caused a huge damage to its image, confirming at the same time the importance of the recalled press in its role of watchdog, even for an important international Organization like the United Nations.

61. In particular, the Tribunal notes that the United Nations logo which was written out on the white car immediately created a connection between the activity of the Organization and the activity of sexual connotations performed inside the car.

62. The clip, which was widely disseminated, undermined the reputation, credibility and integrity of the Organization, within a difficult conflict affected area of the world (see also Mr. Swanson’s statements to the investigators about the adverse reputational impact that the clip had on the Organization, including in causing tensions between the United Nations and Israel, the host Member State).

63. The Tribunal observes that, the Applicant being responsible for the facts at the origin of the Organization’s disrepute, took responsibility for all consequences, foreseen or not foreseen, of his conduct. He was certainly unlucky that the clip was filmed and then disseminated, but if it was not for the improper use of the United Nations vehicle entrusted to him and his misconduct, the harm to the Organization would not have occurred, and therefore the Applicant remains responsible for that (see *Kennedy2021-UNAT-1184*, para. 69 (c) on the relevance of this damage in the assessment of the disciplinary responsibility of a staff member).

Failure to cooperate with the OIOS investigations between May 2020 and August 2020.

Applicant’s submissions

64. The Applicant highlights that the allegation of not cooperating with the OIOS investigation between May 2020 and August 2020 cannot hold. The clip did not surface

until 23 June 2020 and an OIOS investigation was not initiated until 24 June 2020. Therefore, it was impossible for him to have not cooperated with the OIOS investigation until at least when the investigation commenced on 24 June 2020.²⁸

65. He explains that he was interviewed on 30 June 2020 and he fully cooperated with the OIOS investigation request to submit to an interview as required. During the interview, he was shown the clip. He was unable to positively identify any of the occupants of the vehicle. This was not surprising given that it was the first time he had seen the clip and that there were no frontal shots of the faces of the visible occupants, as well as the driver not being able to be seen.²⁹ Accordingly, given that he was seeing the video for the first time and was being placed under severe pressure by the investigator, it was perfectly understandable that he could not be certain about who was shown in the clip.

66. In addition, given that he was sick and had passed out at the time in question, he should not be expected to know of anything that went on in the vehicle. He was just like anyone else viewing the video for the first time since he never saw what was going on in the back seat as he was facing forward and never turned around. Therefore, he did not mislead the investigators, nor did he fail to co-operate with the investigation during the 30 June 2020 interview as alleged.³⁰

67. In relation to the allegation of deleting the data from the phone, the Applicant denies having deleted any data from his personal mobile phone or from the United Nations owned SIM card. He indicates that he will produce technical expert testimony at trial to buttress his position.³¹

Respondent's submissions

68. The Respondent submits that on 25 June 2020, an investigation was initiated into the Applicant's possible misconduct. The Applicant in various ways and at

²⁸ Application, annex 22, para. 74.

²⁹ *Ibid.*, paras. 78-79.

³⁰ *Ibid.*, para. 87.

³¹ Application, p. 8, para. 29.

multiple moments failed in his duty to cooperate with the OIOS investigation. Not all instances of the Applicant's failure to cooperate led to formal charges. Reference is made in particular to the Applicant's failure to acknowledge the obvious during his first interview with OIOS, *i.e.*, that he was the passenger seated in the front passenger seat shown in the clip, as well as his refusal to participate in a third subject interview by OIOS without any valid reason. These facts remain contextually relevant, as the Applicant's failure to cooperate with the investigation.³²

69. The Respondent submits further that the Applicant interfered with the investigation. During his interview on 30 June 2020, the Applicant submitted a mobile phone and the United Nations issued SIM card to the investigators. The Applicant presented this mobile phone to OIOS as the mobile phone he had been using with the official United Nations issued SIM card. OIOS analysed UNTSO's central telephone records (call logs) involving the Applicant, Mr. Antoine and Mr. Cunillera between 1 March 2020 through 30 June 2020. OIOS established that there was communication among them between those dates, including on the date of the incident captured in the clip (*i.e.*, 21 May 2020) and around the time of the clip's circulation (*i.e.*, 23 and 24 June 2020), using their official United Nations numbers and United Nations issued SIM cards.

70. In view of UNTSO's central telephone records, which confirmed communication between the Applicant, Mr. Antoine and Mr. Cunillera using their official United Nations telephone numbers, the forensic analysis of the mobile phone and United Nations issued SIM card that the Applicant submitted to OIOS on 30 June 2020 should have detected user activities on the Applicant's mobile phone.

71. Subsequently, the forensics by OIOS, reported on 28 July 2020, found no user activity on the Applicant's mobile phone prior to 25 June 2020. The mobile phone appeared to be a different phone or one that had been erased and reset on 25 June 2020. Consistent with this finding was that there was very little user data on the phone, the address book, for example, contained only three contacts. Furthermore, the forensics

³² Reply, para. 26 and 27.

found no iCloud account information whatsoever for the mobile phone that the Applicant submitted to OIOS.

72. The Respondent opines, therefore, that it is highly probable that the Applicant either removed this information from the mobile phone he submitted to OIOS on 30 June 2020 or that he submitted to OIOS a different mobile phone from that used on 21 May 2020, and/or that he deleted data from his United Nations issued SIM card. Either way, the Applicant interfered with the investigation.³³

Considerations

73. The Tribunal is of the view that the Applicant failed in his duty to cooperate with the OIOS investigation, notably he did not acknowledge the obvious during his first interview with OIOS, *i.e.*, that he was the passenger seated in the front passenger seat shown in the clip, as well as he refused to participate in a third subject interview by OIOS without any valid reason.

74. These facts remain contextually relevant, as the Applicant's failure to cooperate with the investigation.

Whether the established facts amount to misconduct.

Applicant's submissions

75. The Applicant submits that his rights were violated, and that the allegations have not been established with clear and convincing evidence. The only established fact is that the Applicant was in the front passenger's seat of a United Nations vehicle where an unauthorized female passenger was in the rear passenger seat. The established facts cannot sustain the charges of misconduct, nor the sanction imposed on him.³⁴

³³ *Ibid.*, paras. 28-32.

³⁴ Application, paras. 31 and 32.

Respondent's submissions

76. The Respondent contends that by his conduct, the Applicant acted in violation of staff regulations 1.2(b), 1.2(f), 1.2(q) and 1.2(r), and staff rules 1.2(c) and 1.2(g), and his two acts of misconduct, each separately as well as together, constitute serious misconduct.

77. The Respondent elaborates that by enabling the 21 May 2020 events and failing to cooperate with the OIOS investigation, the Applicant failed, by each act and together, to: (i) uphold the highest standards of efficiency, competence and integrity required under staff regulation 1.2(b); (ii) conduct himself at all times in a manner befitting his status as an international civil servant, in violation of staff regulation 1.2(f); (iii) use the property and assets of the Organization only for official purposes and failed to exercise reasonable care when utilizing such property and assets, in violation of staff regulation 1.2(q).

78. The Respondent further submits that by failing to cooperate with the OIOS investigation, in particular his failure to respond fully to requests for information from officials authorized to investigate the possible misuse of funds, waste or abuse, in the instant case, the United Nations vehicle featured in the clip, the Applicant acted in violation of staff regulation 1.2(r). In addition, by failing to cooperate with a duly authorized investigation, the Applicant's conduct was in violation of staff rule 1.2(c); and by failing to cooperate with the OIOS investigation, the Applicant disrupted or interfered with an official activity of the Organization, including the Organization's official activity in connection with the administration of justice system in violation of staff rule 1.2(g).

79. In light of the above, the Respondent submits that the Applicant's conduct, in each instance, constitutes misconduct under Chapter X of the staff rules, which, each separately and together, is serious.

Considerations

80. The relevant provisions of the revised staff regulations (applicable to this case) stipulated as follows:

1.2 (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;

1.2 (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;

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;

1.2 (r) Staff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate the possible misuse of funds, waste or abuse.

81. The relevant provisions of the staff rules stipulate as follows:

82. 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.

83. Staff rule 1.2 (g):

Staff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization, including activity in connection with the administration of justice system, nor shall staff members threaten, intimidate or otherwise engage in any conduct

intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions. Staff members shall not threaten, retaliate or attempt to retaliate against such individuals or against staff members exercising their rights and duties under the present Rules.

84. The Tribunal preliminarily notes that the use of the property and the assets of the Organization is allowed only for official purposes and that in this case the Applicant failed to exercise reasonable care when utilizing such property and assets, in violation of staff regulation 1.2(q).

85. Permitting a non-authorized female to be transported in the vehicle and enabling the behavior of Mr. Antoine above mentioned, which put the Organization into disrepute and caused a huge damage to its image, the Applicant took a behavior contrary to the standard of integrity required of an international official.

86. In these circumstances, there was undoubtedly a preponderance of evidence that the Applicant had committed serious misconduct not befitting an international civil servant (see *Millan* 2023-UNAT-1330, para. 72).

87. The Applicant objects that he had nothing to do with the wide dissemination of the video, which he could not control and recalled the UNAT judgment in *Van de Graaf* 2023-UNAT-1325.

88. The Tribunal already noted that the Applicant could have prevented the reputational damage to the Organization by behaving in compliance with the rules. The case is different from *Van de Graaf* because there the video depicted a situation which was different from reality, and whose evidence was contrasted by some testimonies, which revealed that the publication of the video was unpredictable by the staff member as it was deliberately orchestrated in bad faith and maliciously by the same people involved in the facts and the facts were inflated with the aim to damage Mr. Van de Graaf (see in particular paras. 127 and 128 of the UNDT judgment *Van de Graaf*, UNDT/2022/037). Here, the reputational damage to the Organization was an objective consequence of the Applicant's behavior, which, given the circumstances, he could have foreseen and avoided.

89. As to the facts contained in the second count, as indicated above, the Tribunal observes that by failing to cooperate with the OIOS investigation the Applicant did not violate staff regulation 1.2(r), as this provision is not applicable to the author of misconduct assessed in the same proceeding.

90. The Tribunal, as to the failure by the Applicant to provide OIOS the information stored in his phone, recalls what UNAT stated in *AAE 2023/UNAT/1332*, para. 140 (see also what was already expressed in *Applicant UNDT//2022/30*, dissenting opinion), finding it necessary to distinguish the behaviour of the staff member who actively hampers and misleads the investigation and the behaviour which is purely passive.

91. The obligations set in the Staff Regulations and Rules to cooperate with the investigation, answer questions, provide documentary evidence in his/her possession or which should reasonably be expected to be in his/her possession cannot be applied to the subjects of the investigation, being applicable only to other staff members. Indeed, while a purely passive behaviour can be an expression of the right of self-defence, sanctioning the said behaviour would mean that every misconduct would be punished twice, one following the prohibition of the material conduct, and a second time simply because its author does not confess to the misconduct alleged to the investigators or does not help them in finding evidence at charge; in other terms, a detrimental treatment (a kind of “*double peine*”) will be following an act of exercise of the right to self-defence.

92. The said protection can be extended to the right not to be prosecuted for not confessing or for denying his/her own misconduct and, in general, for any form of lack of cooperation (including one that, in a passive way only or with a generic verbal conduct only, has the effect of obstructing the investigation).

93. Instead, the obligation not to interfere with any investigation, and, in particular, not to withhold, destroy or tamper with evidence, and not to influence or intimidate the complainant and/or potential witnesses is applicable to all staff members, including the subject of an investigation.

94. Applying this principle to the case at hand, a disciplinary sanction for non-cooperation has to be excluded with reference to the staff member who committed a misconduct sanctioned in the same proceedings.

95. Owing to the said reasons, the accusations under count two fall.

96. In any case, the Tribunal highlights that misconduct occurred in relation to count one only.

Whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

Applicant's submissions

97. The Applicant raises three grounds in arguing that his due process rights were violated: (i) the participation of Mr. Rajkumar as an investigator was a serious conflict of interest; and (ii) the Organization and OIOS had already improperly concluded that the Applicant was guilty of the misconduct before the investigation was started and even before he was charged,³⁵ and (iii) violation of his presumption of innocence.

(i) *Participation of Mr. Rajkumar as an investigator.*

98. The Applicant submits that Mr. Swanson assigned Mr. Rajkumar to investigate this matter under the remote management of Ms. Margaret Gichanga-Jensen, OIOS Chief Investigator at the United Nations Office in Vienna.³⁶ The Applicant thus notes that since Mr. Rajkumar was not an OIOS investigator, the investigation in this case was not “operationally independent” as required for misconduct cases under category 1 and as defined in section 1.3.1 of the OIOS Investigations Manual.³⁷ The Applicant, therefore, opines that the involvement of Mr. Rajkumar on the investigation team is a serious violation of his due process rights.

³⁵ Application, para. 9.

³⁶ *Ibid.*, at annex B, para. 1.

³⁷ *Ibid.*, at para. 3.

99. The Applicant notes that the e-referral document did not comply with the requirements of a “Class C referral”, which refers the responsibility to conduct an investigation to another office.³⁸ Further, Mr. Swanson had no authority to delegate OIOS tasks to Mr. Rajkumar as an OIOS-tasked investigator. The Chief Mission Support of UNTSO was not consulted.³⁹ The failure to explain how Mr. Rajkumar became part of the investigation team was, thus, a violation of his due process rights.

100. The Applicant also indicates the Mr. Rajkumar unlawfully physically seized his personal cell phone in violation of ST/SGB/2004/15 (Use of information and communication technology resources and data) and the OIOS protocol 5b-PROT-042015 for ICT retrievals.⁴⁰ The Applicant maintains that Mr. Rajkumar unlawfully participated in the investigation because he was not an OIOS staff. As such, he was not authorised to seize information, communication and technology (“ICT”) resources, nor did he work with the assistance of an authorised ICT officer. This act specifically violated paragraphs 7 and 14 of the OIOS’s own retrieval protocol and making the seizure of his phone unlawful.

101. The Applicant further submits that Mr. Rajkumar had a serious conflict of interest and should never have been allowed to act as an investigator in this case. Not only was Mr. Rajkumar an agent of the Administration and therefore, not a staff of an independent body, but he knew the Applicant and worked with him. Mr. Rajkumar was assigned as the Area Security Officer in Tiberias, Israel, while the Applicant was a Security Officer there.⁴¹

102. In addition, it is clear from para. 10 of the 30 June 2020 communication to Ms. Catherine Pollard, the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) from Mr. Swanson, that Mr. Rajkumar also gave evidence, helping to identify the Applicant.⁴² Further, on 24 June 2020, Mr. Rajkumar acting in his personal capacity as a staff member, submitted a report about the alleged

³⁸ *Ibid.*, para. 4.

³⁹ *Ibid.*, para. 6.

⁴⁰ *Ibid.*, para. 8.

⁴¹ *Ibid.*, para. 9.

⁴² Application, annex entitled RESP-2.

incident to OIOS, less than 12 hours after the clip initially was provided to the OIOS hotline on 23 June 2020. In this regard, as a staff member submitting a report of possible misconduct, Mr. Rajkumar's only involvement in the case should have been as a witness, but not as an investigator. Just 24 hours after Mr. Rajkumar submitted a report to the OIOS hotline, he was engaged with OIOS as an investigator. By doing so, Mr. Rajkumar placed himself in a position of conflict and thereby violated the Applicant's due process rights.⁴³

103. The Applicant maintains that even if Mr. Rajkumar was to be appointed as an OIOS tasked investigator, he should have complied with all the requirements of being an OIOS investigator, including declaring a possible conflict of interest in accordance with the OIOS protocol.⁴⁴

(ii) Conclusion by the Organization and OIOS that the Applicant was guilty of misconduct before the investigation and being charged by the Administration.

104. The Applicant submits that on 2 July 2020, Mr. Stéphane Dujarric, the Spokesperson for the Secretary-General, issued a press release, followed by another issued on 3 July 2020 by UNTSO.⁴⁵ Both press releases falsely misrepresented that the staff member(s) had "been identified as having engaged in misconduct, including conduct of a sexual nature", which publicly defamed the staff member(s) whose names had already been released by Inner City Press on 28 June 2020. This was before the investigation was even a week old. At the time of these press releases, UNTSO and Mr. Dujarric knew that the Applicant had been placed on ALWOP on 2 July 2020, which is supposedly not a disciplinary measure and is certainly not proof that the Applicant had been found to have engaged in any misconduct.⁴⁶

105. The Applicant contends that the public statements made by UNTSO and Mr. Dujarric were outrageous abuses of authority and a further violation of his due process

⁴³ *Ibid.*, at annex B, paras. 9-13.

⁴⁴ *Ibid.*, at annex B, para. 14.

⁴⁵ *Ibid.*, at annex B, para. 23.

⁴⁶ *Ibid.*

rights and were in complete contradiction with the assurances contained in the pre-interview sheet provided to him.⁴⁷

(iii) Violation of the Applicant's presumption of innocence.

106. The Applicant seeks to challenge the credibility of OIOS while conducting the investigations in his case. He contends that OIOS was not operationally independent. He also submits that OIOS influenced the decision maker. He cites a recommendation contained in Mr. Swanson's memorandum dated 30 June 2020 to the USG/DMSPC as to whether or not to place the Applicant on ALWOP or ALWP. The Applicant states that the responsibility to place a staff member on ALWOP or ALWP rests solely with USG/DMSPC. OIOS' responsibilities do not include to influence or advise of whatever administrative decision the USG/DMSPC may make as a result of the OIOS report. Therefore, OIOS's predetermined conclusions overtly influenced the decision maker and thus violated his due process rights to be considered innocent until proven guilty. Accordingly, the investigation report is unreliable and should be disregarded.⁴⁸

Respondent's submissions

107. The Respondent's position is that the Applicant's procedural fairness rights were respected throughout the investigation and the disciplinary process. The Applicant was interviewed twice by OIOS about all material aspects of the matter, and he presented an additional written statement. He was provided with all supporting documentation along with the Allegations Memorandum, was informed of his right to seek the assistance of counsel and was given the opportunity to comment on the allegations against him.⁴⁹

108. The Respondent seeks to rely on *Millan*,⁵⁰ where the Tribunal already rejected the Applicant's claim of violation of his due process rights in this matter, including,

⁴⁷ *Ibid.*, para. 24.

⁴⁸ Application, annex B, paras. 40-50.

⁴⁹ Reply, para. 64.

⁵⁰ *Millan* UNDT/2021/152, paras. 46-50.

regarding Mr. Rajkumar's involvement as an investigator and the Organization's press releases.

109. In specific response to the Applicant's claims against Mr. Rajkumar, the Respondent submits that the Applicant's assertions are irrelevant; the Applicant does not allege or substantiate that the OIOS investigation report was biased. Furthermore, the Applicant provides no legal basis for his contention that Mr. Rajkumar should not have been involved in the investigation. In this regard, it should be recalled that Mr. Rajkumar was involved by OIOS because he was on-site in a situation of urgency due to the publication of the clip and the immediate action required while there were serious travel restrictions due to the Covid-19 pandemic. The Applicant's assertion that his interview by OIOS was not conducted independently because Mr. Rajkumar was not "*operationally independent*," fails. There is no evidence of a lack of independence of Mr. Rajkumar. Moreover, Mr. Rajkumar was acting under the management of Ms. Gichanga-Jensen, OIOS Investigator in Vienna, who asked most of the questions during the interview of the Applicant, while Mr. Rajkumar assisted her in displaying the evidence, including the clip of the Applicant's behaviour.⁵¹

110. The Applicant's assertion that Mr. Rajkumar should not have been involved due to an apparent "*conflict of interest*" because he was an "*agent of the Administration*," "*he knew the Applicant*" or a "*witness*", since he had recognized the Applicant in the clip, is erroneous. There was sufficient photographic evidence that served to identify the Applicant as the passenger in the front seat of the United Nations vehicle featured in the clip. Moreover, the mere fact that Mr. Rajkumar knew the Applicant by virtue of serving in the same mission, and therefore, could identify him in the clip, does not create a conflict of interest. In what capacity Mr. Rajkumar recognized the Applicant in the clip and made a report is really not to the point.⁵²

111. The Respondent also refutes the Applicant's contention that the investigator unlawfully physically seized his cell phone. The Applicant's rights were not violated

⁵¹ Reply, para. 71.

⁵² Ibid., paras. 72-73.

and the OIOS investigator's request for submission of the Applicant's phone is lawful.⁵³ The Respondent highlights that the mobile phone the Applicant submitted to OIOS was operational through a United Nations issued SIM card and was used for official purposes, in the sense of section 1(d) of ST/SGB/2004/15. The mobile phone, including the United Nations issued SIM card, was thereby an ICT resource in the sense of section 1(b) of ST/SGB/2004/15, *i.e.*, a tangible asset capable of generating, transmitting, receiving, processing, or representing data in electronic form used by the United Nations. As noted, OIOS had authority to access that ICT resource under section 9 of ST/SGB/2004/15, even remotely and without prior written request. Accordingly, there was no violation of any procedures set out in ST/SGB/2004/15 by the Applicant submitting an United Nations issued SIM card operated phone to OIOS.⁵⁴

112. Regarding the Applicant's complaints about the press releases, the Respondent maintains that the Organization did not violate the confidentiality of the investigation, create the publicity of this case, or violate the Applicant's presumption of innocence. The Organization abided by the confidentiality of the investigation, notwithstanding that transparency, accountability and good governance are the overarching principles of the Organization. Accordingly, the press releases and briefings issued in relation to the clip contained no names.

113. On the Applicant's claim on the violation of the presumption of innocence principle, the Respondent submits that OIOS respected his due process rights. The Applicant's assertions that OIOS failed to act with "*operational independence*" and attempted to "*improperly influence*" the decisions of the USG/DMSPC, are unsubstantiated and not borne out by the record. OIOS did not make any "*recommendations*" to the USG/DMSPC as to whether the Applicant should be placed on ALWOP or not. These contentions are therefore, without basis. Moreover, the contentions are irrelevant for the disciplinary process as they pertain to the Applicant's placement on ALWOP, which is a separate, administrative decision.

⁵³ *Ibid.*, para. 75.

⁵⁴ *Ibid.*, para. 78.

Considerations

114. The Tribunal is of the view that the Applicant's procedural fairness rights were respected throughout the investigation and the disciplinary process. In particular, the Applicant was provided with all supporting documentation, interviewed, informed of his right to seek the assistance of counsel and, in sum, he was given the opportunity to comment on the allegations against him and to contrast them.

115. The Tribunal notes that the same issues were raised by the Applicant in a previous proceeding on the same events, and that the Tribunal found them unfounded.⁵⁵

116. UNAT stated that 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 (*Millan* 2023-UNAT-1330, para. 83; see also *Nimer* 2018-UNAT-879, para. 33, citing *Nadeau* 2017-UNAT-733/Corr.1, para. 31).

117. In any case, even assuming that the irregularities complained of by the Applicant occurred, they are related to side aspects of the proceedings which interfere in no way with the evidence, essentially resulting from the video and the Carlog system, and they are irrelevant to the outcome of the investigations and with no influence on the assessment of the facts and on their occurrence (as reflected above in para. 96).

118. In the case, the Applicant failed to demonstrate in what way the alleged violations of his due process rights prejudiced him within the context of the case and impacted the outcome of his case.

Whether the sanction is proportionate to the gravity of the offence

Applicant's submissions

119. The Applicant maintains that the established facts do not support the allegations against him. Accordingly, the disciplinary measure imposed on him cannot stand. He

⁵⁵ *Millan* UNDT/2021/152.

avers that he was wrongfully separated based on a biased, flawed and vindictive investigation designed from the outset to find him guilty where the presumption of innocence was not respected.

120. The organization has vicariously placed the responsibility of Mr. Antoine's actions on him, while effectively absolving Mr. Cunillera of responsibility by retaining him in service, yet Mr. Cunillera was the driver of the vehicle and saw what Mr. Antoine was doing. Mr. Cunillera remains in service while the Applicant was separated for sitting in the front seat of a United Nations car, while sick and drowsy. This is outright favouritism.

121. The Applicant states that the worst sanction that he may have expected would be an administrative measure for being in a United Nations vehicle with an unauthorized passenger and loss of his driving permit for 30 days. The Applicant has been a hard worker in difficult conditions for a long time and this sanction was disproportionate and punitive simply because of the publicity associated with this case.

122. As remedies, the Applicant requests the Tribunal to: (i) rescind the contested decision and to reappoint him to a suitable position commensurate with his skills; (ii) order compensation for the damage to his career and self-respect; and (iii) if the Tribunal considers that the sanction of separation was appropriate, to change the sanction to separation from service with compensation in lieu of notice with termination indemnity, in accordance with staff rule 10.2(a)(viii).

Respondent's submissions

123. The Respondent's position is that the Applicant engaged in serious misconduct under Chapter X of the staff rules. The 21 May 2020 events imply serious misconduct by the Applicant that justifies, in and of itself, regardless of the Applicant's lack of cooperation with the OIOS investigation, a disciplinary measure at the severest end of the spectrum, *i.e.*, dismissal or separation from service. His conduct displayed a lapse of integrity and competence and stands in stark contrast with the conduct befitting an international civil servant, such that continuation of his employment relationship with

the Organization cannot be tolerated, since this requires mutual trust and confidence. His conduct went against the core values of the Organization and reflects badly on it. His conduct also implied an obvious risk of significant harm to the Mission and to the Organization's reputation, including to the relationship between Israel, as the Mission's Host Member State, and the United Nations, as well as to the Mission and United Nations personnel in Israel resulting from any backlash against such personnel.

124. The Respondent further submits that the Applicant's obstruction of the OIOS investigation, by withholding information and by submitting a mobile phone without any of the expected user data, displayed a serious lack of integrity and warrants a firm disciplinary measure and message that such conduct will not be tolerated. It means that also for this serious misconduct the employment relationship between the Applicant and the Organization, which is based on mutual trust and confidence, is so seriously damaged as to render its continuation untenable. Accordingly, the disciplinary measure imposed on the Applicant is appropriate and proportionate.

Considerations

125. The Applicant claims that offence number 10 as contained in UNTSO procedures applicable to the operation of UNTSO vehicles,⁵⁶ explicitly states that the sanction for the first violation of "transportation of non-authorized persons in UN vehicles" is withdrawal of Driving Permit for 30 days, and that it does not entail any misconduct.

126. The Tribunal already clarified that in this case there was not only liability for transportation of a person not authorised, transported without a belt, but there was more, as all the consequences of the transportation fall on the person in charge of the custody and care of the United Nations vehicle, specifically entrusted to him.

127. The Tribunal cannot, therefore, find that the Organisation exerted its discretionary disciplinary powers unlawfully nor that the sanction applied was

⁵⁶ Application, doc, ICF 000261.

disproportionate.

128. Considering only count one, the sanction is, indeed, adequate. *Millan2023-UNAT-1330*, para. 73, confirms this evaluation, stating that:

The misconduct was grave enough for the Administration to contemplate separation or dismissal, as it was irremediably damaging to the trust relationship between the staff member and the Organization.

129. The Applicant claims that the sanction was disproportionate in comparison to other cases and in particular to the sanction applied to Mr. Cunillera.

130. As to the first concern, the Tribunal notes that the cases recalled by the Applicant are related to driving of vehicle, transportation of unauthorized passengers, car crash, driving in drunken state, or to minor route violation, and that in those cases minor sanctions were applied, and notably the censure. The facts there committed, however, are different from the one at stake in the present case, where the interests violated are not related at all to vehicle circulation discipline but to the integrity of international officials and to damage caused to the Organization.

131. As to the second issue, Mr. Cunillera, who drove the car in the same event of the Applicant, was disciplined only by a written censure, with loss of two steps and deferment, for a period of two years of eligibility for salary increment, in accordance with staff rule 10.2(a)(i), (ii) and (iii).

132. The Tribunal is of the view that the imposition on Mr. Cunillera of a less severe sanction is justified by the fact that his role in the events was fundamentally different; the United Nations vehicle was not assigned to him and in his care when F01 was allowed to travel in it, and Mr. Cunillera tried to stop the event as inappropriate, while the Applicant was, as simply put by the Respondent, the main actor in the affair, as clearly shown in the video-clip.

133. Finally, the Tribunal notes that the Applicant's claim for a remedy on two heads of damage: i) "damage to his career and self-respect," which, according to the Applicant, "started with the information put in the public domain by the press team of

the Organization at various stages of the investigations up to the sanction letter” (“Publication Damage”);and ii) damage due to being “shocked, dismayed and depressed under the care of doctors without employment needing to explain to his family and friends that he is now considered by the UN to be a deviant.” This damage, according to the Applicant, resulted from being “returned to the United States of America” (“Dismissal Damage”).

134. The first claim is ill-founded. Indeed, as regards the alleged dismissal damage, the contested decision was lawful and therefore, the issue of remedies in that regard does not arise.

135. As regards the second claim, related to publication damage, apart from any consideration that the press releases contained no names, that it is irrelevant that names appeared elsewhere by non-official sources whose effects cannot be attributed to the Organization (see also Order No. 185 (NBI/2020) and *Millan* UNDT/2021/152, both *inter partes*), the Tribunal observes that the Organization did not violate the confidentiality of the investigation or give undue publicity to the case, being instead called to a transparent accountable position on the events.

136. In any case, the claim is inadmissible because the Applicant has not directly challenged in these proceedings any act of the spokesperson for the United Nations Secretary-General (solely recalling it for an alleged violation of the due process in the disciplinary process).

137. In conclusion, as the Tribunal does not find unlawful the disciplinary sanction chosen and applied by the Organization, the application is dismissed in its entirety.

Conclusion

138. In light of the foregoing, the application fails.

(Signed)

Judge Francesco Buffa

Dated this 21st day of June 2023

Entered in the Register on this 21st day of June 2023

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi