Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

BANAJ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Federica Midiri, UNDP
Teresa Posse, UNDP

Introduction

1. By application filed on 15 January 2021, the Applicant, a staff member of the United Nations Office on Drugs and Crime ("UNODC"), contests the decision to impose on her the disciplinary measure of demotion of one grade with deferment, for one year, of eligibility for consideration for promotion ("contested decision").

Facts and procedural history

2. On 1 January 2000, the Applicant joined UNODC in Tirana on a fixed-term appointment as a National Programme Officer at the NO-B level. Since the Applicant's appointment, her service is limited to UNODC, whereas her contract is administered by the United Nations Development Programme ("UNDP").

3. On 1 January 2008, the Applicant was promoted to the NO-C level. On 23 November 2012, the Applicant's appointment was retroactively converted to a permanent appointment effective 30 June 2009. As a consequence of the disciplinary proceedings and her resulting demotion, the Applicant is currently serving in the same position at the NO-B level.

4. On 18 July 2018, the Regional Representative for South-eastern Europe ("RR") at UNODC, reported the Applicant to the Office of Audit and Investigations ("OAI") of UNDP for possible misconduct, alleging that to secure support for preserving her personal situation as the sole UNODC representative in Albania, the Applicant may have lobbied government officials against the recruitment of the newly created P-4 Advisor Post in the UNODC Albania Office.

5. Having conducted a preliminary assessment, OAI also obtained information showing that the Applicant may also have communicated internal information, which she became aware of as a result of her official position with UNODC, to officials of the Albanian Government and the U.S. Embassy in Albania.

6. On 25 October 2018, the Applicant was informed by OAI that she was the subject of an investigation and was interviewed on 26 October 2018.

7. On 29 October 2018, the RR informed the Applicant that "it has been decided to effect a temporary reassignment of [her] functions" and instructed her as follows:

> With immediate effect you shall focus your work exclusively on ongoing approved technical project activities linked to the Container Control Programme segment for Albania. You shall not engage [or] commit UNODC in any other matter. You shall limit your consultations with national project partners at technical level and refrain [from] representing UNODC at senior level including with Embassies and international counterparts based in Albania. Functions linked to the representation of UNODC and management of our wider portfolio for Albania will fall under my direct responsibility. A message informing of these interim measures will be addressed accordingly to our national and international counterparts, including Embassies, in Tirana and Heads of UNODC Global Programmes in Vienna.

8. On 1 May 2019, OAI sent the Applicant a draft investigation report and requested her to provide comments and any countervailing evidence, which she provided on 20 May 2019.

9. On 21 May 2019, the Applicant filed an application before the Tribunal, which was registered under Case No. UNDT/GVA/2019/031, challenging the Respondent's decision to temporarily reassign her functions.

10. On 23 July 2019, OAI issued its investigation report.

11. By charge letter dated 21 May 2020, the Assistant Administrator, UNDP, charged the Applicant with misconduct for intentionally disclosing internal information to officials of both the Albanian Government and the U.S. Embassy in Albania without authorization, and for sharing criticism of UNODC's activities and policy decisions with government officials against the interest of UNODC.

12. On 30 June 2020 and 1 July 2020, the Applicant submitted her response to the charge letter.

13. By letter of 22 October 2020, the UNDP Associate Administrator informed the Applicant of his decision to demote her from NO-C to NO-B level with deferment, for one year, of eligibility for consideration for promotion.

14. On 16 December 2020, the Applicant was advised that as a result of her demotion, the reassignment of her functions was now permanent.

15. On 15 January 2021, the Applicant filed the subject application referred to in para. 1 above.

16. On 16 February 2021, the Respondent filed his reply.

17. By Judgment *Banaj* UNDT/2021/030 dated 26 March 2021, the Tribunal rejected the Applicant's application, registered under Case No. UNDT/GVA/2019/031, contesting the Respondent's decision to temporarily reassign her functions (see para. 7 above).

18. On 10 January 2022, the present case was assigned to the undersigned Judge.

19. By Order No. 5 (GVA/2022) of 18 January 2022, the Tribunal convoked the parties to a case management discussion ("CMD"). The CMD took place, as scheduled, on 17 February 2022, with Counsel for each party and the Applicant present. During the CMD, the Applicant requested leave to file further written submissions given an evolution of factual circumstances.

20. By Order No. 23 (GVA/2022) of 21 February 2022, the Tribunal granted the Applicant's request ordering her to file an additional submission by 28 February 2022 and invited the Respondent to respond to it by 10 March 2022.

21. On 28 February 2022, the Applicant filed her additional submission.

22. Further to a motion for extension of time to respond to the Applicant's additional submission, which was granted in part by Order No. 27 (GVA/2022) of 2 March 2022, the Respondent filed his response to the Applicant's additional submission on 5 April 2022.

23. By Judgment *Banaj* 2022-UNAT-1202 dated 18 March 2022, the Appeals Tribunal set aside Judgment *Banaj* UNDT/2021/030 in relation to the decision to temporarily reassign the Applicant's functions and remanded the case to this Tribunal to determine remedies in conjunction with its judgment to be issued in the present case.

24. By Order No. 55 (GVA/2022) of 22 April 2022, the Tribunal informed the parties that it was fully informed on the matter and the case could be determined without holding a hearing. Consequently, it instructed the parties to file their respective closing submission by 6 May 2022.

25. On 6 May 2022, the parties filed their respective closing submission.

Parties' submissions

26. The Applicant's principal contentions are:

a. The facts on which the allegations were based have not been established:

i. The original allegations against the Applicant concerning the creation of the P-4 Advisor Post emanated from hearsay repeated by the UK representative to the UNODC, which was later repudiated by the original source; and

ii. Hearsay is insufficient by itself to prove the charges.

b. While the underlying facts concerning various communications relied upon in the contested decision are not in dispute, their interpretation as acts of misconduct is at issue. This in turn requires that the surrounding context of the communications be considered;

c. While numerous communications with Government counterparts were questioned, the Respondent appears to have failed to take into account the fact that:

i. The Applicant's office is a liaison office that requires close collaboration with the Governments that work together on UNODC programmes;

ii. Her supervisor informed the Albanian Government and the U.S. Embassy in Albania that she would act as the focal point for communications representing UNODC; and

iii. The document containing critical comments of UNODC's activities that she shared with a member of the U.S. Embassy in Albania was not created by her.

d. There is no basis for a finding that misconduct occurred:

i. The Applicant was accused of improperly sharing the terms of reference ("TOR") of the Advisor Post, but it is not clear what the basis is for considering this an act of misconduct as the TOR was a working document not marked as privileged or confidential, and the Applicant was not informed that she could not disclose it; and

ii. The Respondent has not cited any specific rules that the Applicant violated and the use of terms such as "internal information" and "embargo" to suggest wrongdoing are vague and undefined.

e. The penalty imposed is disproportionate to the alleged offence:

i. The Applicant was unable to find any case comparable to hers, presumably because this is not generally handled as a case of misconduct but as a performance issue;

ii. The refusal to provide her private phone to the investigation panel is proper;

iii. The Respondent failed to take into account mitigating factors such as having to work in a hostile working environment with little or no consultation, a long record of unblemished service and the lack of evidence of improper intent or harm arising from the shared information; and

iv. The most telling comparison is the treatment afforded to her supervisor as opposed to that afforded to the Applicant. In the case of the former, improper behaviour by a senior manager was dealt with administratively as a managerial issue rather than as misconduct.

f. The decision was tainted by violations of due process at the investigative stage:

i. The Respondent's attempt to downgrade her post, together with the intention of assigning her formal functions to a newly established post amounts to a constructive dismissal; and

ii. The Appeals Tribunal sustained her claim that the UNODC improperly and without delegated authority reassigned her functions "temporarily".

27. The Respondent's principal contentions are:

a. The facts based on which the Respondent sanctioned the Applicant have been established and are not in dispute;

b. The Applicant's actions, which are in breach of staff regulation 1.2(e), (f) and (i), constitute serious misconduct;

c. The imposed disciplinary measure fell within the Administration's discretion and was proportionate; and

d. The Applicant' s due process rights were fully respected.

Consideration

Scope and standard of judicial review

28. Judicial review of a disciplinary case requires the Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration (see, e.g., *Applicant* 2013-UNAT-302, para. 29). In this context, the consistent jurisprudence of the Appeals Tribunal (see, e.g., *Haniya* 2010-UNAT-024; *Wishah* 2015-UNAT-537; *Ladu* 2019-UNAT-956; *Nyawa* 2020- UNAT-1024) requires the Dispute Tribunal to ascertain:

a. Whether the facts on which the disciplinary measure was based have been established;

b. Whether the established facts legally amount to misconduct;

c. Whether the disciplinary measure applied was proportionate to the offence; and

d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

29. The Tribunal will address below these issues in turn.

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

30. The disciplinary measure in the present case is demotion of one grade with deferment, for one year, of eligibility for consideration for promotion.

31. It is well-settled case law that the standard of proof applicable to a case where the disciplinary measures do not include separation or dismissal is that of preponderance of evidence, i.e., more likely than not that the facts and circumstances underlying the misconduct exist or have occurred (see sec. 9.1(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process); see also *Suleiman* 2020- UNAT-1006, para. 10).

32. Moreover, in determining whether the standard of proof has been met, the Tribunal "is not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the Secretary-General". Thus, it will "only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based" (see *Nadasan* 2019-UNAT-918, para. 40).

33. As such, the Tribunal considers to be irrelevant the Applicant's submission that the facts on which the allegations were based have not been established. Indeed, what matters in this regard is whether the facts on which the disciplinary measure was based have been established.

34. In the present case, the facts on which the disciplinary measure was based are twofold:

a. The Applicant intentionally disclosed internal information to officials of the Albanian Government and the U.S. Embassy in Albania, without prior authorization; and

b. The Applicant, acting against the interests of the Organization, shared criticism about the activities and policy decisions of UNODC with officials of the Albanian and U.S. Governments.

35. Having reviewed the parties' submissions on record, the Tribunal finds that there is undisputed evidence that the above-mentioned facts on which the disciplinary measure was based have been established.

Intentionally disclosing internal information without prior authorization

36. Indeed, the evidence on record shows that on various occasions, the Applicant intentionally disclosed internal information without prior authorization.

The draft TOR for the Advisor Post

37. Specifically, the evidence shows that the Applicant forwarded internal emails containing information related to the creation of an Advisor Post in the UNODC Albania Office, the same office where the Applicant was working as the sole

UNODC staff member, to the Albanian Deputy Minister of Interior, Mr. B. L., and to Mr. S. B., who was then a member of the U.S. Embassy in Albania. This sharing of information occurred on several occasions, i.e., on 21 November 2017, 23 March 2018, 17 April 2018, 6 May 2018, 10 May 2018, and 17 May 2018.

38. While she does not dispute the authenticity of the emails relied upon in the contested decision, the Applicant, nevertheless, does not accept that all her communications with Government counterparts were unauthorized. To support her position, she claims that she shared information with government officials because, on the basis of her TOR, her role "is to manage and supervise the projects in the Country, including … Government relations building and management" and that "this is done in close collaboration with Government officials including 'provision of top-quality policy advice services to the Government'". The Applicant also argues that she shared the TOR for the Advisor Post for operational purposes.

39. The Tribunal is not convinced by the Applicant's submissions in this respect. First, while it is not disputed that communication with government officials is part of her tasks, the evidence on record shows that the type of communication she shared with government officials did not have the nature of "top-quality policy advice" but involved UNODC's internal information and decisions of which she became aware due to her role with UNODC and with which she was not in agreement. Specifically, the Applicant shared with governmental officials from two Member States the draft of the TOR for the Advisor Post prior to its finalization and publication.

40. Second, there is no evidence that the Applicant shared the draft TOR for the Advisor Post for operational purposes. Indeed, if she was acting for operational purposes, the Applicant failed to demonstrate why she shared the TORs only with some officials from the Albanian Government and the U.S. Embassy and not with any other of UNODC's partners. Instead, there is evidence showing the Applicant's comments about the fact that her role would be marginalized by UNODC with the creation of the Advisor post, suggesting that she acted for personal interests.

41. Moreover, as the Respondent pointed out, at no time did the Applicant copy her supervisor or any other UNODC official in her communications with the Albanian Government or the U.S. Embassy in Albania, nor request authorization to share such information with the two Member States. The evidence indicates that the Applicant did so without the knowledge of her supervisor or any other UNODC official and that she wanted to conceal from UNODC that she was sharing such information with the U.S. Embassy and her own Government.

The World Drug Report

42. The evidence on record also indicates that by email of 22 June 2018, the Applicant forwarded the World Drug Report, while it was under embargo and without authorization, to three senior officials in the Albanian Ministry of Interior.

43. Moreover, there is sufficient evidence to show that the Applicant knew that the report was under embargo and, thus, that she was not allowed to share it without authorization from UNODC.

44. Indeed, the investigation report and its exhibits indicate that on 12 June 2018, the Applicant requested and received specific authorization from the RR to share the World Drug Report exclusively with the UN Resident Coordinator ("RC") and that the RR explicitly informed the Applicant that "[t]he document [is] under strict embargo and even within UNODC the circulation [was] restricted to a limited number of staff".

45. Furthermore, when requesting a copy of the report on 20 June 2018 from the Chief of the Drug Research Section, UNODC, the Applicant explicitly indicated that "[n]eedless to say that it will be confidentially shared with the RC and kept under embargo till June 25th". In response to the Applicant's request, the Chief of the Drug Research Section, UNODC, highlighted that the document was under embargo until 26 June 2018, and she specifically requested the Applicant to "ensure the embargo [was] respected".

46. Notwithstanding the RR's statement regarding the embargo of the document, the explicit instruction of the Chief of the Drug Research Section and the Applicant's confirmation, the evidence shows that the Applicant shared the report with the Albanian Government on 22 June 2018.

47. Accordingly, the Tribunal finds that the evidence on record shows that the Applicant shared without authorization internal information, which she became aware of by virtue of performing her official UNODC functions, with government officials from two Member States and that she did so based on her personal interest and not for official purposes.

Sharing personal criticism about the activities and policy decisions of the UNODC with officials of the Albanian and U.S. Governments

48. The evidence on record also shows that the Applicant shared via email on several occasions her personal criticism of UNODC's internal decision to create the Advisor Post with the then Secretary-General within the Ministry of Interior of the Government of Albania, Ms. A. T., Mr. B. L., and Mr. S. B. She did so on 18 January 2018, 23 March 2018, 6 May 2018, and 17 May 2018.

49. To justify her action, the Applicant contends that she did not create the document that she shared with Mr. S. B. but merely entered the text of the document in her computer. It is noted that this document contained critical comments of UNODC activities, emphasizing the alleged influence of the Russian Federation and mentioning a lack of transparency in the UNODC regional desk.

50. Having reviewed the evidence on record, the Tribunal does not consider the Applicant's assertion in this respect to be credible. First, the document metadata lists the Applicant as the author. Second, the Applicant provided different accounts as to how she purportedly came upon the document. Indeed, during the investigation, the Applicant claimed that the document was produced by other authors, and that she came across it by chance. However, during the course of the disciplinary proceedings, she stated that the document was specifically given to her by a person allegedly working for the U.S. Embassy in Albania. Nevertheless, the

Applicant failed to provide evidence that she received the document from such an individual.

51. Moreover, regardless of whether the Applicant's assertion is to be accepted, the Applicant did not dispute that she shared with a Member State a document containing criticism of UNODC's activities and officials, including its leadership.

52. Therefore, the Tribunal finds that the evidence on record shows that the Applicant shared personal criticism about the activities and policy decisions of the UNODC with officials of the Albanian and U.S. Governments.

53. In light of the foregoing, the Tribunal concludes that the Administration has established to the requisite standard of proof the facts on which the disciplinary measure was based.

Whether the established facts legally amount to misconduct

54. Regarding whether the established facts legally amount to misconduct, the Tribunal recalls that staff rule 10.1(a) provides that:

> Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

55. Having found in paras. 47 and 52 that the Applicant intentionally disclosed internal information without authorization and shared personal criticism of UNODC's activities and policy decisions against the interest of UNODC, the Tribunal recalls that the Staff Regulations and Rules provide in their relevant part that:

Regulation 1.2
Basic rights and obligations of staff

…

General rights and obligations

…

(e) By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct **with the interests of the Organization only in view**. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants (emphasis added);

(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** (emphasis added);

…

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

56. Turning to the present case, the Tribunal first acknowledges the fact that the Applicant's office is a liaison office requiring close collaboration with the Governments that work together on UNODC programmes and that the RR informed the Albanian Government and the U.S. Embassy in Albania that the Applicant would act as the focal point for communication representing UNODC. However, this does not mean that the Applicant could share any internal information without

authorization and expose the Organization to criticism with such Governments while performing her functions.

57. Specifically, with respect to the draft TOR of the Advisor Post, the circumstances of the case appear to show that the Applicant shared it to further her own personal interest. Also, the Applicant's sharing of the draft TOR could give an advantage in recruitment if it was shared with prospective candidates, thereby potentially tainting the recruitment process.

58. In relation to the World Drug Report, the evidence clearly shows that the Applicant was aware of the meaning and implications of the term "embargo" since she herself had sought permission to share it with the RC and had been specifically required by relevant officials to keep it under embargo until 26 June 2018.

59. Accordingly, the Tribunal considers that the Applicant intentionally disclosing the above-mentioned internal information to governmental officials from Albania and the U.S., and sharing her personal criticism do not fall within the scope of "the normal course of [her] duties" under staff regulation 1.2(i).

60. Second, the Tribunal notes that the Applicant sought to justify her actions by claiming that the documents she disclosed to external parties were not classified as "confidential" under the ST/SGB/2007/6 (Information sensitivity, classification and handling). However, the obligation not to disclose internal information under the Staff Regulations and Rules is not limited to confidential information classified under the ST/SGB/2007/6. Indeed, staff regulation 1.2(i) explicitly refers to "any information known to [the staff members] by reason of their official position that they know or ought to have known has not been made public".

61. As a seasoned and senior staff member, the Applicant knew or ought to have known what constituted internal information not to be disclosed to parties external to the Organization. Furthermore, it is obvious that documents either in draft form or under embargo that have not been made public could not be disclosed to external parties without authorization.

62. Finally, the Tribunal finds no merit in the Applicant's submission that there is no basis for a finding that misconduct occurred. Indeed, the Applicant's conduct is prohibited under staff regulation 1.2(e), (f) and (i), which are provisions of paramount importance aimed at protecting the independence and integrity of the work of the Organization and its officials.

63. Specifically, the Applicant violated staff regulation 1.2(i) by communicating to government officials from two UN Member States information known to her due to her official position that she knew or ought to have known had not been made public. Furthermore, by intentionally disclosing internal information without prior authorization and sharing personal criticism of UNODC's activities and policy decisions, the Applicant failed to discharge her functions and regulate her conduct with the interest of the Organization only in view pursuant to staff regulation 1.2(e). By her actions, the Applicant acted in a manner that could reasonably be perceived as adversely reflecting on the integrity, independence and impartiality of her status as a staff member which is in contravention of staff regulation 1.2(f).

64. Accordingly, the Tribunal concludes that the established facts legally amount to misconduct.

Whether the disciplinary measure applied was proportionate to the offence

65. Staff rule 10.3(b) provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". This legal provision is mandatory since the text contains the expression "shall". The Tribunal must therefore verify whether the staff member's right to a proportionate sanction was respected and whether the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct.

66. However, the Tribunal is mindful that "the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case, and to the actions and behaviour of the staff member involved". As such, the Tribunal will only interfere with this administrative discretion if "the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms,

excessive, abusive, discriminatory or absurd in its severity" (see *Portillo Moya* 2015-UNAT-523, paras. 19-21; see also *Nyawa* 2020-UNAT-1024, para. 89; *Cheikh Thiare* 2021-UNAT-1167, para. 33).

67. Nevertheless, due deference does not entail uncritical acquiescence (*Samandarov* 2018-UNAT-859, para. 24). The Appeals Tribunal held that misconduct "must be viewed in terms of the nature of the mission, purpose and principles of the United Nations, and the impact [that the] type of misconduct can have on the Organization's reputation, credibility and integrity" (see *Ogorodnikov* 2015-UNAT-549, para. 32).

Whether the Administration duly considered the totality of the circumstances

68. In the present case, the Tribunal must determine whether the Administration's imposition of the disciplinary measure at issue on the Applicant was after giving due consideration to the entire circumstances of the case, including any aggravating and mitigating factors. In this respect, the Tribunal recalls that the Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose (see *Nyawa* 2020-UNAT-1024; *Ladu* 2019- UNAT-956).

Aggravating factors

69. Having reviewed the evidence on record, the Tribunal finds that the Administration duly considered aggravating factors.

70. First, as pointed out by the Respondent, the Applicant's conduct not only broke her obligation not to disclose internal information she knew was not public, but also criticized the UNODC's policy decision and activities. This type of misconduct, if allowed, could have a substantial reputational impact on the Organization and may negatively affect its independence and impartiality. Such misconduct is particularly grave considering that the Applicant is a relatively senior professional with twenty years of experience with the Organization and, thus, is expected to know the limits that exist to protect the independence and impartiality of UN staff members.

71. Second, despite the serious nature of her misconduct, the Applicant does not recognize that her conduct is inappropriate and refuses to acknowledge any fault on her part. In this respect, the Tribunal notes that the lack of any expression of remorse is often considered as an aggravating factor in disciplinary matters (see, e.g., *Jenbere* 2019-UNAT-935, para. 36).

72. Moreover, the Applicant engaged in repeated separate acts of misconduct. Indeed, as previously demonstrated, the Applicant repeatedly violated staff regulation 1.2(e), (f) and (i) governing general rights and obligations of UN staff members, a regulation aimed at preserving the independence and impartiality of the International Civil Service.

73. Finally, the Tribunal notes that UNDP considered as an aggravating factor the Applicant's refusal to cooperate with the investigation by refusing to provide her UNODC-issued mobile phone and her personal phone, for which she received payment from UNODC and that she also used for official calls.

74. In this respect, the Tribunal recalls that sec. 6.2 of ST/AI/2017/1 provides that:

> Pursuant to staff regulation 1.2 (r) and staff rule 1.2 (c), staff members are required to fully cooperate with all duly authorized investigations and to provide any records, documents, information and **communications technology equipment** or other information under the control of the Organization or **under the staff member's control**, as requested. Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct. (emphasis added)

75. In addition, the Applicant does not dispute that the phone, although belonging to her, was being routinely used by her for official purposes, which is supported by the fact that the phone's service charges incurred to perform her official functions were being paid by the Organization.

76. Therefore, the Applicant was obliged to provide to the investigating authority, as requested, her phone that was used for official calls. Her not doing so constitutes failure to cooperate with duly authorized investigations, potentially amounting to another ground for misconduct. As such, the Administration properly considered this factor as an aggravating factor in determining the appropriate sanction.

Mitigating factors

77. With respect to mitigating factors, the Tribunal notes that, contrary to the Applicant's assertion, the evidence on record shows that in determining the appropriate sanction to impose, UNDP considered as mitigating factor the Applicant's previously unblemished record of service. UNDP also took into account the fact that in two instances the information forwarded by the Applicant i.e., critical comments against the Organization, had already been shared with representatives of Member States.

78. Moreover, the Tribunal finds no merit in the Applicant's submission that the Administration failed to consider other relevant factors such as the lack of evidence of improper intent or harm arising from the sharing of information and having to work in a hostile working environment with little or no consultation.

79. Regarding the alleged lack of improper intent, the Tribunal notes that factors relevant to this include "whether the staff member made full, timely disclosure to a direct or indirect supervisor," and "whether the staff member concealed or attempted to conceal the misconduct" (see *Kennedy* 2021-UNAT-1184, para. 69). As previously demonstrated, the Administration considered these factors and concluded that at no time did the Applicant copy her supervisor or any other UNODC official in her communications, and that she attempted to conceal her misconduct from UNODC.

80. Turning to the alleged lack of harm, the Tribunal notes that the Respondent had been able to show the adverse consequences resulting from the Applicant's actions in his submission pursuant to Order No. 27 (GVA/2022). Specifically, the Applicant's misconduct negatively impacted UNODC's relations with donors in Albania and damaged UNODC's reputation in the country. The Applicant does not dispute this argument.

81. In relation to the alleged lack of consultation, the Tribunal notes that in determining the appropriate sanction, "[w]hat factors are relevant considerations will necessarily depend on the circumstances and nature of the misconduct" (see *Kennedy*, para. 69). The Applicant failed to demonstrate how her sanction could have been mitigated had she been consulted. Moreover, it is the Applicant's obligation to consult her supervisors and seek authorization prior to disclosing internal information to external parties.

82. The Tribunal thus finds that the Administration properly considered relevant mitigating factors.

83. In light of the above, the Tribunal concludes that in determining the appropriate sanction, the Administration duly considered the nature and gravity of the Applicant's misconduct as well as all aggravating and mitigating factors. Accordingly, the Administration's imposition of the sanction was after giving due consideration to the totality of the circumstances of the case.

<u>Whether the sanction applied is consistent with prior precedent</u>

84. It is well-settled case law that the principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offences, the penalty, in general, should be comparable (see *Sow* UNDT/2011/086, para. 58; see also *Baidya* UNDT/2014/106, para. 66; *Applicant* UNDT/2017/039, para. 126).

85. Therefore, the Tribunal finds that the Applicant's attempt to draw comparison between the measure imposed on the RR for contributing to an offensive working environment (see *Banaj* UNDT/2022/043, para. 97) and the sanction imposed on her for misconduct in the present case must fail. Indeed, the Applicant's misconduct and the RR's conduct are not similar, and thus not comparable. Similarly, the example of a staff member giving an unauthorized news conference referenced by the Applicant is not relevant to her case because her misconduct is not comparable to that either.

86. Accordingly, the Applicant failed to provide any relevant evidence from UNDP's or the Secretary-General's practices to support her claim of inconsistency.

87. Moreover, an analysis of the Organization's past practice on disciplinary matters shows that between 1 July 2005 and 30 June 2006, a staff member was summarily dismissed by the Secretary-General for having (i) actively participated in disclosing highly confidential information; (ii) publicly discredited his supervisor and the Organization; (iii) interfered with the official activities of the Organization; and (iv) used his office equipment for purposes other than official business. Also, from 1 July 2011 to 30 June 2012, the Secretary-General imposed a sanction of written censure and demotion of one grade, with deferment of one year in eligibility for consideration for promotion on a staff member for having issued, without authorization, letters to various Government offices seeking assistance in issuing visas to persons accompanying an official UN mission.

88. In addition, as pointed out by the Respondent, in 2009, UNDP imposed a sanction of loss of two steps in-grade on five staff members for lobbying a Member State to change a UNDP decision and for disclosure of internal information and bringing the Organization into disrepute as the information resulted in a news story.

89. Unlike the 2005/2006 case that involved a range of activities that aggravated the nature of the misconduct, the present case is not sufficiently serious to warrant dismissal. However, the present case is more serious than the 2009 UNDP case that concerned only one instance of disclosure of internal information to one government. Indeed, the Applicant's case not only involved multiple instances of

disclosure to more than one Government but also concerned multiple instances of sharing criticism about UNODC's activities and policy decisions with officials of two Member States.

90. Nevertheless, the Tribunal considers that the Applicant's case is similar to the 2011/2012 case because both cases involved communications with Governments without authorization and acting in certain cases contrary to explicit instructions. Indeed, the disciplinary measures imposed in both cases are almost the same.

91. Therefore, the Tribunal finds that the sanction applied in the present case is consistent with prior precedent.

92. Accordingly, the Tribunal concludes that the disciplinary measure applied was proportionate to the offence.

Whether the Applicant's due process rights were respected during the investigation and the disciplinary process

93. Staff rule 10.3, setting forth rules governing due process in the disciplinary process, provides in its relevant part that:

> (a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and had been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense;
>
> (b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

94. The Tribunal is satisfied that the key elements of the Applicant's right to due process were met in the present case. Indeed, the evidence on record shows that the Applicant was fully informed of the charges against her, was given the opportunity to respond to those allegations, and was informed of the right to seek the assistance

of counsel in her defence. Moreover, contrary to the Applicant's assertion, the Tribunal finds that the disciplinary measure imposed on her is proportionate to the nature and gravity of her misconduct and is consistent with those applied in similar cases.

95. Nevertheless, the Tribunal notes that the Applicant claims that the contested decision was tainted by violations of due process at the investigative stage. In support of her claim, she specifically argues that the Respondent's attempt to downgrade her post, together with the intention of assigning her formal functions to a newly established post amounts to a constructive dismissal, and that the Appeals Tribunal sustained her claim that the UNODC improperly and without delegated authority reassigned her functions "temporarily".

96. In this respect, the Tribunal recalls that only substantial procedural irregularities during the investigation and disciplinary proceedings can render a disciplinary sanction unlawful (see, e.g., *Abu Osba* 2020-UNAT-1061, para. 66; *Muindi* 2017-UNAT-782). The onus is on the Applicant to provide proof of the lack of due process and how it negatively impacted the investigation and/or the disciplinary process (see *Pappachan* UNDT/2019/118 Corr.1, para 78).

97. First, the Tribunal is not convinced by the Applicant's submission that the Respondent's actions amount to a constructive dismissal. Indeed, the Applicant currently holds a position within UNODC, and the only effect of the disciplinary measure was to demote her from NO-C to NO-B level with deferment of eligibility for consideration for promotion for one year, at the end of which the Applicant can apply to higher level posts that may become available. It follows that the demotion of the Applicant to the NO-B level was the result of her misconduct and not an arbitrary decision of the Organization to deprive her of her functions with the intent to constructively dismiss her.

98. Second, as pointed out by the Applicant, the Appeals Tribunal found that the temporary reassignment of certain of her functions during the investigation process was an unlawful exercise of administrative power (see *Banaj* 2022-UNAT-1202, para. 1). However, the Applicant fails to show how this irregularity negatively impacted the investigation and/or the disciplinary process.

99. Moreover, the Tribunal finds that this alleged procedural irregularity is of no consequence given the kind and amount of evidence proving the Applicant's misconduct. As the Appeals Tribunal stated in *Michaud*:

> This is also one of those cases where the so-called "no difference" principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct (see *Michaud* 2017-UNAT-761, para. 60).

100. Accordingly, the Tribunal finds that the Applicant has failed to substantiate her claim that her right to due process during the investigation and disciplinary proceedings were violated.

101. In light of the above, the Tribunal upholds the disciplinary measure imposed on the Applicant.

Whether the Applicant is entitled to any remedies

102. In her application, the Applicant seeks the rescission of the disciplinary measure and requests compensation for damages in the amount of two years' net base pay for the fundamental violation of rights and for damage to her professional standing.

103. Having upheld the disciplinary measure, the Tribunal rejects the Applicant's request for the rescission of the disciplinary measure.

104. In relation to the alleged damages, art. 10.5(b) of the Tribunal's Statute provides that compensation for harm may only be awarded where supported by evidence. Furthermore, the case law requires that "the harm be shown to be directly caused by the administrative decision in question" (see *Kebede* 2018- UNAT-874, para. 20; see also *Ashour* 2019-UNAT-899, para. 31). However, other than making general allegations, the Applicant has not provided any evidence supporting that she suffered harm.

105. In addition, the Tribunal notes that whether the Applicant is entitled to remedies given the Appeals Tribunal's finding that the temporary reassignment of certain of her functions is unlawful is reserved for the remanded case, which is registered under Case No. UNDT/GVA/2019/031/R1.

Conclusion

106. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(*Signed*)
Judge Alexander W. Hunter, Jr.
Dated this 21st day of June 2022

Entered in the Register on this 21st day of June 2022
(*Signed*)
René M. Vargas M., Registrar, Geneva