
Judgment No. 2024-UNAT-1448



Before: Judge Kanwaldeep Sandhu, Presiding
Judge Gao Xiaoli
Judge Graeme Colgan

Case No.: 2023-1843

Date of Decision: 28 June 2024

Counsel for Appellant: Sètonджи Roland Adjovi & Anthony Kreil Wilson

Counsel for Respondent: Angélique Trouche

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, (F01) 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 as some of the same arguments and submissions were considered on similar facts.³

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 the [redacted] in Jerusalem.⁹

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-

- a) Staff Regulation 1.2(b): (i) by enabling the 21 May 2020 events; and (ii) by failing

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.

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 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 F01 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 F01 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, alla Tw 0.gi. ng p(-)-0.315 0 Td[(w)t.ne (n)6.8 (i)2.3 (80 Tc (d)0.7 (N)-2 (a)6.8v(ng)-6.1 4(n)6h1 7

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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.

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 [redacted] in the impugned Judgment.³⁹ He further says that the Dispute Tribunal erred in its findings on the merits of the case.

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), I01,⁴⁰ an expert

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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 6c 2O-7c 3(ffic7.4 (1)e38Tr6300r)

55. Article 2 of the UNAT Statute provides that the Appeals Tribunal can review the Dispute

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

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 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 .⁷¹

⁶⁶ Impugned Judgment, para. 44.

⁶⁷ Annex to the Sanction Letter, para. 15.

⁶⁸ , Judgment No. 2024-UNAT-1427.

⁶⁹ , para. 51.

⁷⁰ , para. 50. As we noted in paragraph 49 of the 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 Judgment, , 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

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 F01, 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).

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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 I01 as an investigator and a violation of the ~~Spf~~ 4h8e8eMMd.

104. Mr. Millan's