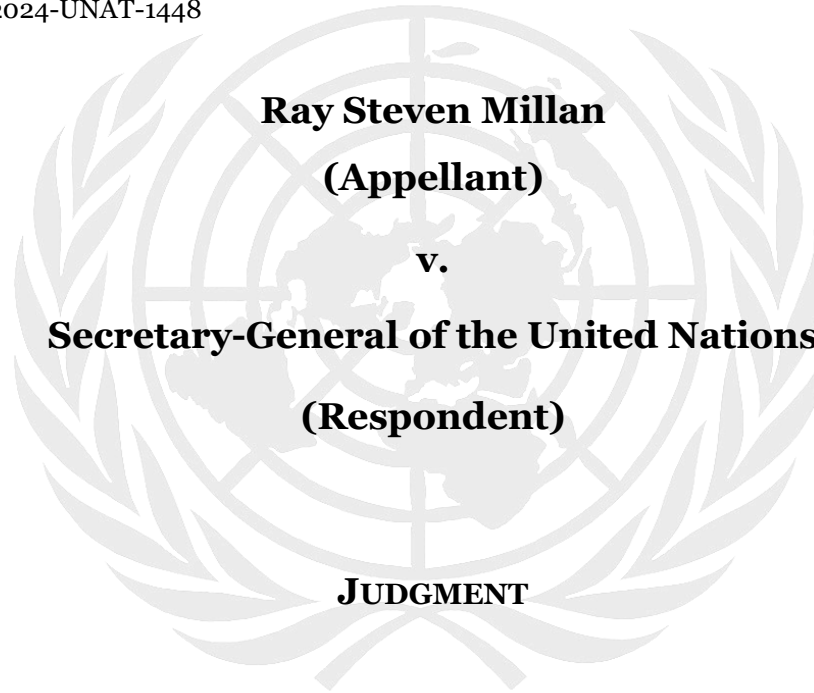




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2024-UNAT-1448



Ray Steven Millan

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Gao Xiaoli Judge Graeme Colgan
Case No.:	2023-1843
Date of Decision:	28 June 2024
Date of Publication:	23 July 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant: Sètondji Roland Adjovi & Anthony Kreil Wilson

Counsel for Respondent: Angélique Trouche

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. Ray Steven Millan, the Appellant, was a former Security Officer (FS-5) in the Office of the Deputy Chief Mission Support, United Nations Truce Supervision Organization (UNTSO), based in Jerusalem. He contested a disciplinary decision to separate him from service with compensation in lieu of notice and without termination indemnity for misconduct on two counts: the first count was permitting an individual, external to the United Nations, (FO1) to be transported unauthorized who publicly engaged in sexually suggestive behaviour in a United Nations vehicle assigned to him and the second count was failing to cooperate with the investigation (the contested decision).

2. By Judgment No. UNDT/2023/060, the United Nations Dispute Tribunal (UNDT) dismissed the application on the merits (impugned Judgment).¹ The UNDT upheld the first count of misconduct but found that the facts in count two did not amount to misconduct.

3. Mr. Millan appeals in respect of count one. Neither party appeals the UNDT's decision on count two. Therefore, the only issue in this appeal concerns the UNDT's decision on count one concerning the use of and conduct in the United Nations vehicle.

4. Mr. Millan admits that the vehicle was assigned to him, there was an unauthorized individual in the rear seat, and he was in the front passenger seat during the events in question. He says that he did not consent to having the unauthorized individual in the vehicle and had no control over her actions or those of Mr. Michael David Antoine, another staff member of UNTSO.² Although Mr. Millan was in the vehicle, he says that he was ill, drowsy and/or asleep during the entire time and did not have requisite culpable intent to commit the misconduct.

5. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment. Our decision is issued contemporaneously with our Judgment in *Antoine* as some of the same arguments and submissions were considered on similar facts.³

¹ *Millan v. Secretary-General of the United Nations*, Judgment dated 21 June 2023.

² Those actions of Mr. Antoine prompted a disciplinary process and a sanction that was upheld by the UNDT in *Antoine v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/059. Mr. Antoine appealed and it was registered as Case No. 2023-1844.

³ *Michael David Antoine v. Secretary-General of the United Nations (Antoine II)*, Judgment No. 2024-UNAT-1449.

Facts and Procedure⁴

6. Mr. Millan joined the United Nations in 1997.⁵ In 2005, he moved to UNTSO and began service in Jerusalem.⁶ At the time of the conduct in question, he held the position of Security Officer, at the FS-5 level, on a continuous appointment at UNTSO in Jerusalem.⁷

7. On 21 May 2020, the following events took place.⁸ Mr. Millan drove the United Nations vehicle, with United Nations markings and assigned to him, from Jerusalem to Tel Aviv in the company of two other male staff members (Mr. Antoine and SD) on board. For the return trip to Jerusalem, four individuals occupied the vehicle in Tel Aviv: Mr. Millan, Mr. Antoine, SD and FO1 who was not a member of United Nations personnel. A liability waiver was not signed on her behalf, and she was an unauthorized passenger in the United Nations vehicle. Mr. Millan started the vehicle by swiping his card and handing it over to SD to drive. Accordingly, SD was the driver in the driver's seat, Mr. Millan was a passenger in the front passenger's seat, and Mr. Antoine and FO1 were passengers in the rear seating area. As the vehicle was being driven along a busy street in Tel Aviv, FO1 was seated on Mr. Antoine's lap, straddling and facing Mr. Antoine and gyrating.

8. By chance, the vehicle and its occupants were being video recorded by a member of the public or other unknown individual.⁹ A 18-second video clip (the video clip), showing United Nations markings on the vehicle and the activity of Mr. Antoine and FO1 in the rear of the vehicle, was widely disseminated on social media and media outlets and "brought unwanted negative publicity to the [O]rganization".

9. On 24 June 2020, the Office of Internal Oversight Services (OIOS) received a report, containing the video clip, of possible misconduct, implicating staff members at UNTSO in Jerusalem.¹⁰ Upon receipt of the information, OIOS conducted formal investigations and identified the staff members in the vehicle. Mr. Millan was interviewed on 30 June 2020 and on 6 August 2020.

⁴ Summarized from the impugned Judgment as relevant to the appeal.

⁵ *Ray Steven Millan v. Secretary-General of the United Nations (Millan I)*, Judgment No. 2023-UNAT-1330, para. 5.

⁶ Annex to the Sanction Letter, para. 2.

⁷ *Millan I* Judgment, *op. cit.*, para. 5.

⁸ Impugned Judgment, paras. 2-4, 35 and 44.

⁹ *Ibid.*, paras. 41, 60, 62-63.

¹⁰ *Ibid.*, paras. 2-3 and 5.

10. On 1 July 2020, Mr. Millan was placed on Administrative Leave Without Pay (ALWOP), which was subsequently changed to Administrative Leave with Pay (ALWP) effective 17 September 2020, extended on 22 June 2021.¹¹

11. On 19 May 2021, OIOS transmitted its Investigation Report to the Office of Human Resources (OHR) for appropriate action.¹² By a letter dated 12 August 2021, the Assistant Secretary-General, OHR, DMSPC, (ASG/OHR/DMSPC) charged Mr. Millan with misconduct. He was granted a period of one month to provide comments to the charges.

12. By the Sanction Letter dated 11 April 2022, Mr. Millan was informed of the contested decision.¹³ The ASG/OHR/DMSPC informed him that it was established by clear and convincing evidence that:¹⁴

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

b) In the UN 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 (together with [subparagraph a]) above referred to as “the 21 May 2020 events”); and

c) Between June 2020 and August 2020, Mr. Millan failed to cooperate with the OIOS investigation, by deleting data from a mobile phone which he had submitted to the investigators or submitting to OIOS a different mobile phone from that used on 21 May 2020 and/or deleting data from a UN-issued SIM card which he had submitted to the investigators.

13. The Sanction Letter stated that Mr. Millan had violated Staff Rules and Regulations as follows:¹⁵

¹¹ *Ibid.*, paras. 6 and 11(e).

¹² *Ibid.*, paras. 7-8.

¹³ *Ibid.*, para. 8.

¹⁴ Annex to the Sanction Letter, para. 25.

¹⁵ *Ibid.*, para. 40. In respect of count one, reference was made to Secretary-General’s Bulletin ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations), applicable in 2020.

- a) Staff Regulation 1.2(b): (i) by enabling the 21 May 2020 events; and (ii) by failing to cooperate with the OIOS investigation, Mr. Millan failed, by each act and together, to uphold the highest standards of efficiency, competence and integrity.
- b) Staff Regulation 1.2(f): (i) by enabling the 21 May 2020 events; and (ii) by failing to cooperate with the OIOS investigation, Mr. Millan, by each act and together, failed to conduct himself in a manner befitting his status as an international civil servant.
- c) Staff Regulation 1.2(q): by enabling the 21 May 2020 events, Mr. Millan failed to use the property and assets of the Organization only for official purposes and failed to exercise reasonable care when utilizing such property and assets.
- d) Staff Regulation 1.2(r): 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 UN vehicle featured in the clip.
- e) Staff Rule 1.2(c): by failing to cooperate with a duly authorized investigation (...).
- f) Staff Rule 1.2(g): by failing to cooperate with the OIOS investigation (...), Mr. Millan disrupted or interfered with an official activity of the Organization, including the Organization’s official activity in connection with the administration of justice system.

14. The Sanction Letter informed him that in determining the appropriate sanction, the USG/DMSPC had considered the past practice of the Organization in matters of comparable misconduct and that he had not actively participated in the activity on the backseat of the vehicle himself.¹⁶ The Sanction Letter pointed out that the reputational harm to the Organization resulting from his conduct constituted an aggravating factor. It stated that the USG/DMSPC had considered his long period of service in a mission setting as a mitigating factor, although in view of the gravity of the acts of misconduct, it could not alter the sanction. Lastly, it was noted in the Sanction Letter that the disciplinary measure of separation was effective upon its receipt by Mr. Millan.

The UNDT Proceedings

15. On 10 July 2022, Mr. Millan filed an application with the UNDT.¹⁷ He also requested that the UNDT conduct an oral hearing with certain witnesses.

16. In Order No. 042 (NBI/2023), the UNDT denied the request for an oral hearing because Mr. Millan had not specified the reasons for hearing the requested witnesses and that a hearing could not be a way to allow “fishing expeditions” on purported due process violations or

¹⁶ Annex to the Sanction Letter, paras. 52-55.

¹⁷ Impugned Judgment, para. 12.

unspecified facts.¹⁸ The UNDT further noted that it had already held that the relevant facts were clear and there was no need to conduct a hearing as the matter could be determined based on the record, and thus directed the parties to submit closing submissions on or before 31 March 2023.

The impugned Judgment

17. In the impugned Judgment, the UNDT dismissed the application.

18. The UNDT found that, with regard to count one, the facts were clearly demonstrated by the 18-second video clip of Mr. Millan's behaviour, which clip spoke for itself.¹⁹ The acts committed in the United Nations vehicle had a clear sexual connotation and were indeed perceived as sexual by people who saw the video on the web and commented on it. Finally, the sexual nature of the activity is also confirmed by this Tribunal's findings in the *Millan I* Judgment.

19. The UNDT noted that two e-mails of 23 and 24 June 2020 which referred to OIOS identifying information about the persons on board, including defining FO1 as a local prostitute, also expressed disagreement with the behaviour in the public space.²⁰ Not brought into question by either of the parties, the UNDT held that these e-mails were reliable in full. The said facts corroborate the assessment of the nature of the activity depicted in the video as sexual.²¹

20. The UNDT held that the United Nations vehicle was entrusted to Mr. Millan and was under his duty of care.²² He consciously allowed FO1 to be transported in it. He failed to use it for official purposes and to exercise reasonable care with it. Whether or not he was aware of Mr. Antoine's actions, Mr. Millan was responsible for the use of the vehicle by the passengers. He started the engine and, allowing persons on board, he took responsibility that the vehicle was used properly by all passengers.

21. Referring to several news articles, the UNDT observed that the video clip spread on the web, attracting many negative comments and prolonged attention from the public.²³ It caused tremendous damage to the image of the Organization. In particular, the United Nations logo on

¹⁸ *Ibid.*, paras. 17 and 25.

¹⁹ *Ibid.*, paras. 44-49.

²⁰ *Ibid.*, paras. 51-54.

²¹ In passing, the UNDT also referred to other details that, in its view, suggested that the scope of the activities of a sexual nature by the group of male staff members on that day plausibly had been more extensive than what was stated in the contested decision.

²² Impugned Judgment, paras. 55-58.

²³ *Ibid.*, paras. 59-63.

the vehicle created a connection between the Organization and the activity with sexual connotations performed inside. It undermined the reputation, credibility and integrity of the Organization in a difficult conflict-affected area of the world. If not for his misconduct, the harm to the Organization would not have occurred, and therefore he remains responsible for it.²⁴

22. The UNDT held that Mr. Millan failed to exercise reasonable care when utilizing the property and the assets of the Organization, in violation of Staff Regulation 1.2(q), and this amounted to serious misconduct not befitting an international civil servant.²⁵

23. The UNDT highlighted that misconduct had occurred in relation to the events of 21 May 2020 only.²⁶ As to count two, i.e. failing to cooperate with the OIOS investigation, a disciplinary sanction for non-cooperation must be excluded with reference to the staff member who committed misconduct sanctioned in the same proceedings. Accordingly, the accusations under count two fall.

24. Citing *Millan I* as confirmation, the UNDT found that the Organization had exerted its discretionary disciplinary powers lawfully and the sanction applied had been proportionate.²⁷ In the present case, the interests violated are not related to “vehicle circulation discipline” but to the integrity of international officials and to reputational damage caused to the Organization. The imposition on SD of a less severe sanction is justified by the fact that SD’s role in the events was fundamentally different: the vehicle was not assigned to SD and SD tried to stop the event as inappropriate, whereas Mr. Millan was the main actor in the affair.

25. The UNDT was of the view that his procedural fairness rights had been respected throughout the investigation and the disciplinary process.²⁸

26. Last, the UNDT held that Mr. Millan’s claim for compensation for moral damage related to the publication of information was inadmissible because he had not directly challenged in these proceedings any act of the spokesperson for the Secretary-General.²⁹

²⁴ The UNDT further noted that the reputational damage to the Organization was an objective consequence of Mr. Millan’s behavior, which, given the circumstances, he could have foreseen and avoided (impugned Judgment, para. 88).

²⁵ Impugned Judgment, paras. 84-86.

²⁶ *Ibid.*, paras. 73-74, 89-92 and 94-96.

²⁷ *Ibid.*, paras. 127-130. *Millan I* Judgment, *op. cit.*, para. 73.

²⁸ Impugned Judgment, paras. 114-118.

²⁹ *Ibid.*, para. 136.

Submissions

Mr. Millan's Appeal

27. Mr. Millan requests the Appeals Tribunal to remand the case for additional findings of fact or, in the alternative, rescind the contested decision and order reappointment to a suitable position commensurate with his skill set, compensation in lieu of rescission in the amount of three years of salary and pension payments and compensation for harm for the damage to his career and self-respect. In the alternative, he requests the Appeals Tribunal to reduce the sanction and find that he was only guilty of allowing an unauthorized passenger to be in the vehicle or, if the Appeals Tribunal considers that the misconduct still warranted separation, to replace the sanction with separation with termination indemnity.

28. Mr. Millan argues that the UNDT failed to exercise jurisdiction vested in it, erred on a question of law, committed an error in procedure, such as to affect the decision of the case, and erred on a question of fact, resulting in a manifestly unreasonable decision.

29. He submits that he was expecting a trial. In the application, he requested a hearing to call witnesses and himself to give oral testimony. He provided a detailed justification for his request on 28 February 2023, including the relevance of hearing the testimony of the Director of the Investigation Division, OIOS (D/ID/OIOS), on the validity of the Investigation Report.³⁰

30. Mr. Millan further maintains that he, Mr. Antoine and SD, at minimum, were “informed of the material acts at stake” as they had been in the vehicle during the incident. In addition, the actions of both investigators, IO1³¹ (calling as witness requested at paragraph 36(d) of the application) and the Chief Investigator (CI), OIOS, United Nations Office in Vienna, (at paragraph 36(b) of the application), should have been challengeable under oath, as well as the role of the D/ID/OIOS (at paragraph 36(b) of the application). The subsequent analysis by the USG/DMSPC (paragraph 36(c) of the application) as the decision-maker was also of key importance. By refusing to hold an oral hearing and hear those witnesses, the UNDT committed a serious error in procedure.

³⁰ Mr. Millan refers to Annex 4 to the appeal, paras. 8-29.

³¹ Identified by the UNDT as Chief, Special Investigations Unit, UNTSO (impugned Judgment, para. 59).

31. Mr. Millan argues that the UNDT wrongly copied numerous parts of the impugned Judgment from its Judgment in *Antoine*.³² Those parts contained serious errors of fact or did not apply to Mr. Millan's case, and were incorrectly relied on by the UNDT.³³

32. He contends that the UNDT erred when it disapproved of the purpose of the trip to Tel Aviv, characterized FO1 as a prostitute and found that he had not questioned the veracity of the allegation about FO1's occupation made in the e-mails of 23 and 24 June 2020.³⁴ He had no opportunity to cross-examine the author of the e-mails. The allegations should have been ruled inadmissible as hearsay. Moreover, the UNDT erred by relying on *Millan I*, which had established the facts merely by a preponderance of the evidence.³⁵ The UNDT also erred when it held him responsible for the reputational damage to the Organization.

33. Mr. Millan submits that the UNDT justified the sanction on the basis of the impact of the alleged misconduct of Mr. Antoine, not his. Facilitation can legally be applied only in the instance of the same intent to commit misconduct, which he did not have. The UNDT judged his conduct without him having formed the requisite culpable intent. He had no control over FO1 hopping onto Mr. Antoine's lap. The sanction was arbitrary and not in line with previous practice. The UNDT erred when it concluded that the unauthorized transportation of FO1 in the vehicle warranted separation.³⁶ Contrary to the UNDT's view, he was not the "main actor in the affair". The UNDT erred in affirming a more severe sanction than imposed on SD.

34. Lastly, Mr. Millan avers that the UNDT failed to address and ignored the bias of Judge S. and the Administration against him and Mr. Antoine in favouring SD by a lesser sanction because SD was not represented by his and Mr. Antoine's legal counsel and did not have to submit an application challenging placement on ALWOP, responding to which, according to the Secretary-General in other cases concerning administrative leave, were "consuming considerable human resources".

³² *Antoine* Judgment, *op. cit.*

³³ Mr. Millan refers to phrases in paragraphs 17 and 132 of the impugned Judgment.

³⁴ Mr. Millan refers to the statement of a Field Security Assistant, UNTSO, in an interview of 10 July 2020, at 26:23.

³⁵ *Millan I* Judgment, *op. cit.*

³⁶ Mr. Millan cites *AAK v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1348, para. 97(h).

The Secretary-General's Answer

35. The Secretary-General requests the Appeals Tribunal to uphold the impugned Judgment and dismiss the appeal.

36. The Secretary-General argues that the UNDT correctly concluded that the contested decision was lawful. Mr. Millan has failed to establish any error by the UNDT, warranting a reversal of the impugned Judgment. The Appeals Tribunal has upheld disciplinary decisions without a hearing at the UNDT level.³⁷ He has failed to explain how holding a hearing and calling the witnesses he had listed would have made a difference to the outcome of the case. The UNDT established the facts on the basis of his admissions and the video clip which, as rightly found, “speaks for itself”.

37. The Secretary-General submits that Mr. Millan has misrepresented the impugned Judgment. The UNDT made no finding that FO1 had been a prostitute. It was not relevant. The argument that the UNDT erred in referring to a preponderance of the evidence is misleading. The UNDT was clear that it applied the standard of clear and convincing evidence.

38. The Secretary-General contends that Mr. Millan has failed to show that the UNDT should have found the sanction irrational or arbitrary. He has merely restated his arguments. The very significant reputational harm caused to the Organization distinguishes this case from *Kennedy*.³⁸ The sanction of written censure, with loss of two steps and deferment for two years of eligibility for salary increment, imposed on SD is irrelevant to Mr. Millan’s case.

39. The Secretary-General observes that the argument of bias of Judge S. and the Administration against Mr. Millan is new and, as such, not receivable. Regardless, he has not substantiated any bias against him. The impugned Judgment was not rendered by that UNDT Judge he complains of. His argument has no merit.

³⁷ The Secretary-General cites *AAC v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1370; *Oswaldo Di Mario v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1331; and *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, para. 28.

³⁸ *Timothy Kennedy v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1184.

Considerations

40. Mr. Millan says that the Dispute Tribunal erred in fact or in law in the impugned Judgment as well as committed an error of procedure when it denied him an oral hearing and copied parts of its Judgment in *Antoine* in the impugned Judgment.³⁹ He further says that the Dispute Tribunal erred in its findings on the merits of the case.

Denial of an oral hearing by the UNDT

41. During the UNDT prehearing process, Mr. Millan formally requested a hearing to call the other male passengers of the United Nations vehicle during the conduct in question as witnesses, as well as the individuals from OIOS related to the investigation, the USG/DMSPC, the ASG/OHR/DMSPC, the Director of OHR, DMSPC (D/OHR/DMSPC), IO1,⁴⁰ an expert witness regarding data storage on phones, and himself.

42. In Order No. 042 (NBI/2023), the Dispute Tribunal denied the request for an oral hearing on the basis that Mr. Millan “did not specify the reasons for hearing the witnesses” and that the hearing “cannot be a way to allow fishing expeditions on purported due process violations or unspecified facts”. In addition, the Dispute Tribunal considered that the D/ID/OIOS had already testified regarding the investigation and disciplinary process in its earlier case regarding Mr. Millan’s dispute of the decision to place him on ALWOP⁴¹ and the D/ID/OIOS’s evidence was already on the record as Annex 7 to the Secretary-General’s reply.

43. Relying on *Mbaigolmem*,⁴² Mr. Millan requested the Dispute Tribunal reconsider the Order, arguing that he had not yet had an opportunity to challenge the OIOS investigation, present expert evidence regarding storage of data on phones, and consider the credibility of SD.

44. In Order No. 059 (NBI/2023), the Dispute Tribunal rejected Mr. Millan’s motion to reconsider its decision on the oral hearing.

³⁹ *Antoine* Judgment, *op. cit.*

⁴⁰ Mr. Millan referred to IO1 as another Security Officer at UNTSO.

⁴¹ *Millan v. Secretary-General of the United Nations*, Judgment No. UNAT/2021/152 (Second *Millan* UNDT Judgment), affirmed by the Appeals Tribunal in the *Millan I* Judgment.

⁴² *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819.

45. Article 16(2) of the UNDT Rules of Procedure provides that a hearing shall *normally* be held following an appeal against an administrative decision imposing a disciplinary measure.⁴³

46. The Appeals Tribunal in *Mbaigolmem* previously held that as cases of alleged misconduct typically require determination of disputed factual issues, this is best done in “an oral hearing involving an adversarial fact-finding process which tests the credibility, reliability and probabilities of the relevant testimony”.⁴⁴ Further, as a factual finding of misconduct is of serious import, the determination of misconduct should preferably be done in an oral hearing.⁴⁵

47. However, we have also held that “an oral hearing and cross-examination will not be required in all disciplinary cases”.⁴⁶ Further in *Shumba*, the Appeals Tribunal held that whether an oral hearing will be required “will depend on the circumstances of the case before the UNDT. For example, there may be documentary, audio or video evidence or circumstances surrounding the parties or witnesses that may support the decision not to hold an oral hearing.”⁴⁷

48. Finally, the Appeals Tribunal has consistently held that the UNDT, as a first instance tribunal, is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to provide justice for both parties and therefore enjoys a wide margin of discretion in all matters relating to case management.⁴⁸

49. The present case is not one where the issues require the Dispute Tribunal’s determination of the credibility of contradicting testimonies of parties or witnesses. In declining the request for an oral hearing, the Dispute Tribunal appropriately considered the undisputed facts, Mr. Millan’s admissions, and evidence that independently corroborated the facts in dispute such as the video clip depicting the events in question, the investigation record, copies of e-mails, and other evidence.

⁴³ Emphasis added.

⁴⁴ *Mbaigolmem* Judgment, *op. cit.*, para. 26.

⁴⁵ *Ibid.*

⁴⁶ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1187, para. 58.

⁴⁷ *Humphreys Timothy Shumba v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1384, para. 74 (internal citation omitted).

⁴⁸ *Samer Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2022-UNAT-1195, para. 55.

50. For example, Mr. Millan admits that the United Nations vehicle in the video clip was assigned to him, and that he drove it to Tel Aviv on 21 May 2020. He says that after a meal in Tel Aviv, he started the vehicle but handed it over to SD to resume driving as he was not well. He does not dispute that Mr. Antoine was in the rear seat of the vehicle with an unauthorized female passenger. What he disputes is that he was aware of what was occurring between Mr. Antoine and the female passenger or that he had control over their conduct. As result, he argues that he did not have the requisite intent to commit the alleged misconduct.

51. The allegation against Mr. Millan in count one is not that he “controlled” the behaviour of Mr. Antoine and FO1 in the vehicle but that he “permitted” their behaviour as the staff member responsible for the vehicle, being the Security Officer to whom it had been assigned. We find that the Dispute Tribunal did not err in finding that this factual determination did not require an oral hearing.

52. The Dispute Tribunal had Mr. Millan’s admissions and written evidence and arguments. In addition, the Dispute Tribunal had the best evidence depicting the conduct in question which was the video clip. The video clip is clear and has not been impugned. There is no dispute that it accurately depicts the events and Mr. Millan’s conduct.

53. As for the lawfulness of the investigation process, this was considered by the Dispute Tribunal in the Second *Millan* case where the UNDT had held a hearing on Mr. Millan’s application contesting the decision to place him on ALWOP during the disciplinary process.⁴⁹ In that application, the Dispute Tribunal considered the exact same arguments made by Mr. Millan regarding the alleged due process violations in the investigation and disciplinary process, namely the alleged conflict of interest of IO1 and the lack of presumption of innocence by the investigators. It heard testimony from the D/ID/OIOS on these submissions and ultimately held these arguments were not substantiated. Therefore, these arguments have already been judicially considered and determined.

54. Further, in the present application the Dispute Tribunal had before it existing evidence and findings from the Second *Millan* UNDT Judgment.⁵⁰

⁴⁹ Second *Millan* UNDT Judgment, *op. cit.*

⁵⁰ *Ibid.*

55. Article 2 of the UNAT Statute provides that the Appeals Tribunal can review the Dispute Tribunal’s judgment concerning an error in procedure “such as to affect the decision of the case”.

56. We find that, although the Dispute Tribunal would “normally” hold a hearing in a disciplinary matter, the Dispute Tribunal exercised its discretion judiciously in not holding a hearing in the circumstances of this case and that the lack of a hearing did not affect the decision of the case.

*Reproduction of the UNDT Judgment in Antoine*⁵¹

57. Mr. Millan says that the Dispute Tribunal erred when it “cut and pasted” parts of its Judgment in *Antoine* into the impugned Judgment, particularly paragraphs 17 and 132 that referred to facts specific to *Antoine*.⁵² As a result, Mr. Millan argues, the Dispute Tribunal did not treat him fairly.

58. In that respect, the Appeals Tribunal has previously held in *AAG*:⁵³

(...) As a general rule, there is a judicial presumption of integrity and impartiality that the Judge has done his/her task as sworn to do. A party seeking to set aside a judicial decision owing to the fact that the reasons in the judgment incorporated portions of the submissions of the parties bears the burden of showing that this presumption is rebutted. Moreover, the threshold for rebutting the presumption of judicial integrity and impartiality is high, as it requires cogent evidence. The question is therefore whether the evidence presented by a party challenging the judgment convinces the reviewing court that a reasonable person would conclude that the Judge did not perform his/her sworn duty to review and consider the evidence with an open mind.

59. Although there are references in the impugned Judgment that mirror and even reference facts specific to *Antoine*,⁵⁴ this alone is not sufficient to rebut the presumption of integrity and impartiality of the Dispute Tribunal judge. We have previously held that the burden to rebut the presumption is not discharged by simply pointing out paragraphs and bullet points that have the same format, wording and syntax, including punctuation.⁵⁵ The entire judgment must be reviewed to consider whether the presumption has been rebutted.

⁵¹ *Antoine Judgment, op. cit.*

⁵² *Ibid.*

⁵³ *AAG v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1308, para. 59.

⁵⁴ *Antoine Judgment, op. cit.*

⁵⁵ *AAT v. Secretary-General of the United Nations*, Judgment No. 2024-UNAT-1412, para. 76.

60. We accept that paragraphs 17 and 132 make references to facts applicable to *Antoine*⁵⁶ and not to the present case. However, a review of the entire impugned Judgment illustrates that the Dispute Tribunal judge thoroughly reviewed and considered the relevant evidence and submissions of the parties, including the facts specific to the present case. For example, he made findings that the United Nations vehicle was “entrusted” to Mr. Millan and was under his “duty of care” and that Mr. Millan “consciously allowed FO1 to be transported in it”.⁵⁷ The Dispute Tribunal judge provided findings specific to the present case and where relevant, findings that mirrored those in *Antoine*.⁵⁸ The judge provided adequate and sufficient findings and reasons for his determinations on Mr. Millan’s misconduct.

61. Therefore, we find that Mr. Millan has not discharged his burden on this ground.

Merits of the appeal

62. As stated above, Mr. Millan does not dispute that the marked United Nations vehicle was assigned to him. He admits that he allowed SD to drive the vehicle in Tel Aviv. He does not dispute that no liability waiver was signed on behalf of FO1 and that she was an unauthorized passenger in a marked United Nations vehicle assigned to him. He does not dispute that he was in the front passenger seat during the events depicted in the video clip.

63. He argues that, as he was unwell, he could not give consent to FO1 to board the vehicle and that he did not have control over her and Mr. Antoine’s conduct. He says that due to his illness, he did not have the capacity to form the requisite culpable intent for the alleged misconduct. Therefore, he argues, these established facts along with an allegedly flawed investigation cannot support the disciplinary sanction imposed.

Standard of review in disciplinary cases

64. In disciplinary cases such as this one, it is well-established that the Dispute Tribunal must consider (a) whether the facts on which the sanction is based have been established by the Secretary-General by clear and convincing evidence when termination is a possible outcome, (b) whether the established facts qualify as misconduct under the Staff Regulations and Rules, (c) whether the sanction is proportionate to the offence and the circumstances, and (d) whether

⁵⁶ *Antoine* Judgment, *op. cit.*

⁵⁷ Impugned Judgment, para. 55.

⁵⁸ *Antoine* Judgment, *op. cit.*

the staff member's due process rights were observed in the investigation and disciplinary process.⁵⁹ Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt; it means that the truth of the facts asserted is highly probable.⁶⁰

65. Mr. Millan argues that the Dispute Tribunal erred in applying the wrong standard of proof when it stated that "there was (...) a preponderance of evidence that the Applicant had committed serious misconduct".⁶¹ However, it is clear that, in that paragraph of the impugned Judgment, the Dispute Tribunal was citing the Appeals Tribunal's findings in *Millan I*.⁶² This statement alone is not an indication that the Dispute Tribunal applied the incorrect standard of proof required to establish the facts in this case. This is borne out by the factual findings made by the Dispute Tribunal in other parts of the impugned Judgment. For example, the Dispute Tribunal held that the facts regarding the first count were "clearly demonstrated" by the video clip.⁶³

66. For the following reasons, we find that the Dispute Tribunal did not err.

Clear and convincing evidence of misconduct

67. Both the Dispute Tribunal and the Appeals Tribunal reviewed the conduct in question in the context of the Administration's decision of 1 July 2020 to place Mr. Millan on ALWOP and the 22 June 2021 decision to extend his placement on ALWP.⁶⁴ Both the Dispute Tribunal and the Appeals Tribunal held in those prior decisions that there was a preponderance of evidence that he had engaged in serious acts of misconduct warranting separation or dismissal.⁶⁵

68. The issue in the present case is whether the facts have been established by the higher, clear and convincing standard.

⁵⁹ *Maguy Bamba v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1259, para. 37 (internal citation omitted).

⁶⁰ *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 30.

⁶¹ Impugned Judgment, para. 86.

⁶² *Millan I* Judgment, *op. cit.*

⁶³ Impugned Judgment, para. 44.

⁶⁴ *Millan v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/145 (First *Millan* UNDT Judgment); Second *Millan* UNDT Judgment, *op. cit.*; and *Millan I* Judgment, *op. cit.*

⁶⁵ *Millan I* Judgment, *op. cit.*, para. 74.

69. In the impugned Judgment, the Dispute Tribunal held that the facts were “clearly demonstrated by the 18-second video-clip of the Applicant’s behaviour” which “speaks for itself”.⁶⁶

70. In the video clip, Mr. Millan was filmed in a clearly marked United Nations vehicle stopped in traffic, in the front passenger seat, facing forward but leaning onto the window frame of the vehicle, with the side of his face on his right hand. In the rear seat, Mr. Antoine is holding a female individual on his lap who was facing or straddling him and moving her hips while Mr. Antoine holds her with his hands on her buttocks, pulling her genital area closer to his crotch area. The actions depicted in the video clip have a clear sexual connotation as determined by the Dispute Tribunal. At 00:00:05 of the video clip, the SD’s hand is seen reaching back to touch Mr. Antoine’s knee. When the vehicle speeds up in traffic, Mr. Millan looks up.

71. Mr. Millan said that what was occurring in the back seat of the vehicle had “absolutely nothing to do with [him] while he was sick/passed out in the front seat and completely unaware of it”.⁶⁷ However, it does not appear that Mr. Millan was “passed out” in the video clip as he did look up when the vehicle sped up.

72. The Appeals Tribunal in *AAS* reviewed intent in misconduct cases and the elements of intent.⁶⁸ We opined that “it will not be in every case that there may be questions about the mental element of misconduct, that is the staff member’s capacity to commit misconduct. Often the act or omission of the misconduct will make it clear that it must have been intended by the staff member and that he or she clearly had the necessary mental capacity to do so.”⁶⁹ We also stated that there is no onus on the Administration in all cases “to negative the first sub-element where there are no or insufficient indicia of it that arise in the disciplinary process”.⁷⁰

73. The case at bar is not a case of the staff member having an ongoing condition that could affect his mental capacity as in *AAS*.⁷¹

⁶⁶ Impugned Judgment, para. 44.

⁶⁷ Annex to the Sanction Letter, para. 15.

⁶⁸ *AAS v. Secretary-General of the United Nations*, Judgment No. 2024-UNAT-1427.

⁶⁹ *Ibid.*, para. 51.

⁷⁰ *Ibid.*, para. 50. As we noted in paragraph 49 of the *AAS* Judgment, the first sub-element of intent is “the conscious choice or the exercise of free will to do or not to do the act, a necessary condition of responsibility”.

⁷¹ *AAS* Judgment, *op. cit.*, para. 50.

74. Here, there is no obvious issue about the mental element of the misconduct. Mr. Millan first raised it as a defence after he was presented with the video clip during the course of the investigation. He did not raise it earlier. In the initial interview of 30 June 2020, after having been shown the video clip, he stated that he did not recall being in the vehicle during the events in question and could not identify himself in the video clip.⁷² Subsequently, he provided a written statement acknowledging his involvement but stated that he became “nauseous” while walking back to the vehicle after dinner.⁷³ In the second interview of 6 August 2020, Mr. Millan provided further details. He stated that he started to feel unwell after having left the restaurant with Mr. Antoine, SD and FO1. Although he walked back on his own, he says that he could not have given consent for FO1 to be in the vehicle. He said that he could not recall her entering into the vehicle or details of the trip after that.

75. Despite this, Mr. Millan did not seek medical attention that evening or subsequently. If his illness was so severe that he says he could not have the requisite intent or capacity, it is reasonable to expect Mr. Millan to have sought medical attention.

76. In these circumstances, where the staff member is arguing that he was incapable of forming intent to commit the alleged misconduct because of a sudden and short-lived physical stomach illness without seeking any medical attention, there is some obligation on the staff member to provide corroborating medical evidence. Mr. Millan failed to provide any corroborating medical evidence to support his contention that he was so ill that he could not have the mental capacity to commit the prohibited conduct.

77. The circumstances of the car trip also raise questions about the severity of Mr. Millan’s illness. The electronic vehicle management system used by UNTSO (Carlog) to track the United Nations vehicle in question indicated that it was registered as private/liberty travel—meaning that the assigned driver was responsible for the charges—and that the driver on the trip was Mr. Millan.⁷⁴ It showed that on 21 May 2020, the vehicle was logged for the trip at 11:37 a.m. to 1:33 p.m. (UTC)⁷⁵ from Jerusalem to Tel Aviv. The video clip showed the earliest creation date as being 21 May 2020 at 5:03 p.m. and was sent via WhatsApp on 21 May 2020 for the first time on

⁷² Transcript of Mr. Millan’s interview on 30 June 2020, line 812 (Annex 3 to the Secretary-General’s Supplementary Filing).

⁷³ Mr. Millan’s written statement of 11 July 2020 (Annex 4 to the Secretary-General’s Supplementary Filing).

⁷⁴ Investigation Report, paras. 28-32.

⁷⁵ Coordinated Universal Time.

5:03 p.m. (UTC). The vehicle was logged arriving at Hakovshim Garden and the Hilton Hotel in Tel Aviv, including being in the hotel parking lot from 6:48 p.m. to 10:04 p.m. (UTC). The return trip from Tel Aviv started at 10:04 p.m. and ended at 11:28 p.m. (UTC) in Jerusalem.⁷⁶

78. Therefore, if Mr. Millan was so ill that he was incapacitated, it would be reasonable to expect him to visit a doctor or hospital in Tel Aviv after 5:03 p.m. (UTC) when the video clip was taken and when he allegedly was ill and incapacitated. However, the vehicle was at the Hilton Hotel in Tel Aviv for hours. In an interview during the investigation, Mr. Millan stated that he did not recall any of his companions inquiring if he needed medical attention or offering to take him to a medical facility.⁷⁷ He also could not account for why they stopped at the Hilton Hotel from 6:48 p.m. to 10:04 p.m. (UTC). He also did not go see a doctor or seek medical attention the following day as he “felt a bit better”.⁷⁸

79. If Mr. Millan’s claim was true and credible, it is reasonable to expect that he would seek medical attention and provide medical evidence to support his contention that, as a result of his sudden and short-lived illness, he was incapable of forming culpable intent for the misconduct. But he has not. Therefore, we find that his evidence that he was incapable of forming the requisite intent is not credible.

80. Mr. Millan says that he could not “control” what was happening in the rear seat of the vehicle and that he was not an active participant.

81. Regardless of Mr. Millan’s arguments disputing the Dispute Tribunal’s statements in the impugned Judgment regarding the suspicion of the involvement of prostitutes and the veracity of the anonymous e-mails complaining about the video clip, the Dispute Tribunal did not err when it held that the evidence clearly and convincingly established the facts underlying the misconduct in count one.

82. Mr. Millan was assigned the United Nations vehicle and was in the front passenger seat while Mr. Antoine and FO1, an authorized individual, committed acts of a sexual nature in public. As such, Mr. Millan failed to use the United Nations vehicle for official purposes and was

⁷⁶ Investigation Report, paras. 28-32.

⁷⁷ Transcript of Mr. Millan’s interview on 6 August 2020, lines 739-782 (Annex 9 to the Secretary-General’s Supplementary Filing).

⁷⁸ *Ibid.*

responsible for the use of the vehicle entrusted to him. He allowed an unauthorized individual on board and failed to ensure that the vehicle was used properly by all passengers.

83. This conduct is contrary to Staff Regulation 1.2(q) that provides that 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.

84. Section 3.6 of Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) provides that misconduct may also include assisting in, or contributing to, the commission of misconduct.

85. The Dispute Tribunal did not err in finding that Mr. Millan “permitted” or allowed the conduct of Mr. Antoine and FO1 in the vehicle. In the video clip, it is clear that SD was certainly aware of what was going on as he turned and touched his hand to Mr. Antoine’s knee. Certainly, at that point if not earlier, Mr. Millan should have become aware of what was occurring in the rear seat. Instead, in the video clip, Mr. Millan is seen lifting his head and continuing to look forward without intervening.

86. The video clip was widely disseminated in social media and regular media. Although Mr. Millan did not disseminate the clip, the actions in the United Nations vehicle in a public place were contrary to the standard of integrity required of an international official. It brought disrepute to the Organization and difficulties with the host country, undermining the goals of the Organization. We reiterate that:⁷⁹

(...) Mr. Millan’s act of misconduct was grave enough for the Administration to contemplate separation or dismissal, as it was irretrievably damaging the trust relationship between the staff member and the Organization. There is no gainsaying that the nature of the alleged misconduct and its unfortunate publicity were factors that called for Mr. Millan’s removal from service (...).

87. As such, the Dispute Tribunal did not err in finding that the facts were established clearly and convincingly and that they constituted misconduct pursuant to Staff Regulation 1.2(b) and 1.2(q).

Due process of the investigation and the disciplinary process

⁷⁹ *Millan I* Judgment, *op. cit.*, para. 73.

88. Mr. Millan raises allegations to support his submission that his due process rights were violated during the investigation and disciplinary process, particularly the participation of IO1 as an investigator and a violation of the presumption of innocence by OIOS.

89. As stated above, these allegations have already been decided in the First and Second *Millan* UNDT Judgments in the context of the Organization's decision to place Mr. Millan on ALWOP and extend his ALWP.⁸⁰ Although the administrative decision in question here is the Administration's finding of misconduct and the disciplinary measure, Mr. Millan's due process allegations and arguments are the same and have already been adjudicated.

90. The Appeals Tribunal has previously held that only substantial procedural irregularities in the disciplinary investigation will render a disciplinary measure unlawful.⁸¹

91. We find that the Dispute Tribunal did not err in finding that Mr. Millan's procedural fairness rights were respected during the investigation and disciplinary process.

Proportionality of the sanction

92. Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of the staff member's misconduct.⁸²

93. As correctly noted by the Dispute Tribunal, the Secretary-General has broad discretion in determining the appropriate disciplinary measure for the established misconduct and the Tribunal will only overturn a measure if it finds that it is excessive or unreasonable.⁸³

94. Mr. Millan says the Dispute Tribunal erred when it found that the imposition of the disciplinary measure of separation was lawful and proportionate. He says the Dispute Tribunal erred in ignoring the bias against him by Judge S. and the lesser sanction received by SD.

95. On 14 July 2020, Mr. Millan had applied to the Dispute Tribunal for suspension of action of the decision to place him on ALWOP.⁸⁴ In that case, on 20 July 2020, Judge S. of the Dispute

⁸⁰ First *Millan* UNDT Judgment, *op. cit.*, and Second *Millan* UNDT Judgment, *op. cit.* The UNDT's findings on due process were not subject of the appeal in *Millan I* (*Millan I* Judgment, *op. cit.*).

⁸¹ *Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 33 (internal citations omitted).

⁸² Staff Rule 10.3(b).

⁸³ *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 19-21 (internal citations omitted).

⁸⁴ Impugned Judgment, para. 11(b).

Tribunal issued unpublished Order No. 136 (NBI/2020), denying Mr. Millan's motion to file a response to the Secretary-General's reply.⁸⁵ On the same day, Counsel for Mr. Millan requested her recusal in that case.⁸⁶ Mr. Millan contended that the Judge, and the UNDT proceedings themselves, were biased.⁸⁷ He says this matter is unaddressed in the impugned Judgment.

96. The Dispute Tribunal might not have addressed these submissions in the impugned Judgment because they are irrelevant to this matter. Order No. 136 (NBI/2020) was issued in respect of another application before the UNDT, regarding suspension of the decision to place Mr. Millan on ALWOP. Judge S. was not involved in the UNDT proceedings regarding the application contesting the disciplinary decision on appeal in the present case.

97. Mr. Millan argues that he received "biased" treatment in both the UNDT proceedings and in the proportionality of the sanction when compared to SD. SD received a written censure with loss of two steps and deferment of eligibility for salary increment for a period of two years pursuant to Staff Rule 10.2(a)(i) and (iii).⁸⁸

98. The Dispute Tribunal dealt with this in the impugned Judgment and held that the less severe sanction was justified by the fact that SD's role in the events was fundamentally different: the vehicle was not assigned to SD who was driving and attempted to stop Mr. Antoine.

99. Mr. Millan also says that Mr. Antoine was the main actor in the incident while he was not. However, we accept that the Secretary-General took this into consideration in determining the sanction. Mr. Antoine received a different sanction, namely dismissal pursuant to Staff Rule 10.2(a)(ix), while Mr. Millan was separated from service with compensation in lieu of notice without termination indemnity pursuant to Staff Rule 10.2(a)(viii).

100. The Secretary-General has broad discretion in determining the disciplinary measure and there is a reasonable range of sanctions open to the Secretary-General. In this case, the Secretary-General considered all the relevant factors (aggravating and mitigating) and we find that the disciplinary measure imposed was consistent with prior precedent and proportionate to the offence, i.e. neither excessive nor unreasonable. The Secretary-General considered that Mr. Millan had not actively participated in the conduct in the rear seat of the United Nations

⁸⁵ *Millan v. Secretary-General of the United Nations*, Order No. 136 (NBI/2020), para. 5.

⁸⁶ Impugned Judgment, para. 11(c).

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, para. 131.

vehicle as had Mr. Antoine. Therefore, we find that the sanction issued to Mr. Millan was a lawful exercise of the Secretary-General's discretion.

101. Consequently, we agree with the Dispute Tribunal that the sanction was not disproportionate in the circumstances. Mr. Millan's conduct was such that the continuation of his employment relationship with the Organization could not be tolerated and the damage to the Organization's reputation was "unprecedented". The only appropriate sanction is therefore separation from service.

102. As the administrative decision in question is lawful, there is no basis for Mr. Millan's claim for compensation for harm.

103. Therefore, the appeal fails on all grounds.

Judgment

104. Mr. Millan's appeal is dismissed, and Judgment No. UNDT/2023/060 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 28th day of June 2024 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Gao

(Signed)

Judge Colgan

Judgment published and entered into the Register on this 23rd day of July 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar