



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

Judgment No. 2020-UNAT-1024

George M'mbetsa Nyawa
(Respondent/Appellant on Cross-Appeal)

v.

Secretary General of the United Nations
(Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Graeme Colgan Judge John Raymond Murphy
Case No.:	2019-1338
Date:	26 June 2020
Registrar:	Weicheng Lin

Counsel for Mr. Nyawa:	Self-represented
Counsel for Secretary-General:	Noam Wiener

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2019/149, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 11 October 2019, in the case of *Nyawa v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 10 December 2019, and Mr. George M'mbetsa Nyawa filed his answer and a cross-appeal on 8 February 2020. The Secretary-General filed his answer to the cross-appeal on 20 April 2020. We reject the appeal and the cross-appeal and uphold the decision of the UNDT.

Facts and Procedure

2. Mr. Nyawa served with the Security and Safety Service of the United Nations Office at Nairobi (UNON/SSS) from 2005 to 2007 and then again since 20 February 2009. On 31 July 2014, he was selected to participate in a mission providing “security surge services” at the United Nations High Commissioner for Refugees (UNHCR) facility in Dadaab, Northern Kenya, as Team Leader of Surge Team XVI.

3. During the early morning hours of 19 December 2014, Mr. Andrew Mboya, of UNON/SSS, a member of Mr. Nyawa’s team, was involved in an argument with his (Mr Mboya’s) girlfriend in his room. During the incident, Mr. Mboya allegedly misused his service firearm by pointing it at his girlfriend and at a fellow security officer and his housemate, Mr. Muloki, once the latter tried to intervene. Mr. Muloki called upon Duty Officer, Ms. Awuonda, and told her that in the course of an argument with his girlfriend, Mr. Mboya was brandishing his weapon. Ms. Awuonda called upon Mr. Nyawa as Team Leader, and Ms. Oluoch as Deputy Team Leader. Eventually, all three responded at the scene. Ms. Awuonda arrived first, dissuaded the argument and secured the weapon of Mr. Mboya, which she found placed on the top of a refrigerator. Then Ms. Oluoch, arrived, followed by Mr. Nyawa. Ms. Awuonda and Ms. Oluoch soon departed from the scene, to secure the weapon. The girlfriend was escorted to Ms. Oluoch’s house.

4. On the same date, Ms. Awuonda, who was finishing her shift, made entry in the Daily Occurrence Book (DOB) and drafted the daily report, without mentioning the firearm issue. Around 7:30 a.m., Mr. Nyawa transmitted his daily report to his immediate supervisor, Ms. Sonja Jakic, the Field Security Coordinator (FSCO). In relation to the incident involving Mr. Mboya, Mr. Nyawa’s report stated:

Today at around 0427hrs, the duty officer received a call from Mr. Muloki Wako of UNHCR Block A2 reporting noise from the neighbour's room. SSS duty officer went to the said house and found the occupant; Mr. Andrew Mboya, arguing with a friend but not violent. They were advised to calm down and not disturb the neighbourhood. They heeded to the advice and the area was left safe and peaceful.

5. Later that morning, Ms. Sonja Jakic demanded to see Mr. Nyawa, Mr. Mboya and Ms. Oluoch and instructed that Mr. Mboya apologize to the UNHCR person and swap houses with other SSS officers. No mention was made to her about the involvement of firearms in the incident.

6. Mr. Mboya's girlfriend, in a conversation with Ms. Oluoch, told the latter that she had been menaced with a gun. Ms. Oluoch relayed this to Mr. Nyawa. The girlfriend reconciled with Mr. Mboya and returned to his house on the night 19/20 December 2014, and on 20 December 2014, she left the compound.

7. Mr. Nyawa returned the service weapon to Mr. Mboya on the morning of 19 December 2014, but at the end of the shift at 6.00 p.m. the latter brought it back and requested that it be kept in the safe for the night.

8. On a date which is disputed, either 19 December or 22 December 2014, in the morning hours, Mr. Nyawa held a meeting with security officers of his team. During the meeting, Mr. Nyawa received a phone call from Ms. Okal from the Nairobi Headquarters, who inquired about the incident and the whereabouts of Mr. Mboya. Mr. Nyawa informed Ms. Okal that there had been a dispute of a personal nature, which had since been resolved. Mr. Nyawa confirmed that Mr. Mboya was in service and his weapon had been returned to him.

9. On 9 January 2015, UNON's Special Investigations Unit (SIU) received a report of possible misconduct implicating Mr. Mboya. Specifically, it was reported that on 19 December 2014 at around 4.30 a.m., Officer Mboya threatened his girlfriend with his service firearm Glock 19 Serial Number GRK 679; further, that on the same date and time, Mr. Mboya threatened Mr. Muloki with the same firearm.

10. During the investigation, SIU detected possible misconduct implicating Mr. Nyawa.

11. On 12 June 2015, SIU issued its investigation report regarding Mr. Mboya's alleged misconduct. SIU concluded that there were reasonable grounds to conclude that Mr. Mboya had failed to observe the standards of conduct required of an international civil servant and recommended that the administration should take appropriate action against him.

12. By memorandum dated 1 July 2015, the Director-General of UNON (DG/UNON) referred the allegations of misconduct against Mr. Mboya to the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM) for consideration of possible disciplinary action pursuant to paragraph 3 of ST/AI/371 (Revised disciplinary measures and procedures). In the memorandum, the DG/UNON indicated that Mr. Nyawa, who was Mr. Mboya's supervisor at the time of the incident, had failed to properly report the incident and take appropriate action in light of its seriousness, and that, in the circumstances, she was requesting OHRM to consider whether to proceed with a disciplinary process against either Mr. Mboya or Mr. Nyawa, or both of them.

13. On 3 November 2015, Mr. Nyawa was informed that his authorization to carry a service firearm had been revoked pending the outcome of the investigation against him.

14. Following a request by the UNON Senior Legal Officer for further investigation, SIU re-interviewed Mr. Nyawa on 9 November 2015.

15. On 12 November 2015, SIU issued an addendum investigation report which concluded that Mr. Nyawa had failed to observe the standards of conduct of an international civil servant.

16. On 8 February 2016, the ASG/OHRM informed Mr. Nyawa of the allegations of misconduct against him and required him to provide a response within two weeks. It was specifically alleged:

- a. he had full knowledge of the alleged incident of 19 December 2014 committed by Mr. Mboya, including the alleged misuse of his firearm;
- b. however, in his capacity as the Team Leader and Supervisor of the Security and Safety team in Dadaab, he deliberately disseminated false information relating to the incident, specifically by suppressing any mention of Mr. Mboya's alleged firearm misuse;

c. he instructed other staff members to provide false information by (i) telling the Duty Officer to refer to the incident in the Daily Report as an argument with a girlfriend that had been settled; and (ii) directing other Security Officers not to mention Mr. Mboya's alleged firearm misuse, if asked about it; and

d. that he failed to report and/or reported false information about the incident by (i) circulating the Daily Report, knowing that it was inaccurate; and (ii) misleading a more senior Security Officer by indicating that Mr. Mboya had had a small disagreement with his girlfriend.

17. Following an exchange of e-mails between the Office of Staff Legal Assistance (OSLA) and OHRM, Mr. Nyawa was granted an extension of time to file his response to the allegations of misconduct which he ultimately did on 28 March 2016.

18. On 10 May 2016, SIU issued an addendum to the investigation report comprising of clarifications to questions posed by OHRM.

19. On 11 May 2016, OHRM sought Mr. Nyawa's comments on the SIU addendum report. Mr. Nyawa submitted his comments on 8 July 2016.

20. On 21 December 2016, the Officer-in-Charge/OHRM conveyed the USG/DM's decision regarding the allegations against Mr. Nyawa. The USG/DM, having dropped the allegation that Mr. Nyawa had circulated a false Daily Report, found that Mr. Nyawa had

deliberately disseminated false information relating to the incident, specifically by suppressing any mention of [...]] alleged firearm misuse by, during a meeting on 22 December 2014: (a) instructing other staff members to provide false information by directing them not to mention Mr. Mboya's alleged firearm misuse, if asked about it; and (b) failing to report the incident by misleading a more senior Security Officer by indicating that Mr. Mboya had a small disagreement with his girlfriend.

21. The USG/DM imposed on Mr. Nyawa the disciplinary measures of deferment, for a period of two years, for eligibility for consideration for promotion, together with a written censure and the administrative measure requiring Mr. Nyawa to attend a course on gender sensitivity.

22. On 26 March 2017, Mr. Nyawa filed his application with the UNDT, whereby he asserted that the decision that his conduct amounted to misconduct and the consequent disciplinary measures were unlawful and/or improper because they were based on the following misleading

premises: a) that he was the Team Leader and Supervisor of the UNON Security and Safety team in Dadaab; b) that he instructed other officers not to mention the alleged firearm misuse; and c) that he misled a more senior Security Officer (Ms. Okal) by indicating that Officer Mboya had a small disagreement.

23. The UNDT rendered its Judgment on 11 October 2019, granting the application in part. It found that by failing to report Mr. Mboya's breach of the Organization's rules and regulations to the officials responsible for taking appropriate action, Mr. Nyawa violated Staff Rule 1.2(c) (failure to report unsatisfactory conduct). Mr. Nyawa also violated Staff Regulation 1.2(b) (failure to uphold the highest standards of integrity). Mr. Nyawa committed this misconduct having had supervisory responsibility in terms of responding to incidents and reporting them. However, the UNDT was not satisfied that Mr. Nyawa would have instructed other staff members to provide false information.

24. On the matter of the proportionality of the sanction to the offence, the UNDT found that the sanction of deferment, for a period of two years, for eligibility for consideration for promotion and the administrative measure requiring Mr. Nyawa to attend a course on gender sensitivity, were both reasonable and not disproportionate, given the seriousness of the principal offence which was unreported and that it involved violence against a woman. Further, the UNDT found that the lack of the formal designation as supervisor had no bearing on the reasonableness of the sanction of deferment for eligibility for promotion.

25. However, the UNDT found that there did not exist any purpose of combining the disciplinary measure of deferment for eligibility for promotion with a written censure, as the latter was subsumed by the former.

26. Consequently, the UNDT upheld the disciplinary measure of deferment of promotion for two years, but dismissed the charge that Mr. Nyawa would have instructed other staff members to provide false information and ordered, by way of relief, rescission of the decision to impose on Mr. Nyawa the disciplinary measure of written censure.

Submissions

The Secretary-General's appeal

27. The Secretary-General submits that the UNDT erred by substituting its decision for that of the Administration by holding that the disciplinary measure of a written censure was disproportionate because, in its opinion, accountability had been achieved by the imposition of the sanction of deferment of promotion for two years. The UNDT thus exceeded its competence and its holding on the proportionality of the disciplinary measure should be overturned.

28. Moreover, the UNDT erred in its interpretation of Staff Rule 10.2 in two ways. There is nothing in the Staff Rule that would proscribe the imposition of written censure concurrently with other disciplinary measures. Second, contrary to the UNDT's holding, Staff Rule 10.2 does not create or assume a gradation in the severity of disciplinary measures that can be determined by a "systemic reading" of the rule.

29. In light of the foregoing, the Secretary-General requests the Appeals Tribunal to uphold the Administration's decision to impose disciplinary measures on Mr. Nyawa and to vacate the UNDT's rescission of the written censure.

Mr. Nyawa's answer

30. Mr. Nyawa maintains that the UNDT did find some extenuating circumstances which the Administration had failed to consider at the time of imposing the sanctions. Moreover, the UNDT was not satisfied on all the accusations leveled against him for which the two disciplinary measures were arrived at. Therefore, this reduction in the number of accusations logically called for a corresponding reduction in the level of the sanctions. In this regard, the UNDT correctly and appropriately reduced the sanctions from two to one.

31. Consequently, Mr. Nyawa requests that the Appeals Tribunal reject the appeal.

Mr. Nyawa's Cross-Appeal

32. Mr. Nyawa avers that the UNDT erred in fact and law in concluding that he violated Staff Rule 1.2(c) (failure to report unsatisfactory conduct) and Staff Regulation 1.2(b) (failure to uphold the highest standards of integrity).

33. In particular, Mr. Nyawa submits that the UNDT erred in fact and law by holding that he failed to report the firearm misuse. It was the Duty Officer's, and not his, obligation to report the incident, and that he was, therefore, not bound by such duty.

34. Further, Mr. Nyawa argues that he had no duty to report the incident, as at the time in question, his knowledge of the incident was no more than a rumor which he was proscribed from reporting to his superiors.

35. Then, Mr. Nyawa asserts that the UNDT erred as a matter of fact and law when it found that he spoke with Ms. Janet Okal, a Security Inspector at UNON, after he had already been made aware of the severity of the incident and that he misled Inspector Okal by stating that the incident was no more than a minor argument between Mr. Mboya and his civilian girlfriend.

36. Based on the foregoing, Mr. Nyawa requests, *inter alia*, the Appeals Tribunal to allow the cross-appeal in its entirety including his claim for compensation of USD 15,000.00 in moral damages.

The Secretary-General's Answer to Cross-Appeal

37. The Secretary-General argues that the UNDT correctly held that Mr. Nyawa had a duty to report the incident. Staff Rule 1.2(c) provides that “[s]taff members have the duty to report any breach of the Organization’s regulations and rules to the officials whose responsibility it is to take appropriate action.” Mr. Nyawa’s argument that he had no obligation to report the incident because the Duty Officer did not do so is wrong because neither the Staff Regulations and Rules, nor any other source of instructions regulating the conduct of United Nations staff, suggest that the failure of one staff member to properly discharge his or her duties under Staff Rule 1.2(c) releases other staff members from their obligation to comply with these duties. Thus, even if the Duty Officer failed to adequately report the incident in the daily report, Mr. Nyawa’s argument that he, consequently, had no duty to do so is inconsistent with his obligations under Staff Rule 1.2(c).

38. Mr. Nyawa’s argument that he had no obligation to report the incident because he was not acting in any “supervisory role” over the Duty Officer is a *non-sequitur*. The relevant question is not whether Mr. Nyawa was the supervisor of his fellow security officers, but rather whether as the Team Leader he was responsible to report the incident. Based on the orders he received, and in light of his leadership role (of which he was well aware and which he noted as an

accomplishment in his annual performance evaluation), it was indeed his responsibility to report the incident.

39. Mr. Nyawa's argument that he was prohibited from reporting "rumors" by ST/IC/2005/19 and ST/SGB/2017/2 is misplaced because the provisions of both documents, which address protection from retaliation, are not applicable in this case. Moreover, as a security officer, it was Mr. Nyawa's role and official duty to report allegations of security violations such as the incident so they could be properly investigated, and not to dismiss them as mere rumors.

40. The UNDT correctly found that Mr. Nyawa misled the Security Inspector at UNON when she inquired about the incident.

41. The UNDT correctly held that Mr. Nyawa had failed to comply with his obligations under Staff Rule 1.2(c) to report misconduct and Staff Regulation 1.2(b) to uphold the highest standard of integrity when he had failed to report the incident, among others, when he spoke with Ms. Janet Okal, UNON Security Inspector.

42. The UNDT correctly held that Mr. Nyawa had a duty to report the incident to Inspector Okal. The UNDT also correctly found that Mr. Nyawa had denied knowledge of the severity of the incident in a conversation with Inspector Okal after he had already known that Mr. Mboya had threatened his girlfriend and Mr. Muloki with a firearm.

43. The UNDT did not err when it held that Mr. Nyawa had an obligation to report the incident to Inspector Okal when she asked him directly whether Mr. Mboya threatened his girlfriend and Mr. Muloki with his firearm.

44. Finally, the UNDT was correct not to award Mr. Nyawa moral damages.

45. Consequently, the Secretary-General requests that the Appeals Tribunal reject the cross-appeal in its entirety.

Considerations

Merits of the appeal and the cross-appeal

46. The main issues before the Appeals Tribunal on appeal and cross-appeal are whether the UNDT erred in finding that: a) by failing to report Mr. Mboya's breach of the Organization's rules and regulations to the officials responsible for taking appropriate action, Mr. Nyawa violated Staff Rule 1.2(c) (failure to report unsatisfactory conduct); b) Mr. Nyawa also violated staff Regulation 1.2(b) (failure to uphold the highest standards of integrity); c) the imposition of the disciplinary sanction of a written censure was subsumed by that of deferment of eligibility for promotion.

47. That part of the Judgment that concerns the count of Mr. Nyawa having instructed other staff members to provide false information is not before us on appeal.

Standard of review in disciplinary cases

48. In disciplinary cases, the Tribunals will examine the following: (i) whether the facts on which the disciplinary measure is based have been established (where termination is a possible sanction, the facts must be established by clear and convincing evidence); (ii) whether the established facts amount to misconduct; (iii) whether the sanction is proportionate to the offence; and iv) whether the staff member's due process rights were respected.¹

49. Furthermore, this Tribunal has held that in a system of administration of justice governed by law, the presumption of innocence has to be respected.²

50. It is in the context of these definitions and principles that the Secretary-General's appeal and Mr. Nyawa's cross-appeal against the UNDT's conclusions must be assessed.

¹ *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para.15.

² *Ibid.*, para.16, citing *inter alia* *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-718, para. 47.

Clear and convincing evidence established the material facts

51. Applying the above-mentioned standards and criteria to the present case, we find that the facts on which the Administration based its decision to impose on Mr. Nyawa the challenged disciplinary sanctions were established. The records show clear and convincing evidence establishing facts which amount to misconduct and these facts have not been successfully rebutted by Mr. Nyawa. The UNDT did not err as there was clear and convincing evidence that Mr. Nyawa indeed committed the disciplinary offences attributed to him, which forms the subject-matter of the present appeal and cross-appeal.

52. As the UNDT provided a thorough and convincing reasoning, we do not find it necessary to repeat each and every detail except to refer to paragraphs from 56 to 70 and from 75 to 84 of its Judgment. We will, however, present the most important pieces of evidence on record and highlight those factual findings which clearly demonstrate that Mr. Nyawa committed misconduct.

53. In reviewing the Administration's decision, the UNDT had before it the documentary evidence on the record and heard the testimonies of various witnesses together with that of Mr. Nyawa. In particular, during the hearings, oral testimony was received from: a) Mr. Nyawa; b) Mr. Muloki Wako, Security Officer, UNON; c) Mr. Prince Bruce, Deputy Chief of Security, UNON; d) Mr. Andrew Bakhoya, Security Inspector, UNON; e) Mr. Raphael Mabuyah, Security Officer, UNON; f) Ms. Janet Okal, Security Inspector, UNON; g) Ms. Lensah Oluoch, Security Officer, UNON; and h) Ms. Carolyn Awuonda, Security Officer, UNON. All these testimonies were properly assessed by the UNDT.

54. Further, the UNDT properly assessed the extensive documents submitted by the parties as evidence in support of their contentions, including *inter alia*:

- a) UNON/SSS Daily Orders submitted by Mr. Nyawa as proof that he was selected as Team leader only and not as a supervisor in Dadaab;
- b). A Daily Report submitted by Mr. Nyawa as proof that he was obliged to report to the FSCO information which the Duty Officer recorded;

- c) Dadaab Handover Notes of 20 August 2014 submitted by the Secretary-General as proof that Mr. Nyawa had a duty to ensure that the Daily Report was accurate and comprehensive;
- d) SIU interview records for several witnesses, including Mr. Nyawa, relevant to the firearm incident;
- e) Ms. Okal's mobile telephone billing records submitted by the Respondent as proof that she called Mr. Nyawa on 22 December 2014 and that this corroborated Mr. Muloki's statement that Mr. Nyawa convened a meeting on that date;
- f) Ms. Okal's billing records were also submitted to support the Secretary-General's contention that she did not call Mr. Nyawa on 19 December 2014, contrary to Mr. Nyawa's assertion;
- g) Telephone records for Ms. Okal and Mr. Bakhoya's office landline extensions submitted by the Secretary-General to show that the latter's extension number was used to dial Mr. Nyawa's mobile phone number on 22 December 2014 at 7:57 a.m.; and
- h) Telephone records submitted by Mr. Nyawa on 9 November 2018 to prove that Ms. Oluoch telephoned Mr. Mboya on the night of 19 December 2014, in support of his allegation that Ms. Oluoch perjured herself before the Dispute Tribunal when she denied having done so.

55. Mr. Nyawa argues that the UNDT erred in a number of ways in upholding the Administration's decision to the extent it found that he violated Staff Rule 1.2(c) (failure to report unsatisfactory conduct) and Staff Regulation 1.2(b) (failure to uphold the highest standards of integrity).

Whether Mr. Nyawa had knowledge of the firearm incident on 19 December 2014

56. On the issue of Mr. Nyawa's knowledge of the incident on 19 December 2014, especially of the alleged firearm misuse by Mr. Mboya, which preceded his disputed duty to report it to his superiors in the chain of command, the Appeals Tribunal takes note at first

that Mr. Nyawa's attack on the impugned Judgment on cross-appeal is mainly centered around his argument that this was only a rumour, upon which he had no basis to act. In this respect, he submits further that abstaining from spreading a rumour was clearly encouraged by the rules of the Organization.

57. Coming to the point, Mr. Nyawa's knowledge of the material facts of the case was borne out by the witnesses' testimonies either before the SIU or the UNDT, according to which he had been instantly informed about the events.

58. Specifically, Mr. Muloki, Mr. Mboya's housemate, has stated that:

He returned to his room. Shortly after, he heard Mr. Mboya's girlfriend screaming. Once again, he went to Mr. Mboya's room and found the girlfriend kneeling on top of the bed pinned down by Mr. Mboya on the mattress with the left hand while his right hand was holding his service weapon pointed at her head at close range. He tried to grab the hand that was holding the weapon. Before he could do this, Mr. Mboya pushed his girlfriend aside and pointed his weapon at him saying, "toka toka" (get out, get out). Mr. Mboya's finger was on the trigger.

He personally informed [Mr. Nyawa] about the details of the firearm incident as soon as [Mr. Nyawa] arrived at the scene, as he was the first person [Mr. Nyawa] encountered and asked what the problem was. Earlier he had told these to Ms. Awuonda when he had met her going to the scene.

And Ms. Awuonda, the Duty Officer, has stated that:

When [Mr. Nyawa] arrived at the scene she informed him that, according to Mr. Muloki, Mr. Mboya, during the quarrel with his girlfriend, pointed his gun at her and Mr. Muloki. She handed the matter to him as the supervisor. She confirmed obtaining instructions from [Mr. Nyawa] on what to put in the report regarding the incident.

59. The critical fact of Mr. Nyawa's knowledge of the firearm misuse was corroborated by Ms. Oluoch, the Deputy Team Leader, who testified that:

During the day of 19 December 2014 she was duty officer and thus worked closely with [Mr. Nyawa] as her supervisor. At some point [Mr. Nyawa] asked whether she could confirm that in addition to the disturbance, it was true that Mr. Mboya had pointed his firearm at his girlfriend. She confirmed that this was what Mr. Mboya's girlfriend – who at the time was staying at her place - had told her. She understood that [Mr. Nyawa] was aware of the issue but did not advise her anything regarding this information.

Just before the meeting with the FSCO, [Mr. Nyawa] asked her in Swahili whether it was true that Mr. Mboya had pointed a gun at his girlfriend. She confirmed that this was what the girlfriend had told her.

60. While it is true that Mr. Muloki and Ms. Awuonda did not supply the above information during their initial interview by SIU but at a later stage, i.e. when they were re-interviewed by SIU as well as before the UNDT, this alone does not eliminate the evidentiary value of their testimonies, nor does it render their statements unreliable, as correctly found by the UNDT. Moreover, their versions of the critical events coincided with that of Ms. Oluoch's account, which the UNDT Judge found more plausible, detailed and consistently narrated in her interviews than Mr. Nyawa's contention that he had heard the story from Ms. Oluoch on 20 December 2014. We share the UNDT Judge's assessment of the evidence.

61. Further, the UNDT Judge, based on the record and these testimonial statements, held that:³

[i]nforming [[Mr. Nyawa]] about a weapon being involved in the incident would have been an obvious thing to do, both because of the drama experienced by both Mr. Muloki and Awuonda and given that the Team Leader and his Deputy had been woken up and called to the scene at night.

62. Additionally, the UNDT found

it improbable that the gist of the incident would not have been conveyed to [Mr. Nyawa] at the scene. Together with the fact that Mr. Mboya's weapon was recovered from the top of the fridge near the door and taken away from him and that his room was in disorder, even scant information about this violent behavior was serious enough to not be dismissed lightly by [[Mr. Nyawa]] and mandated verification at the nearest appropriate opportunity, that is, in the morning.⁴

63. These are accurate conclusions from the evidence on record and common knowledge and we find no reason to differ from them. The Dispute Tribunal has broad discretion under Article 18(1) of its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact

³ Impugned Judgment, para. 58.

⁴ *Ibid.* para. 59.

resulting in a manifestly unreasonable decision, which is not the case here. This Tribunal is mindful that the Judge hearing the case had an appreciation of all the issues for determination and the evidence before it. We are satisfied that the UNDT conclusion is consistent with the evidence. Mr. Nyawa has not put forward any persuasive grounds to warrant interference by this Tribunal.

64. To the above UNDT's correct evidentiary assessments, we would add the evidence drawn from the fact that, as soon as Ms. Awuonda arrived at the scene, she checked on top of the refrigerator and found Mr. Mboya's service weapon, and subsequently, when Mr. Nyawa arrived there, she briefed Mr. Nyawa, and thereafter she and Ms. Oluoch departed to escort Mr. Mboya's girlfriend to Ms. Oluoch's room and to place the weapon in the office safe. As Mr. Nyawa stated in his testimonies to SIU on 20 January 2015 and 9 November 2015, respectively, with reference to this fact:

Ms. Awuonda checked on top of the fridge and found Mr. Mboya's weapon. Ms. Awuonda informed [Mr. Nyawa] that she had taken the weapon together with one magazine of 15 rounds of ammunition. She explained that she had taken it as an instinctive reaction, having sensed danger in the way Mr. Mboya's girlfriend had pointed at the fridge. [Mr. Nyawa] accepted the explanation and advised her to go with Ms. Oluoch to the SSS office and secure the weapon in the office safe. Ms. Oluoch had a key to the safe and they were able to secure the weapon and the ammunition.

Given the fact that Ms. Awuonda found the firearm on the fridge, [Mr. Nyawa] thought it prudent to accept Mr. Mboya's request to secure the firearm for him that night and the following night. This transaction was not recorded.

65. The fact that Mr. Mboya's weapon was removed by Ms. Awuonda and secured, on Mr. Nyawa's advice, in the office safe because Ms. Awuonda had "sensed danger in the way Mr. Mboya's girlfriend has pointed at the fridge", as Mr. Nyawa conceded, was a strong case of circumstantial evidence and provides a reliable basis for the inference that Mr. Nyawa was immediately informed about the firearm misuse when he arrived on the scene and took the necessary preventive steps to avoid any further escalation. Indicative of the prevailing atmosphere in terms of the information of Mr. Mboya's brandishing his service weapon at his girlfriend and of the whole situation in general was that, although Mr. Nyawa returned the service weapon to Mr. Mboya, at the end of the shift at 6.00 p.m on the evening of 19 December 2014, the latter brought it back and requested that it be kept in the safe for the

night. Obviously, Mr. Mboya, being under formidable stress because of the event, in an act of self-restraint and caution, sought to avoid any possible escalation.

66. In sum, the documentary evidence on file, the oral testimonies of the witnesses, as well as the strong circumstantial evidence, suggest, as correctly held the UNDT, that by the end of 19 December 2014, Mr. Nyawa had at least reasons to believe that misuse of firearm had taken place during the incident implicating Mr. Mboya, which warranted reporting it through the chain of command. Therefore, his contentions to the contrary are rejected as being without merit.

Whether Mr. Nyawa had a duty to report the incident

67. Firstly, Mr. Nyawa submits that the UNDT erred in fact and law by holding that he failed to report the firearm misuse. According to Mr. Nyawa, it was the Duty Officer's, and not his, obligation to report the incident, and he was, therefore, not bound by such duty. Mr. Nyawa further submits that the UNDT erred in attributing a leadership role and the responsibility that flows from such a role to him, because he was not his colleagues' supervisor and held the same rank as the other officers at the duty station.

68. Further, Mr. Nyawa argues that he had no duty to report the incident, as, at the time in question, his knowledge of the incident was no more than a rumor which he was proscribed from reporting to his superiors. To support the argument that he was not allowed to report a rumor, Mr. Nyawa refers to his application before the UNDT, in which he cited a 2005 information circular ST/IC/2005/19 titled "Reporting of suspected misconduct" and the Secretary-General's Bulletin ST/SGB/2017/2 titled "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations".

69. We reject these submissions as being entirely without merit. The UNDT meticulously surveyed the Standard Operating Procedures (SOPs) and other sources of authority in the Judgment at length.⁵ The UNDT further reviewed the standing orders issued to Mr. Nyawa regarding his position as Team Leader when he took up his duties and found that these orders clearly established his role in designating duty officers, supervising the other security

⁵ Impugned Judgment, paras. 75-84.

officers and his additional role in reporting daily to the senior Department of Safety and Security officials on the ground.⁶

70. In this regard, the UNDT opined:⁷

It is thus clear that, at minimum, designating duty officers, stand-by shifts, oversight of the G4S Security personnel, enforcing the curfew, responding to calls and proper reporting were the obligations of the Team Leader and in this respect [Mr. Nyawa] could give binding instructions to the team members. In addition, as transpires from the oral and documentary evidence, [Mr. Nyawa] exercised a *de facto* commanding role over the other Security Officers in his team in the following aspects ...

71. Moreover, the UNDT heard testimony from three senior security staff based in Nairobi who elaborated on the role and responsibilities of Team Leaders.⁸ Finally, the UNDT, having regard to the evidence heard, determined and ruled upon the contested factual issue coming to the conclusion that in his role as Team Leader, Mr. Nyawa was responsible for his team's response to incidents and for reporting on such incidents.⁹

72. We share the UNDT's conclusion that in his capacity as Team Leader Mr. Nyawa was clearly under an obligation to report the incident of the firearm misuse by Mr. Mboya to the Organization.

73. Indeed, as per the evidence on file, notwithstanding the fact that, in the case at hand, Mr. Nyawa could not be described as a supervisor in the sense that the term is applicable in the United Nations staff legal framework, as he was neither a First Reporting Officer (FRO) nor a Second Reporting Officer (SRO) to any of the team members with whom he was working in Dadaab, he had nevertheless been designated a team leader; this in turn imposed on him the duty of ensuring that the team members properly performed their responsibilities under his binding instructions.

⁶ *Ibid.*, para. 82.

⁷ *Ibid.*, para. 83.

⁸ Testimony of UNON Deputy Chief of Security, at the 5 November 2018 Hearing before the UNDT, at minute mark 34:00; testimony of Inspector Okal at the 6 November 2018 Hearing before the UNDT, at minute mark 43:45; and testimony of Inspector Bakhoya at the 7 November 2018 Hearing before the UNDT at minute mark 1:12:45.

⁹ Impugned Judgment, para. 84.

74. The fact that Mr. Nyawa had been exercising at this time a *de facto* commanding role over the other Security Officers of the team, including, *inter alia*, his authority to give binding instructions to them, was borne out from the whole evidentiary material which spoke to his central role in terms of this incident on 19 December 2014, and especially to him being the central person to whom his colleagues and superiors addressed themselves in this regard. This is evident, in particular, in that:¹⁰

- a. he was called by the Duty Officer to the scene of the firearm incident to take charge of the situation;
- b. he followed up about the incident with the other Security Officers such as Ms. Oluoch and Mr. Mboya;
- c. he was called by Ms. Okal, a senior Security Officer based in Nairobi, in relation to the incident in his capacity as “the supervisor on the ground”;
- d. Mr. Mboya surrendered his weapon to him for safekeeping;
- e. he summoned the other Security Officers to meetings, whether on 19 or 22 December 2014; and
- f. he admitted that it was his duty to ensure that the daily incident report was accurate, comprehensive and to then transmit it to the FSCO and to UNON/UNDSS.

75. Consequently, Mr. Nyawa was under a duty, in his capacity as team leader, to properly report the incident but failed to do so, as correctly found the UNDT.

76. Further, we agree with the Secretary-General’s argument that, contrary to Mr. Nyawa’s contention, neither the Staff Regulations and Rules nor any other source of instructions regulating the conduct of the United Nations staff suggest that the failure of one staff member to properly discharge his or her duties under Staff Rule 1.2(c) releases other staff members from their obligation to comply with these duties. Hence, even if the Duty Officer failed to adequately report the incident in the daily report, Mr. Nyawa was under a duty to do it in compliance with his obligations under Staff Rule 1.2(c).

¹⁰ *Ibid.*, para. 83.

Whether Mr. Nyawa misled Ms. Okal when she inquired about the incident

77. In respect of the charge that he failed to report the incident by misleading a more senior Security Officer by indicating that Mr. Mboya had a small disagreement with his girlfriend, Mr. Nyawa asserts that the UNDT erred as a matter of fact and law when it found that he spoke with Ms. Janet Okal, a Security Inspector in UNON, after he had already been made aware of the severity of the incident and that he misled Inspector Okal by stating that the incident was no more than a minor argument between Mr. Mboya and his civilian girlfriend.

78. Specifically, Mr. Nyawa challenges the relevant conclusions of the UNDT by formulating a three-pronged assertion: First, Mr. Nyawa argues that the UNDT erred when it held that he had a duty to report the incident to Ms. Okal, as she was not his direct supervisor and his duty as a Team Leader was limited to reporting on incidents in the daily report. Second, Mr. Nyawa claims that the UNDT erroneously found that he had spoken with Inspector Okal when he had already been made aware that Mr. Mboya had threatened both his girlfriend and Mr. Muloki with a firearm. Finally, Mr. Nyawa avers that he had no duty to report on the incident because Inspector Okal had never specifically asked him about the misuse of a firearm.

79. We do not find merit in these submissions either. The comprehensive record and extensive witness evidence, as established by the UNDT, demonstrate that Mr. Nyawa had more than one telephone conversation with inspector Okal about the incident involving Mr. Mboya, and that, by the end of 19 December 2014, he had at least reasons to believe that misuse of the firearm had taken place in the incident. Based on the findings of the investigation reports of the SIU, Ms. Okal's mobile telephone billing records as well as the telephone records for Ms. Okal and Mr. Bakhoya's office landline extensions, showing calls to Mr. Nyawa on 22 December 2014, and the testimonies of Mr. Muloki, Ms. Okal and Mr. Bakhoya as to the content of the conversation between Ms. Okal and Mr. Nyawa, the UNDT came to the conclusion that Mr. Nyawa had spoken with the Inspector Okal on 22 December 2014 and, though he was aware of the incident and the potential misuse of the firearm by Mr. Mboya by the end of 19 December 2014, he failed to report the incident to Ms. Okal.¹¹ In assessing the probative value of the aforementioned witness testimonies, the

¹¹ Impugned Judgment, paras. 63, 64, 69, 84.

UNDT even pronounced on the divergences in the witnesses accounts of Ms. Okal with the testimonies of Inspector Bakhoya and Mr. Mabuyah, in terms of the content of the conversation between Ms. Okal and Mr. Nyawa on 22 December 2014. In this regard, the UNDT found that:¹²

The Tribunal notes that there are divergences in the witnesses' accounts concerning the date and time of different phone calls. For example, the record shows an earlier call from the mobile phone of Ms. Okal to [Mr. Nyawa], on 21 December in the afternoon. This is consistent with the undisputed fact that Ms. Okal called twice, even though both [Mr. Nyawa] and Ms. Okal believe that both calls were on the same morning. There is also a later, very brief, call from Ms. Okal's mobile phone on 22 December. These records, in the Tribunal's opinion, indicate that the witnesses do not remember all the calls they had between them and considers it perfectly normal and justified by vagaries of human recollection. By the same token, the Tribunal accepts that Ms. Oluoch's denial that she called Mr. Mboya on 19 December was a matter of forgetting rather than, as [Mr. Nyawa] avers, perjury which would disqualify her testimony.

80. In all the circumstances of the case, this Tribunal is satisfied with the detailed analysis of the totality of the evidence by the UNDT and agrees with its well-reasoned conclusion. Having regard to the factual findings made by the trial Judge, who is best placed to assess the nature and probative value of the evidence placed before him or her by the parties to justify his or her findings,¹³ and considering, in particular, the chronology of the critical events, the undisputed fact that Mr. Nyawa, in his telephone conversation with Ms. Okal, had stated that the incident involving Mr. Mboya was limited to an argument with the latter's girlfriend, without mentioning the weapon issue, and the overall deductive reasoning process of the first instance Judge, this Tribunal shares the UNDT's view that the only reasonable conclusion available to the trial Judge, resulting from the evidence against Mr. Nyawa, uncovered by the investigation and the hearing before the first instance Judge, was that the facts of the alleged conduct were established by clear and convincing evidence.

81. Again, we repeat that this Tribunal considers that some degree of deference must be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence has been heard. This is exactly what happened in the present case in terms of

¹² *Ibid*, para. 70.

¹³ *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 26.

the account of the events before the UNDT by Mr. Muloki, Ms. Okal, Mr. Bakhoya and Mr. Nyawa, among others, which were correctly assessed by the UNDT. Consequently, we dismiss Mr. Nyawa's allegations to the contrary as misplaced. Mr. Nyawa was under an obligation to report the incident to Inspector Okal, who supervises all the uniformed officers at UNON (including him), when asked whether he had something to report as the Team Leader of the security officers in the duty station and generally as a staff member under Staff Rule 1.2(c), but he failed to do so.

82. Moreover, as correctly argued by the Secretary-General, Mr. Nyawa has failed to explain in what way the alleged UNDT's factual errors resulted in a manifestly unreasonable decision warranting the intervention of the Appeals Tribunal.

The established facts qualify as misconduct

83. This Tribunal agrees with the finding of the UNDT that the established facts amounted to misconduct on the part of Mr. Nyawa.

84. Staff Regulation 1.2(b) provides:

Staff Members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

85. Staff Rule 1.2(c) provides:

Staff members have the duty to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action.

86. Under Staff Rule 10.1, a staff member commits misconduct when he or she fails to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant, and such a failure may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

87. Mr. Nyawa, by failing to report the incident of possible misuse of the firearm by Mr. Mboya to the Organization and Inspector Okal, violated his obligation under Staff Rule 1.2(c) to report misconduct, as well as under Staff Regulation 1.2(b) to uphold

the highest standard of integrity. Since the UNDT properly found that the facts amounting to misconduct were established, the Administration has shown misconduct on Mr. Nyawa's part.

88. Accordingly, the cross-appeal fails.

Lawfulness and proportionality of the disciplinary sanction

89. The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures such as a sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. That is why the Tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed without any change in the jurisprudence of this Tribunal.¹⁴ The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.¹⁵

90. Further, as we stated in *Samandarov*,¹⁶

... due deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of

¹⁴ *Ganbold v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-976, para. 58; *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 39; *Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 41.

¹⁵ *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 40.

¹⁶ *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, paras. 24-25.

disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.

... The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

91. In the case at hand, the UNDT found, at first, that the sanction of deferment, for a period of two years, for eligibility for consideration for promotion and the administrative measure requiring Mr. Nyawa to attend a course on gender sensitivity, were both reasonable and not disproportionate, given the seriousness of the principal offence which was unreported and that it involved violence against a woman.¹⁷

92. However, in terms of the sanction of written censure, the UNDT ruled that the cumulative application of the disciplinary measures of a written censure with any other disciplinary measure, i.e. in the litigated case, the deferment for eligibility for consideration for promotion was unreasonable and, as such, unlawful and rescinded the disciplinary measure of the written censure. Specifically, the UNDT reasoned this ruling as follows:¹⁸

The Tribunal, on the other hand, fails to see any purpose of combining the measure of deferment for eligibility for promotion with a written censure. As demonstrated by the systemic reading of staff rule 10.2, written censure is the most lenient of all the disciplinary measures. Its purpose is exhausted by stigmatizing the impugned conduct, creating a record of disciplinary violation of the staff member for the future and fostering correction of behavior, without, however, resorting to financial sanction and/or loss of employment. The retributive and preventive effect of a written censure is inherent to, and thus subsumed by, any other, more onerous disciplinary measure, all of whom stigmatize and create a record of misconduct in addition to more severe financial and/or status-related consequences that they entail. Cumulative application, therefore, of written censure with any other disciplinary measure does not contribute in any way to the “desired end” and, as such, is unreasonable.

¹⁷ Impugned Judgment, para. 94.

¹⁸ *Ibid.*, para. 95.

93. The UNDT premised its ruling on its interpretation of the Appeals Tribunal Judgment in *Samandarov* case,¹⁹ by stating thereupon that:

The Appeals Tribunal, thus, recognizes that a less onerous sanction is preferred where it would be equally effective. This marks a shift or paradigm compared with the previous position, that the Tribunals intervene in the disciplinary measures only where they would be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in severity.²⁰

94. The Secretary-General submits that the UNDT erred in finding that the decision to impose a written censure and deferment for eligibility for promotion on Mr. Nyawa was unlawful. In particular, the UNDT erred in its interpretation of Staff Rule 10.2 in two ways. First, the UNDT's holding that the "retributive and preventive effect of a written censure is inherent to, and thus subsumed by, any other, more onerous disciplinary measure" set forth in Staff Rule 10.2(a) is contrary to the plain wording of the Rule itself. Staff Rule 10.2(a) explicitly provides that "[d]isciplinary measures may take one or more of the following forms only." There is nothing in the Staff Rule that would proscribe the imposition of written censure concurrently with other disciplinary measures. Second, contrary to the UNDT's holding, Staff Rule 10.2 does not create or assume a gradation in the severity of disciplinary measures that can be determined by a "systemic reading" of the Rule. While a written censure according to Staff Rule 10.2(a)(i) is certainly less severe than dismissal according to Staff Rule 10.2(a)(ix), it is not at all clear that a fine according to Staff Rule 10.2(a)(v) is more severe than a loss in one or more steps in a grade according to Staff Rule 10.2(a)(ii). The Secretary-General submits that the UNDT effectively substituted its own discretion for that of the Administration when opining that it was disproportionate to impose the sanction of a written censure concurrently with the sanction of deferment of promotion for two years because, in its opinion, accountability had been achieved by the imposition of the latter sanction. In the view of the Secretary-General, the UNDT thus exceeded its competence and its holding on the proportionality of the disciplinary measure should be overturned.

95. We agree with the Secretary-General that the relevant statutory provisions do not proscribe the imposition of written censure concurrently with other disciplinary measures on the disciplined staff member, and that the determination of the degree of the sanction is usually reserved for the Administration, which has discretion to impose a measure that it

¹⁹ *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, para. 25.

²⁰ Impugned Judgment, para. 93.

considers adequate to the circumstances of the case in light of the actions and behaviour of the staff member involved.

96. We also share the Secretary-General's view that the purpose of a written censure differs from that of other disciplinary measures set forth in Staff Rule 10.2(a) and therefore it is not subsumed by any of them. The decision as to whether or not a written censure or any other disciplinary measure is adequate, imposed alone or cumulatively with other measures on the disciplined staff member, to accomplish their retributive and preventive effect, falls within the discretion of the Administration, which conducts this exercise on a case by case basis, in connection to the circumstances of the specific disciplined behaviour, and not *in abstracto*.

97. That said, however, this discretion is not unfettered, since the Administration is bound, as required by the Appeals Tribunal jurisprudence for the UNDT to review the level of the sanction imposed, to exercise its discretionary authority in a manner consistent with the due process principles and the principle of proportionality, as these principles are best described in *Sanwidi*, where we held:²¹

... In the present case, we are concerned with the application of the principle of proportionality by the Dispute Tribunal. In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.

... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the

²¹ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 39-40 and 42. See also, *Ladu*, *op.cit.*, para. 38.

Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate.

98. In the present case, we are satisfied with the UNDT's conclusion that the impugned administrative decision to impose on Mr. Nyawa a written censure was unlawful, albeit with different reasoning. In particular, given the factual circumstances of the case at hand, as correctly and thoroughly established by the UNDT, the Appeals Tribunal holds that the UNDT correctly balanced the competing considerations and concluded reasonably that the cumulative imposition of a written censure and the deferment for eligibility for promotion on Mr. Nyawa was not reasonable. Having found that one aspect of the charges on which the disputed sanctions were based, i.e. that Mr. Nyawa had instructed other staff members not to reveal the firearm misuse, was not corroborated by the evidence before it, and having subsequently struck it down, the UNDT was in essence called upon to assess the proportionality of the challenged sanctions by taking into account, in the balancing of competing considerations, new factors, in light of which—though not explicitly stated—it came to the conclusion that the cumulative application of a written censure and a deferment for eligibility for promotion was not reasonable. In the circumstances of this case, the UNDT's holding that the deferment for eligibility for promotion was sufficient as the suitable and necessary means to achieve the object of discipline required on the facts was not a manifestly unreasonable decision warranting the intervention of the Appeals Tribunal.

99. The conclusion reached above does not reflect a shift from the rationale followed without any change in the jurisprudence of this Tribunal that it will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, as the UNDT misdirected itself to state in its interpretation of *Samandarov's* case. As already noted above, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, as was found by UNDT, in the case at hand, in the context of exercising its review on grounds of reasonableness.

100. Consequently, the UNDT did not lapse in respect of the considerations it sought to balance or in the assessment of their weight. Concomitantly, the UNDT did not erroneously substitute itself for the Administration, as argued by the Secretary-General. It simply examined the facts and their interpretation led to the correct conclusion that the decision-maker had not exercised his discretionary power properly.²² It accordingly did not err on any question of law or fact permitting interference by this Tribunal in terms of Article 2(1) of the Appeals Tribunal Statute.

101. The appeal must therefore be dismissed.

102. Because of our foregoing decision, in which we did not detect any error on the part of the UNDT, no questions of further relief for Mr. Nyawa arise.

103. In light of the above, we dismiss the appeal and the cross-appeal.

²² *Comp.Yasin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-915, para. 61; *Belkhabbaz v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-873, para. 80.

Judgment

104. The appeal and the cross-appeal are dismissed and Judgment No. UNDT/2019/149 is affirmed.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Raikos, Presiding
Athens, Greece

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 27th day of July 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar