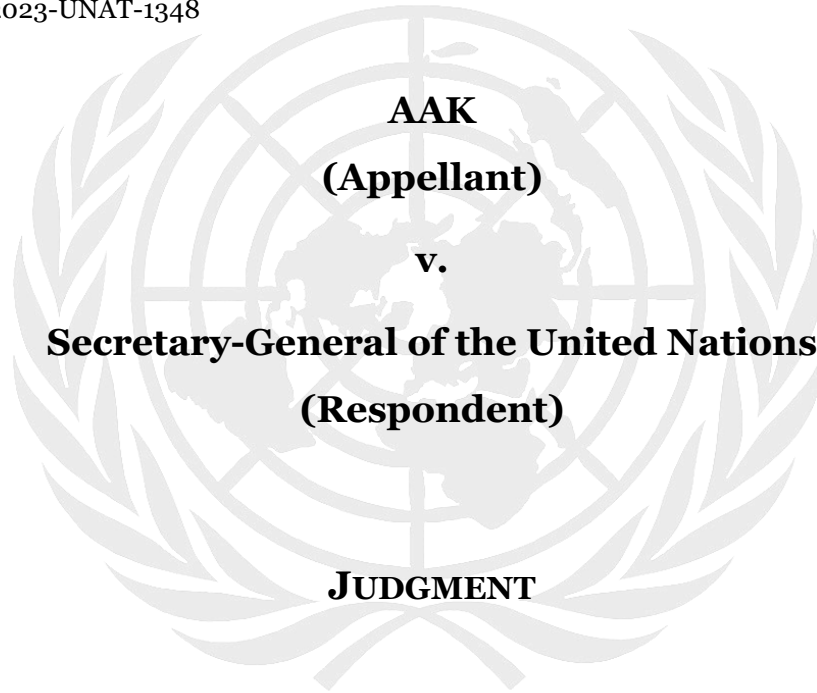




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1348



Before:	Judge Graeme Colgan, Presiding Judge Kanwaldeep Sandhu Judge Martha Halfeld
Case No.:	2022-1673
Date of Decision:	24 March 2023
Date of Publication:	19 May 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	Robeiro de Jesus Franco Lopez
Counsel for Respondent:	Francisca Lagos Pola

JUDGE GRAEME COLGAN, PRESIDING.

1. The Appellant (AAK) appeals against the Judgment of the United Nations Dispute Tribunal (UNDT, Dispute Tribunal or Tribunal) delivered on 29 December 2021.¹ It rejected his challenge to the Secretary-General's (Respondent) decisions to separate him from service with compensation in lieu of notice without termination indemnity, and to fine him one month's net base salary.
2. The Appellant seeks reinstatement to the same step and grade and to be paid all remuneration losses incurred by him after he was placed on administrative leave without pay (ALWOP) while the serious misconduct alleged against him was investigated. He further seeks a sum representing 5 years of net base salary for distress, harm and anxiety.
3. The Appellant's case has been conducted in great detail and hard-fought at all stages from the outset. This has produced on appeal a case file of almost 1400 pages. While the Appellant has attempted repeatedly to re-contest previous factual findings and the Respondent has defended these, this must now be an appeal against specified appealable elements of the UNDT's Judgment. The Appellant says that if he is successful on all or any of these allegations of error (of fact and law) by the Dispute Tribunal, his case should succeed, and he should be awarded the remedies he seeks.
4. For the reasons set out below, we dismiss the appeal and affirm the UNDT's Judgment.

Facts and Procedure

5. The following is the general and uncontroversial context to this case. With a background in United Nations policing and subsequently security in a broader sense, the Appellant left his family in his home country and was posted to a temporary role with the United Nations Integrated Peacebuilding Office in Guinea-Bissau (UNIOGBIS). At his initial duty station, the Appellant encountered a young woman who aspired to higher education but was working to support her own family which was in poor financial circumstances. When the Appellant was to be posted elsewhere in Guinea-Bissau, he asked this young woman (the Complainant) to accompany him as his paid housekeeper which part-time job also allowed her to attend university. The Complainant and her family agreed to this arrangement and the Appellant purchased a solar panel for her family to enable them to have access to some electricity for the first time.

¹ *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/164.

6. At his new duty station, the Appellant had a house in a secure and guarded compound and had access to United Nations motor vehicles for his work. Initially the Complainant rented a room elsewhere the cost of which the Appellant paid, and she travelled to his accommodation to undertake her housekeeping duties and also attended university. The Appellant assisted the Complainant with payment of her university and associated expenses and made some further and regular financial contributions to her family, as well as paying her for her housework. Increasingly, however, the Complainant stayed for periods, including overnight at the Appellant's accommodation, and subsequently had a room and her possessions there. The Appellant and the Complainant, together with some of the Appellant's work colleagues, socialised together on occasions.

7. One late December night in 2018, there was a disruptive incident at the residence after the arrival of several young women as a result of which the Complainant moved out of the house. At about the same time, the Appellant moved the Complainant's possessions out of the house. She complained to both United Nations officials and the local Guinea-Bissau Judicial Police about the Appellant's conduct towards her, both on that night and previously. The Judicial Police decided to take no action against the Appellant. Later, a referral about these matters was also made to the authorities in the Appellant's home country. It is unclear what, if anything, happened to the matter, but the fact of making the referral upset the Appellant. There was an internal United Nations investigation of these complaints and allegations by the Investigations Division of the Office of Internal Oversight Services (OIOS). The allegations were that the Appellant:

- (a) had engaged in a transactional and at times non-consensual and enforced sexual relationship with the Complainant between 2016 and 2018, and with unidentified girls on the December night referred to above;
- (b) assaulted the Complainant and treated her contemptuously by removing her personal possessions from his house on the same date(s);
- (c) provided his driver's licence to a former colleague to enable that person, who was not authorised to operate the vehicle, to drive it and transported unauthorised persons in a United Nations vehicle, again on the same dates; and
- (d) subsequently asked the Complainant to withdraw her complaints in exchange for money.

8. In the course of the investigation into these allegations/complaints, a further charge was added, namely that the Appellant interfered with the investigation by again attempting to persuade the Complainant (through the medium of one of his own security guards) to withdraw her complaints/allegations in return for money.

9. The Appellant was formally charged with serious misconduct by the Officer-in-Charge, Office of Human Resources (OHR), Department of Management Strategy, Policy and Compliance (DMSPC). While these charges were being investigated, the Appellant was placed on ALWOP. After being advised on 23 September 2019 that his temporary appointment would not be extended beyond its expiry on 31 October 2019, on 23 October 2019 he was advised that, with one exception, the allegations against him of serious misconduct had been upheld and the sanctions referred to above were imposed. That exception was that there was no reference in the formal charges that the sexual relations between the Appellant and the Complainant were “forced at times”. His employment was terminated immediately, that is about a week before the scheduled expiry of his temporary role.

10. Because, in addition to general denials of the facts of the alleged misconduct against him, the Appellant takes issue with numerous procedural or due process issues, we begin with a recitation of the procedure that led to the sanctions imposed on him.

11. On 4 January 2019, OIOS began investigating the report of alleged serious misconduct by the Appellant. For convenience, we set out the following account of these events reproduced from the UNDT’s Judgment. References to “the Applicant” are to the now Appellant.

On 24 January 2019, OIOS interviewed the Applicant.² The interview was recorded; the Applicant was provided with a copy of the audio-recording and given two weeks to present any additional information that he deemed appropriate and/or a written statement in relation to the matter under investigation. He did so on three occasions, namely, on 24 and 25 January 2019, and on 25 February 2019.

On 30 April 2019, OIOS issued its investigation report finding that the Applicant:

a. Engaged in a consensual sexual relationship with the complainant, which was also transactional as well as forced at times, and that the Applicant also engaged in transactional sex with other, unidentified, girls, particularly on the night of 29 and 30 December 2018;

² Impugned Judgment, para. 4.

- b. Physically assaulted the complainant on the above-mentioned night and treated her with contempt by putting her personal belongings outside of his house;
- c. Interfered with the investigation by negotiating with the complainant either directly or through third parties; and
- d. Breached the Standard Operating Procedures [SOPs] regarding measures on the Operation of UNIOGBIS vehicles by providing his driver's licence to a former colleague and transporting the complainant in a United Nations vehicle.³

The OIOS investigation report concluded that the “established facts constitute[d] reasonable grounds ... that the Applicant failed to observe the standards expected of United Nations personnel”.⁴

On 16 May 2019, OIOS provided the Assistant Secretary-General [ASG], Office of Human Resources [OHR], DMSPC, with an addendum to its investigation report prompted by the Applicant's allegations against the Chief, Special Unit Investigation [SIU], UNIOGBIS, and a Local Security Associate, UNIOGBIS.⁵

By memorandum dated 18 June 2019, the Officer-in-Charge, OHR, DMSPC, issued formal allegations of misconduct against the Applicant who was requested to submit “any written statement or explanations” in response to the allegations of misconduct.⁶

On 26 July 2019, the Applicant submitted his comments to the above-mentioned allegations.⁷

Upon review of the Applicant's comments, additional information was sought and received from OIOS, which the Appeals and Accountability Section [AAS] shared with the Applicant by email of 25 September 2019. Consequently, AAS invited the Applicant to submit comments, if any, on the additional information.⁸

By memorandum dated 23 September 2019, the Chief Human Resources Officer, UNIOGBIS, informed the Applicant that his temporary appointment would not be extended beyond its expiration date of 31 October 2019. The memorandum listed administrative formalities for the Applicant's check-out procedure and referred to the fact that temporary appointments “[do] not carry any expectancy, legal or otherwise, of renewal”.⁹

On 8 October 2019, the Applicant provided additional comments in response to the above-referred request from AAS.¹⁰

³ *Ibid.*, para. 5.

⁴ *Ibid.*, para. 6.

⁵ *Ibid.*, para. 7.

⁶ *Ibid.*, para. 8.

⁷ *Ibid.*, para. 9.

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*, para. 11.

¹⁰ *Ibid.*, para. 12.

By letter dated 23 October 2019, the ASG, OHR, DMSPC, informed the Applicant of the imposition of the disciplinary measures (...).¹¹

Preliminaries to the UNDT's Substantive Consideration of the Case

12. The Appellant submitted an application to the UNDT, appealing his separation from service and the other sanctions imposed on him by the Respondent. In early 2020 the parties filed their initial pleadings with the UNDT. On 11 November 2020, there was a case management conference with a UNDT Judge, in which both parties agreed not to call any witnesses to give *viva voce* evidence (oral evidence of witnesses in the presence of each other and the Judge) but in which they requested a hearing “on the merits”, in reality consideration and a decision of his appeal on the papers filed. As agreed by the parties and directed by the UNDT, the parties filed a joint bundle of documents on 13 November 2020.

13. On 29 July 2021, the Appellant filed a motion with the UNDT, seeking to introduce additional evidence. The Secretary-General opposed the admission of these materials, contesting their relevance and submitting that they were neither authenticated nor officially translated. The Appellant says that his 29 July 2021 motion for additional evidence was filed in order, among other reasons, to make the UNDT aware that the United Nations Office of Legal Affairs had mistakenly reported the case to his home country’s authorities, causing, he said, serious damage to his reputation.

14. By an order made on 8 September 2021 (Order No. 140 (GBA/2021)), the UNDT confirmed its preliminary proposal to decide the case on the parties’ submissions without an oral hearing; requested the Secretary-General to clarify some specific issues; and recorded its decision to defer its decision on the admissibility of the additional documents that the Appellant had proffered as evidence.

15. In his written submissions, the Appellant contended that the misconduct alleged against him had never occurred and that the facts alleged against him had not been proven to the required “clear and convincing evidence” standard. He contended that his relationship with the Complainant was a purely platonic employer-employee relationship. Further, the Appellant contended that OIOS had not observed the presumption of his innocence during the investigation and disciplinary procedure. The Appellant contended that the investigators had

¹¹ *Ibid.*, para. 13.

obtained evidence illegally by relying on an audio recording made by the Complainant of a conversation between them without his consent and in breach of his privacy rights. The Appellant further contended that the evidence of witnesses proposed by him was not considered by the investigators. Finally, the Appellant submitted that the sanctions imposed on him were neither consistent nor proportionate and that there had been no consideration of mitigating factors in his favour. These were the essential issues posed by the Appellant in his case before the UNDT.

16. Amongst the Secretary-General's responses to the UNDT was the argument that the Organisation's documented case constituted clear and convincing evidence that the Appellant had sexually exploited the Complainant and other unidentified women at his duty station. In other respects, the Respondent also defended all other elements of the Administration's decision-making.

The UNDT's Substantive Judgment

17. As a preliminary direction and taking into account the sensitive nature of the facts and the allegation of sexual exploitation of a vulnerable person, the UNDT granted the Appellant's request for anonymity.

18. As an additional preliminary matter, the Dispute Tribunal noted that the Secretary-General did not pursue the point that the Appellant's challenge to the non-extension or non-renewal of his temporary appointment was not receivable.

19. Addressing the admissibility of documents, the Dispute Tribunal found that three psychological reports on the Appellant were admissible but that their probative value was dubious.

20. As to the admission of other evidence, the UNDT described these documents as evidencing the dismissal of potential criminal proceedings against the Appellant in both Guinea-Bissau and his home country which had been initiated by the Complainant's grievances but which the Complainant had not supported by giving evidence in those proceedings. In this instance, also, the UNDT found the documentary evidence to be admissible but not determinative of the Appellant's case. Its reasoning can be summed up in its words at paragraph 54 of its Judgment as follows:

In the case at hand, the fact that national jurisdictions did not pursue a case against the Applicant has no impact on the disciplinary procedure instituted against him under the Organization's internal law, as his behaviour can still be considered misconduct under the applicable internal legal framework.

21. As to the Appellant's challenge to the admissibility of an audio recording which had been made covertly on 2 January 2019 by the Complainant of a conversation between her and the Appellant, he had objected to its admission and use on the basis that he had not consented to the conversation having been recorded. The UNDT noted the absence of any specific rules or regulations governing the making or admissibility of recordings of such conversations. It concluded, at paragraph 70 of its Judgment, that the recording was both relevant to, and probative of, the issues in the case. In particular, the UNDT said that the audio recording confirmed the Appellant's impugned behaviour towards the Complainant and his efforts to persuade her to withdraw the charges she had made against him. The Dispute Tribunal emphasised that a full transcript of the recorded conversation had been made available by the OIOS investigators to the Appellant who had also been given an opportunity to listen to a full and complete recording of the conversation and to read a summary made of it. The full audio recording was provided to the Appellant as part of the materials comprising the Organisation's investigation and recommendations.

22. At paragraph 74 and following, the UNDT turned to the merits of the Appellant's case. It identified the key issues as being the grounds for the disciplinary sanction of separation from service with compensation in lieu of notice but without termination indemnity, and the imposition of a fine equivalent to one month's net-base salary. The Dispute Tribunal considered itself required to focus on what it described as its judicial review "... on how the decision-maker reached the impugned decision, and not on the merits of the decision".¹² It identified its task as being fourfold. First, it was required to consider whether the facts on which the disciplinary measure was based had been established according to the applicable standard. Second, whether the established facts amounted in law to misconduct under the Staff Regulations and Rules. Third, whether the disciplinary measure applied was proportionate to the breaches. And, finally, whether the Appellant's due process rights had been respected during the investigation and disciplinary process.

¹² We address the UNDT's role and methodology later in this Judgment.

23. Turning to the first of the foregoing tests, the UNDT held that in cases of disciplinary sanction resulting in separation from service, the alleged misconduct had to be established by clear and convincing evidence. It said its role was to “*critically assess the evidence, to review how it was collected and under which circumstances and to determine whether it rationally supports the allegations made against the [Appellant]*”.¹³ The Dispute Tribunal added, in this regard, that United Nations “*disciplinary proceedings are of an administrative nature and the Organisation has limited means to investigate because it does not have law-enforcement powers and bases its investigations on co-operation from staff members and other entities*”.¹⁴ It said, therefore, that “*the main legal principles that are applicable in a criminal law setting cannot be ‘automatically’ transposed to the internal legal framework*”, which was why, it said, the standard of proof applicable to misconduct in disciplinary proceedings resulting in termination of employment is not beyond reasonable doubt.¹⁵ These rationale were also said to justify “*the lower protective status of defence rights in comparison to national jurisdictions in criminal law proceedings*”.¹⁶

24. The UNDT described the investigation report on which it relied as containing an exhaustive description of the events that led to the proceedings against the Appellant and being well-supported by documents, interview transcripts with several witnesses, photographs and phone messages demonstrating an intimate relationship between the Appellant and the Complainant.

25. At paragraph 88 of its Judgment, the UNDT determined: “In disciplinary cases and when dismissal is at stake, it is for the Organization, on the one hand, to collect clear and convincing evidence of the facts that it believes to constitute misconduct. On the other hand, it is incumbent on the implicated staff member to adduce evidence rebutting the facts held against him or her.”

¹³ Emphasis added.

¹⁴ Emphasis added. While accepting that the United Nations cannot compel interviewees to speak to it or to give evidence, that is no different to the situation of many employers in many jurisdictions. The length and comprehensiveness of the OIOS’s investigation and report in this and other cases indicates that the United Nations is well-resourced and does its investigative and decision-making work to a high standard comparable to many investigations of criminal offences. We agree, nevertheless, that such processes are based on administrative and civil but not criminal procedures.

¹⁵ Emphasis added.

¹⁶ Emphasis added.

26. The Dispute Tribunal concluded that the investigation report's transcripts of interviews held with the Complainant coincided with her statement made to the National Judiciary Police of Guinea-Bissau. Further, the audio recording of the conversation between the Appellant and the Complainant was held by the UNDT to indicate that they had an intimate relationship of a sexual nature, and that the Appellant was "extremely concerned" about the complaint that had been made against him which might cost him his job and affect other people's employment as well. In addition, the UNDT held that the audio recording showed that the Appellant offered money to the Complainant in exchange for withdrawal of her charges against him.

27. The UNDT considered the importance of the OIOS investigation report setting out the content of an interview with the Complainant's mother. Despite the fact that her mother was not present when the relevant events of 29/30 December 2018 took place, the Dispute Tribunal concluded that the mother's evidence confirmed her complainant daughter's account of those events and, thereby, rendered the Complainant's version more credible. It was, in the UNDT's opinion, corroborative of the Complainant's evidence.

28. In addition, the Complainant's mother confirmed that the Appellant had met the Complainant's family, asked their permission to take the Complainant to where he was stationed in Guinea-Bissau and had offered the family a solar panel. This was said to have demonstrated that the Appellant had provided considerable help to the Complainant's family. Finally, in relation to the mother's account, she told the investigators of having been aware that her daughter and the Appellant were living together "as man and woman" which the UNDT took to mean that the Appellant and the Complainant had entered into an intimate relationship of a sexual nature.

29. In these circumstances, it was significant to the Dispute Tribunal that the Complainant's mother spoke of her daughter's frequent calls to complain about the way the Appellant was mistreating her daughter including being told that the Appellant had put the daughter's belongings outside his house. This evidence was seen to have been consistent with photographs taken by the Guinea-Bissau Judiciary Police of the Complainant's belongings in and around the Appellant's home. This was said to have been consistent also with a set of telephone messages and pictures showing the Complainant and the Appellant together on many social occasions. This, together with the nature and content of their SMS and WhatsApp exchanges, clearly showed to the UNDT that the Appellant and the Complainant had an

intimate relationship going well beyond a commercial or employment relationship as he had claimed.

30. The UNDT also relied on the account of significant events, at the Appellant's residence, of an independent shopkeeper and resident adjacent to the Appellant's house, Mr. S., who, although he refused to "formally testify",¹⁷ agreed to talk informally to investigators about what had happened on the evening of 28/29 December 2018. Mr. S. said he had observed the arrival at the Appellant's gate of several females (whether women or girls is less than clear) who were requesting money and who later entered the property where there was a confrontation between them and the Complainant. The UNDT concluded that the shopkeeper's account matched precisely the Complainant's account in the sense that on that evening, three "girls" were screaming and laughing outside the Appellant's house and that the Complainant had protested about this. According to the shopkeeper Mr. S., when the Complainant voiced her protest, the Appellant "insulted her and threw her and her personal belongings outside of his house". The UNDT found, contrary to the Appellant's assertion, that there had been no influence by the Complainant on the shopkeeper who, it said, had no previous knowledge of the Complainant's statements to the investigators.¹⁸

31. The UNDT also took account of the evidence of another witness (Ms. M.C.). This person described meeting the Complainant who was "very disturbed the evening of the events and alluded to a conflict with her boss who had 'thrown her out of his house'".

32. The foregoing evidence persuaded the UNDT to find the Appellant's version of events provided to OIOS investigators to be less credible than the version of the Complainant and other witnesses. We conclude that although the UNDT was impressed by the Complainant's consistency in several accounts she gave of these events which, for it, contributed to her credibility, it also relied on several other pieces of evidence which it considered reinforced or corroborated the Complainant's account. Taken together, the UNDT found clear and convincing evidence of the allegations and complaints against the Appellant.

¹⁷ We assume this to mean that Ms. S. refused to participate in the formalities of an OIOS interview, such as taking an oath or providing an affirmation as to the truthfulness of the testimony, accepting to be recorded etc.

¹⁸ There are, in fact, some inconsistencies with the Complainant's account of this event. These include that the confrontation with the Complainant occurred inside the residence, that her possessions were not "thrown out" at that time but rather appeared outside the house on the following day, having been moved there (the photographs tend to indicate that they were not "thrown").

33. The UNDT was also influenced by what it said were two logical inconsistencies. The first was between the Appellant's insistent requests of the Complainant to drop the charges against him in return for money. The second was to involve members of a church who were acquainted with both parties to persuade her to withdraw her complaint. Both of these were held by the UNDT to be inconsistent with his claims that their relationship was only platonic and work-related. The UNDT was impressed by the fact that despite the pressure placed upon her by a number of people, the Complainant maintained a consistent narrative and refused to accept money to withdraw her complaint.

34. On the other hand, the UNDT concluded that the Appellant's nominated witnesses who were interviewed were unreliable because they all knew him either as a friend or as his employees including as security guards at his home. The Dispute Tribunal said that these witnesses provided incomplete narratives omitting details which it said could also have involved them in the impugned or similar events. It relied on a statement by the Complainant alleging that all three of the Appellant's witnesses "were usually involved in transactional sex with local woman". This allegation was not corroborated or even elaborated on by the Complainant and does not appear to have been investigated further.

35. Without more, the UNDT simply noted that "after a thorough analysis of the case file and the available evidence, the Tribunal finds that there is clear and convincing evidence establishing the facts on which the disciplinary measure was based".

36. Turning to the second charge against the Appellant (that he transported the Complainant in a United Nations vehicle several times and provided his driver's licence to a former colleague to use the vehicle), the Dispute Tribunal relied on documentary evidence presented by the investigators, the authenticity of which was not challenged by the Appellant. These documents or records were the log reports of the vehicle in question and OIOS e-mail exchanges with the Organisation's transport section.

37. Having accepted the Secretary-General's and the Complainant's account of the relevant events to a clear and convincing evidential standard, the UNDT concluded that these established facts amounted to misconduct under the Staff Regulations and Rules.

38. In particular, the Tribunal concluded that the established actions of the Appellant constituted sexual exploitation of the Complainant and of other Guinea-Bissau females. It held that it was irrelevant whether the intimate sexual relations were consensual because “the underlying rationale of the [United Nations] policy is to prevent staff members and officials to make use of their professional status to engage in these sorts of exchanges with local populations the [United Nations] assists”.

39. In addition to the Appellant’s behaviour having been in violation of a number of staff regulations and rules and administrative issuances addressing sexual exploitation, the UNDT held that his actions were also contrary to the Standard Operating Procedures governing the use of official vehicles. His behaviour demonstrated a lack of moral judgement and a disrespectful attitude towards the Complainant which was incompatible with the standard of conduct expected of United Nations staff members.

40. Turning to whether the disciplinary measures were proportionate to the breaches, the Dispute Tribunal affirmed the broad discretion left to the Secretary-General to apply sanctions for misconduct, in adherence to the principle of proportionality, and that it would only be in cases of “obvious absurdity or flagrant arbitrariness” that the Dispute Tribunal would interfere with the Respondent’s assessment of this test. The UNDT recalled that the Appellant had not been dismissed but rather his temporary contract had not been extended or renewed beyond its expiry date of 31 October 2019 “due to the gravity of the charges held against him”. At paragraph 114 of its Judgment, it concluded: “Indeed, in the Tribunal’s view, the seriousness of the Applicant’s behaviour, his interferences with the ongoing investigation and his lack of judgement, render the sanction proportional to the gravity of the offence”.

41. Addressing finally the question whether the Appellant’s due process rights were respected during the investigation and disciplinary process, the UNDT concluded that these only came to be considered “once a disciplinary proceeding is initiated” and “only limited due process rights apply” at the preliminary investigation stage on admissibility and information receipt issues. The Dispute Tribunal also recalled that an investigator has a margin of discretion, based on a critical assessment of the evidence produced, in deciding what is or is not relevant for the purpose of the investigation.

42. The Dispute Tribunal stated that it had “carefully scrutinised the OIOS investigation report as well as the evidence collected by the OIOS investigators and [was] satisfied that they [complied] with the requirements of the internal legal framework”. The Appellant’s allegations of bias or other wrongdoing failed.

43. The UNDT noted that there being no error on the part of the Secretary-General in reaching the decisions he did, it was not appropriate for the UNDT to consider the remedies claimed by the Appellant. It dismissed all of the Appellant’s claims.

Submissions

Appellant’s Appeal

44. We address the points in support of the appeal in the order in which they are made in submissions rather than as issues in logical forensic sequence. As will be noted subsequently, we have refined and categorised these points on appeal as well as considering some issues that emerge from them.

45. The Appellant requests the Appeals Tribunal to reverse the impugned Judgment and order the United Nations Office of Legal Affairs to rectify the information it had provided to his home country’s government.

46. The Appellant complains that the UNDT failed to consider the psychological tests provided as evidence of harm caused to him, we assume, from the sanctions imposed on him.

47. Turning to due process issues, the Appellant’s appeal focuses significantly, however, on audio recordings, their accuracy, transcription, use, and their disclosure to him. The Appellant wishes to clarify that the audio recording of the 24 January 2019 OIOS interview with him and its written summary were only disclosed to him on 18 June 2019.

48. The Appellant submits that the UNDT failed to determine that the audio recording of the 24 January 2019 OIOS interview and its transcript had not been presented to him during that interview (or, we assume and more logically, immediately thereafter). At the interview, he says, he was coerced into continuing to answer the investigators’ questions. That audio recording and the transcript of the 24 January 2019 OIOS interview should therefore have been excluded from the evidence considered by the UNDT.

49. As regards the audio recording of his 2 January 2019 conversation with the Complainant, the Appellant maintains that its transcript omitted, maliciously, parts of that recording. He says that he was entrapped by the investigators into having this recorded conversation with the Complainant after she had made her complaints. The veracity and authenticity of its transcript was not forensically tested. The Organisation should have translated and transcribed the recordings and interviews by certified means, instead of by OIOS investigators: that the OIOS investigator's first language was Portuguese which was the language of the conversation, was insufficient reason for doing so.

50. The Appellant argues that the UNDT reached the wrong conclusion from the audio recording and the transcript of his 2 January 2019 conversation with the Complainant. He says that there was no effort by him to have the Complainant withdraw the charges nor did it confirm any intimate relationship of a sexual nature with the Complainant. Accounts of events given by the Appellant, United Nations staff members, former United Nations Police officers and security guards were consistent, whereas the Complainant's testimony was not. The UNDT failed to consider and determine the arbitrariness of the actions of OIOS and USG/DMSPC against him.

51. The Appellant submits that some Notes to File were not duly collected and were not certified with the identification of witnesses; some were not signed; and some were recordings of "mere telephone interviews", "i.e. hearsay and rumours". It is unclear why OIOS did not conduct interviews, using an official UNIOGBIS interpreter, except those with the Complainant's mother and a witness Ms. M.C. The UNDT failed to appreciate that the interpreter at the preliminary interviews, Mr. F.I., a Local Security Assistant of the UNIOGBIS, who also gathered additional information for OIOS, had tried to change the testimony witness Mr. D.V.

52. The Appellant claims that, contrary to the UNDT's conclusion, the Complainant had met with Mr. S. (the neighbouring shopkeeper) on 30 December 2018 and therefore he had information from the Complainant about the events he claimed to have witnessed. The UNDT failed to properly assess the evidence showing that the Appellant had never insulted the Complainant and had not thrown her or her belongings out that night.

53. The Appellant points out that, contrary to the UNDT's assertion, witnesses K. and V. were not indicated for interview by Appellant but were summoned by OIOS. The investigators did not interview or register witnesses whose names had been provided by the Appellant. The UNDT failed to make any findings on the series of WhatsApp text messages and audio recordings, provided by the Appellant, which had not been considered by the investigators. This is clear evidence of bias against him.

54. The Appellant argues that the UNDT did not conduct a coherent fact-finding exercise. The UNDT erred in findings of fact regarding the Complainant's statement before the Judiciary Police of Guinea-Bissau. The UNDT also failed to determine the irregularity in the OIOS investigation report regarding a WhatsApp profile, provided by the Complainant, of a person called by the Appellant's first or given name but apparently of an African woman, i.e. deception on the part of the Complainant.

55. The Appellant maintains that the UNDT failed to consider that the Appellant was not made aware of, or interviewed in relation to, several supporting documents contained in the investigation report, prior to their inclusion among the investigators' conclusions. Neglecting to consider the Appellant's request for additional testimonial evidence, the Administration and the UNDT failed to respect his right to proffer a defence.

56. The Appellant submits that OIOS, the Administration and the UNDT ignored the Complainant's threats against him, that just as he had ended her employment, she would likewise end his.

57. As to the second charge of using a United Nations vehicle to transport the Complainant, the Appellant accepted responsibility, but nonetheless claims that the Complainant was transported for the reason of providing support to her and not for nefarious reasons.

58. The Appellant submits that the impugned Judgment failed to recognise that the Administration's decision was based on an irregular investigation report, and that OIOS based its actions only on the Complainant's testimony.

59. The Appellant argues that he had never demonstrated a lack of moral judgment, had always been highlighted as an exemplary staff member and respectful of internal regulations, and had no history of disciplinary or judicial investigations. The disciplinary measures imposed for the first charge were not proportionate, considering UNAT jurisprudence. The

Appellant's employment contract was not renewed due to the then incomplete disciplinary process, which was a violation of his right to work.

The Secretary-General's Answer

60. The Secretary-General requests that the Appeals Tribunal dismiss the appeal, or, in the alternative, remand the case to the UNDT for additional evidence.

61. The Respondent argues that the facts on which the sanction was based, were established by clear and convincing evidence. The Appellant's conduct showed a lack of respect for the obligations under Staff Regulations 1.2(a) and (f) and was a violation of the prohibitions set out in Staff Rule 1.2(e) and the Secretary-General's Bulletin ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse). The sanction was not the most severe available, which would have been dismissal.

62. The Respondent submits that the UNDT, in determining that the psychological reports had no probative value, referred to its assessment of whether the sanction was lawful, not whether the psychological reports could establish harm incurred by the sanction imposed.

63. The Respondent observes that the UNDT took into account that, during the 24 January 2019 interview with OIOS, the Appellant was given an opportunity to submit comments on the key portions of the audio recording of his 2 January 2019 conversation with the Complainant. Further, the full audio recording was provided to him in the memorandum dated 18 June 2019. The Appellant's clarifications during the OIOS interview did not materially differ from the transcript of the 2 January 2019 conversation.

64. The Respondent maintains that OIOS has operational independence and an obligation to carry out its investigation impartially. No evidence was presented to show that the OIOS investigator inaccurately translated or summarised the content of the audio recording of the 2 January 2019 conversation. The Appellant, himself a Portuguese speaker, did not identify any inaccuracies.

65. The Respondent points out that all witness interviews included in the OIOS report contain an averment of truth by the witnesses. There is no legal requirement for a further authentication of the witness interviews such as the witnesses' signatures, signed Notes to File, or the investigators' signatures.

66. The Respondent argues that the UNDT took into consideration all the evidence adduced by the Appellant. The evidence that he proposed that OIOS collect was either not relevant or could not be obtained, as the proposed individuals had no personal knowledge of the relationship in question, were unreachable, or did not want to be interviewed. In addition, the Appellant did not attempt to call, or proposed that the UNDT should itself call, any of these witnesses before the UNDT or explain how this evidence would have affected the case to his advantage.

67. As to the relief sought by the Appellant, the Respondent submits that interactions between the United Nations and national authorities are governed exclusively by the Secretary-General's obligations under General Assembly resolutions, including 62/63 on the Criminal Accountability of United Nations Officials and Experts on Mission, and the Convention on the Privileges and Immunities of the United Nations. These do not fall within staff members' terms of employment.

Considerations

68. There is no question that if the Appellant committed the acts which were alleged in the charges against him and established by the UNDT, his acts collectively constituted serious misconduct and warranted sanction. Despite the Appellant's submissions to the contrary, there is really no question that terminating the Appellant's employment was an appropriate sanction for such serious misconduct if it was found to have been committed by him. The essential questions on this appeal are therefore, first, whether in light of his denials, the allegations against him were established to the relevant standard of evidential probability (clear and convincing evidence); second, if so, whether the Appellant's employment was properly brought to an end as a consequence; and, third, whether the Appellant's due process rights were respected or breached.

69. In seeking to overturn in its entirety the UNDT's Judgment, the Appellant faces an obstacle for which he must be held responsible in significant part. He agreed at an early stage and never changed his approach to his case, that the UNDT should hear no direct evidence from witnesses in person but should decide the issues before it (including his denial of many of the important factual allegations against him) on the documents submitted. The Respondent, who bore the onus of proof of these allegations to a high standard, might also be said to have committed the same fundamental error, although as the UNDT rejected the application, the Organisation

was not caught by this same approach. Even in light of his denials of important factual allegations against him, the Appellant did not seek to have an oral hearing before the UNDT or insist on proof of the allegations by oral evidence from relevant witnesses, including himself. In accepting this, the UNDT was thereby denied the opportunity to determine disputed significant facts by its assessment of the credibility of witnesses, including by Tribunal questioning and cross-examination.

70. Given the manner in which the Appellant, in particular, elected to present his case before the UNDT (solely on the documentation consisting of the investigation report of OIOS and the Respondent's reasoned decision, together with written submissions thereon), it had no alternative but to decide the issues accordingly. This included whether the UNDT was satisfied, to a clear and convincing evidential standard, that the allegations against the Appellant had been established: if so, whether these constituted breaches of the relevant rules or regulations governing his conduct; if so, whether the sanction applied was proportionate to the seriousness of his offence; and, finally, whether the Appellant had been afforded his relevant due process rights.¹⁹

71. In connection with the issue of how the UNDT managed the case, it is appropriate that we consider its nature and role. We address first the UNDT's nature. We note that as an inquisitorial and not a solely adversarial tribunal, the UNDT was not required to adopt the joint proposal of the parties as to how the case would be conducted. Even faced with a mutually-agreed approach, the UNDT needed to consider carefully whether the absence of a hearing was just and expeditious. If, however, it had concluded, especially in view of the Appellant's denials of any impropriety and of a sexual relationship with the Complainant, that it needed to see and hear evidence from witnesses to determine the relevant facts in dispute, it could have held a hearing. In the circumstances where the Organisation has to establish to the UNDT a clear and convincing case, it generally seems difficult to justify consideration of the case solely on written submissions and documentary evidence, in essence a solely desktop review. However, that is what happened in the present case.

72. This analysis encompasses a broader legal consideration of the role of the UNDT in the system of internal justice in the United Nations in cases where serious misconduct is alleged, denied and termination of employment may be the outcome.

¹⁹ See *Maguy Bamba v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1259, para. 37.

73. The UNDT appears to have been ambivalent about its role in deciding this case in these particular circumstances. In paragraphs 74 and following of its Judgment, the UNDT appears to conclude that its role was to “judicially review” the decision made by the Administration rather than to consider an appeal against the decision as its Statute provides for and requires. Accordingly, the UNDT said initially that it would focus on how the Respondent’s decision was made but not on the merits of the decision.

74. Then, at paragraph 78 of its Judgment, it proceeds to set out the steps of its task which include consideration of the merits of the case (i.e., whether, on the facts, the applicable legal standard of clear and convincing evidence was met).

75. At paragraph 80 of its Judgment, the UNDT appears to then continue to approach the case as an appeal on the merits rather than a judicial review. At paragraphs 76 and 80 of its Judgment, the UNDT noted that a “judicial review is focused on how the decision-maker reached the impugned decision, and not on the merits of the decision”; “it is the role of the first instance Judge to critically assess the evidence, to review how it was collected and under which circumstances and to determine whether it rationally supports the allegations made against an Applicant”.

76. At paragraph 78 of its Judgment, it wrote that “the issues to be examined in the case at hand are: a. Whether the facts on which the disciplinary measure was based have been established according to the applicable standard; b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules; c. Whether the disciplinary measure applied is proportionate to the offence, and d. Whether the Applicant’s due process rights were respected during the investigation and the disciplinary process”.

77. We agree that as part of the appeal before it, the UNDT will consider the merits of the case.²⁰ Reinforcing the need for the UNDT to consider the appeal, including on the merits, the UNDT mentions that the Organisation’s investigatory powers are more limited than that of law enforcement. If that is so, despite the comprehensiveness of the investigations that OIOS appears to make in such cases, it is critical that there be at least one independent, objective and

²⁰ See *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40 and 42.

judicial consideration of the merits of a position, particularly where it may end the Appellant's career with the United Nations.

78. At paragraph 84 of its Judgment, following a thorough analysis of the evidence and the case file before it, the UNDT concluded that it had clear and convincing evidence establishing the facts on which the Organisation had based its sanction of the Appellant.

79. At paragraph 88 of its Judgment, the UNDT said that in such cases, it was for the Organisation to collect clear and convincing evidence of facts constituting misconduct and for the staff member to adduce rebuttal evidence.

80. This is one of a number of cases now or recently dealt with by this Appeals Tribunal in which the Dispute Tribunal's role and scope of its task is examined and clarified.

81. There is no question that the Secretary-General as the employer, is authorized statutorily to impose lawful disciplinary measures on errant and non-compliant staff members. To do so, the Secretary-General must undertake a proper, lawful and fair investigative and decision-making process to determine whether there is sufficient factual basis on which to take such disciplinary measures. The Secretary-General accepts, as formulated by the Tribunals in past cases, that where a staff member's continued employment is at risk because of the seriousness of the alleged misconduct, establishment by proof of those allegations must be to a "clear and convincing" standard.²¹ As we understand it, none of the foregoing is controversial. Arising from submissions made by the Secretary-General in numerous recent cases, however, is the question of the role of the UNDT *vis-à-vis* the Secretary-General in matters where disciplinary decisions are challenged by affected staff members.

82. The starting point for consideration of this question is the relevant statutory provisions. The UNDT Statute refers to such cases as "appeals". There is no statutory reference in this regard to "judicial review", or the phrase combining those words. Thus, the UNDT is bound to consider such a challenge to the Secretary-General's decision as an appeal against it. Any regulations promulgated by the Secretary-General (for example, Staff Regulations and Rules,

²¹ This is a judicially developed principle. It appears nowhere in the UNDT Statute nor is there direction as to the standards of proof. It is generally accepted that this standard falls somewhere between the evidential standards of "balance of probabilities" or "preponderance of the evidence" on the one hand, and "beyond reasonable doubt" on the other. It is a standard requiring both clarity or unequivocality ("clear"), and a high level of confidence or certainty ("convincing").

or administrative issuances) or by the Tribunals (Rules of Procedure, Practice Directions) relating to these matters must conform to the Statute. They cannot contradict, be at variance with, or modify it.

83. It is inherent in the nature of an appeal in law that the decision-maker's decision, if challenged on appeal, must be subject to a subsequent judicial process by an independent and neutral tribunal or court consisting of professional and qualified judges. This is not a unique or novel civil justice regime: such employment issues in both the public (governmental) and private sectors are dealt with by such processes in most national jurisdictions around the world.

84. We do not mean to say that it is for the UNDT alone to establish serious misconduct and that this responsibility is thereby removed from the Secretary-General. To the contrary, the Secretary-General must investigate and establish the alleged misconduct as well as determine the appropriate sanction or discipline, where warranted. But the United Nations internal justice system also provides thereafter for the right to appeal to a neutral expert judicial body.

85. While the General Assembly as lawmaker has left it to the judicial bodies to fill in the details of how they undertake their tasks, those judicially determined procedures and rules must conform to their statutes. A challenge to the lawfulness of the dismissal of a staff member is not only an "appeal" against the decision but is the first opportunity that a staff member has of their appeal being heard and considered by a neutral judicial body which is, and is seen to be, independent of the Administration. The Tribunals exist and operate differently, but in an overall complementary way, to the mechanisms for investigating and deciding disciplinary matters (including the internal oversight and investigation bodies, the decision-making managers of the United Nations and the management reviewers or evaluators). The latter are not and cannot be seen to be either judicial or independent of the Secretary-General.

86. While, for example, reports prepared by the internal oversight and investigation bodies and the reasoned decisions of senior managers can constitute admissible and relevant evidence for consideration by the UNDT, its task is not to decide whether those bodies and managers reached their conclusions correctly and lawfully. In cases of potential loss of a staff member's employment, the UNDT's task is to decide, on the evidence before it and to the clear and convincing evidence standard, both that due process protections have been applied and that

the Secretary-General's decision on the merits of the particular case is correct in law. If, for example, the UNDT concludes that an administrative decision of the Secretary-General is non-compliant with the terms or contract of employment of a staff member, or that a staff member has been unlawfully subjected to a disciplinary sanction, the UNDT may grant certain remedies in accordance with its Statute. Even then, however, there are boundaries that the Tribunals will not cross. These include not substituting its decision for that of the Secretary-General in making an appointment to a role where the latter is best placed to make that decision. There are other well-established areas of similar deference to the Secretary-General who is afforded an appropriate margin of latitude commensurate with his institutional expertise and knowledge of the functioning of the United Nations in practice. If it is not persuaded to set aside the Secretary-General's administrative decisions on an appeal to it, the UNDT will not intervene, and the decision-making remains solely with the designated administrative official.

87. Where allegations are denied and the credibility of disputed accounts is in issue, the UNDT should generally hear from witnesses in person and allow them to be questioned appropriately to best ascertain the veracity of their evidence. This is the staff member's first, and last occasion, to have his or her case heard and decided on its merits by a neutral first instance body which gives its decision with reasons of fact and law (to use the language of Article 2(10) of the UNAT Statute, although relating to cases on appeal from neutral first instance processes other than the UNDT).

88. While not underestimating the logistical challenges of conducting an in-person hearing, given the widely dispersed locations and personnel of the United Nations and the reluctance of some people to be witnesses at formal court hearings, this is not an uncommon situation in many national jurisdictions and contemplated by the Statute and the Practice Directions of the UNDT. The UNDT does conduct in-person hearings in cases such as this and has the ability and power to allow reluctant witnesses to provide their evidence, for example by video link with the UNDT. Judicial tribunals can benefit considerably from the physical (or even virtual) presence of significant people in a case, and the importance to a staff member of having his or her proverbial 'day in court' should not lightly be compromised or abolished.

89. Turning more briefly to the UNAT's role, this is engaged after such a decision-making process in the UNDT. The UNAT's powers of decision-making are limited to where it concludes that the UNDT has exceeded its jurisdiction or competence; where the UNDT has failed to

exercise a jurisdiction vested in it; where it has erred in a question of law; where the UNDT has committed a procedural error affecting its decision; or where the UNDT has erred in fact, resulting in a manifestly unreasonable decision.²²

90. To summarise, the UNDT, following its Statute, considers and decides appeals against the Secretary-General's administrative decisions affecting staff members. It does so by a system of civil, not criminal, justice that has been fashioned deliberately by the General Assembly to recognise both the universality of the procedural rights of employees to neutral and fair consideration and determination of their employment rights²³, and the unique nature of the international work undertaken by the United Nations.

91. We return to the particular case at hand. The disputed facts were several and needed to be isolated in order to be decided individually. Of what did the UNDT have to accept clear and convincing evidence, constituting prohibited conduct? This is dictated by the allegations made against the Appellant which, if accepted by the UNDT, confirmed the grounds for the sanctions imposed by the Respondent. The contested allegations against the Appellant that were before the UNDT, included:

(a) He had engaged in a consensual sexual relationship with the Complainant between 2016 and 2018. Although the allegation originally was that their sexual relations were at times non-consensual and forced (in effect rape or other sexual violation of the Complainant by the Appellant), the Administration did not find this established so that this particular aggravation of the sexual charges was not for consideration by the UNDT.

(b) This sexual relationship was transactional, that is it was a commercial or mercantile relationship in which sexual favours were exchanged for money, goods, services or other benefits received by the Complainant.

²² See Article 2(1) of the UNAT Statute.

²³ See Article 10 of the United Nations Universal Declaration of Human Rights which reads as follows: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations (...)" ; and Article 14(1) of the International Covenant on Civil and Political Rights which states as follows: "All persons shall be equal before the courts and tribunals. In the determination (...) of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (...)".

(c) On the night of 29/30 December 2018 and at other times, the Appellant attempted to engage in transactional sexual acts (as defined above) with several local unidentified females.

(d) On the night of 29 /30 December 2018, the Appellant assaulted the Complainant.

(e) On the same occasion, the Appellant treated the Complainant with contempt by removing her possessions from, and putting them outside, his residence.

(f) The Appellant interfered (either directly or through intermediary third parties) with the Respondent's investigation of the foregoing allegations by negotiating with the Complainant to persuade her to withdraw her allegations.

(g) The Appellant breached the Organisation's standard operating procedures for UNIOGBI's vehicles by providing his driver's license to a former colleague, enabling the latter, who was not authorised to drive such vehicles, to do so.

(h) The Appellant breached those standard operating procedures for vehicles by transporting the Complainant in a United Nations vehicle.

92. In view of the Appellant's denial of all of these charges and of the information constituting them, it was incumbent on the UNDT to make findings, to the clear and convincing evidential standard, on the foregoing alleged acts of serious misconduct of the Appellant. It was also incumbent on the UNDT to express those findings in its Judgment, both as to facts and law, in a manner which clearly indicated why it had reached the conclusions it did.

93. The Administration had also been bound to make this assessment for itself. It could not simply rely on the OIOS investigation's conclusions that were presented to it. The Administration had to reach its own conclusions and, when challenged by the Appellant's appeal to the UNDT, to justify its decision to the UNDT by demonstrating its correctness. In light of the parties' agreement, and the UNDT's acceptance of that joint decision not to present witnesses before the UNDT, the OIOS report (including relevant exhibits and documents) and the Respondent's reasoned written decision were, along with the parties' written submissions, very important pieces of evidence before it.

94. The same objectivity of enquiry and decision-making as applied to the Administration, applied also to the UNDT. It had to consider the Respondent's decision-making not only as to what occurred but also the lawfulness of the sanctions imposed by the Administration. As we have already noted above, the OIOS's investigation's factual findings were important evidentially for both the Administration and the UNDT.

95. The OIOS's conclusions in its report were, however, required to meet a significantly lower standard of proof than the Administration was required to apply in its decision-making role. As the OIOS report concluded at its paragraph 96, it was required to consider and advise whether what it had established factually constituted "reasonable grounds to conclude" that the Appellant had failed to observe expected standards of conduct. That is a relatively low evidentiary standard for referral of a case to the Administration, and certainly significantly lower than the "clear and convincing" standard required of the Administration to impose the sanction of separation upon the staff member, and for the UNDT to uphold the Administration's decision.²⁴

96. As already noted, the UNDT also was required to examine whether the Administration had correctly applied the more stringent standard of proof to the same allegations, i.e. the clear and convincing evidence test. The OIOS's role was supportive of, and advisory to, the Administration in the sense that it assembled a case for presentation to the Administration and recommendations as to what the Administration might consider as an appropriate outcome. It was for the Administration then to decide, independently of OIOS but in reliance on the material submitted by OIOS, whether those allegations had been established by clear and convincing evidence. On the Appellant's appeal to the UNDT, contesting the OIOS's and the Administration's findings, conclusions and recommendations, the UNDT was required to apply the same standard of proof (clear and convincing) to its examination of the Administration's decision.

²⁴ Although it is not always helpful to try to redefine such tests, it is suggested that it may in other words be similar to a "good cause to suspect" or a "*prima facie* evidence" standard.

97. To evaluate the Appellant's allegations that the UNDT erred in fact and in law, we have examined each of the issues identified by the Appellant on appeal. Considering whether the UNDT erred either in fact or in law in its decisions about each, we conclude (using the same lettering references as above) as follows.²⁵

(a) Applying the evidential test stated, the UNDT was entitled to conclude on the Complainant's evidence alone that the Appellant had engaged in a sexual relationship with her. Even ignoring the hearsay evidence from the Complainant's mother (which was in part of dubious probative value), there was direct and some other proper inferential evidence of this sexual relationship, including in particular the audio recording the admissibility of which the Appellant challenged, but not the veracity of its content. This recorded conversation with the Complainant also tends to confirm that the sexual nature of that relationship was employment-related and thereby transactional. While the photographs of the Appellant and the Complainant at social events may perhaps be consistent with a platonic relationship, in combination with the recorded conversation and other evidence, they tend to corroborate the Complainant's account of their relationship. Further, the UNDT assessed the Appellant's denials of that aspect of their relationship as being unconvincing. We need to emphasise, however, that the existence of a sexual relationship alone did not necessarily lead thereby also to the proof of the allegations about the particular features of that relationship, i.e. whether sex was transactional and whether it was exploitative of the Complainant. The Appellant denied these elements too. Simply because the Appellant was not believed about one aspect of their relationship does not necessarily mean that he lied or was unreliable about other elements of it.

(b) From the material before it, it was open to the UNDT to have found the Complainant completely credible and to have rejected the Appellant's denials completely. It was open to have done so, as it did, to the clear and convincing level despite the absence of some of what the UNDT had categorised as corroboration but which we conclude was not persuasive.

²⁵ See para. 91 for the lettering of the allegations.

(c) The UNDT was entitled to conclude that this was an exploitative sexual relationship, one in which the parties had very significantly different degrees of power and vulnerability, which imbalance the Appellant deployed to his advantage. This is a matter of fact and inference from contextual circumstances, the latter of which were several and not disputed. The Complainant was a member of a poor family whom she supported financially from her limited income as well as being a student in another city. As a United Nations staff member, the Appellant was in a relatively advantaged situation financially as compared to the Complainant and to many citizens of Guinea-Bissau. He held a privileged position with the United Nations mission, had access to good accommodation and motor vehicles and was well-protected in his temporary role there. He earned 'good money' when compared to many locals which enabled him to pay for the Complainant to be educated, to be paid as his housekeeper and to make payments to support the Complainant's family as well, we assume, to have continued to support his family in his home country. To pursue higher education and to support her family financially, the Complainant had little choice in reality but to both continue to be the Appellant's housekeeper and, when he wished and dictated, his sexual partner. The UNDT was entitled to decide that their sexual relationship was an exploitative and abusive relationship between a United Nations employee and a local citizen beneficiary of his presence in Guinea-Bissau. As well as being exploitative as we have just described, there was clear and convincing evidence that this constituted a transactional sexual relationship between the Appellant and the Complainant. There is, of course, no dispute that one form of relationship between the Appellant and the Complainant was transactional; she was his housekeeper, but this was neither a prohibited relationship nor a relationship upon which the Respondent relied, except to provide context for what the Respondent alleged was a transactional sexual relationship. On the Complainant's own reliable evidence, at times she was paid (including sometimes for her housekeeping) after having had sexual relations with the Appellant at his bidding. That enabled the UNDT to infer reliably that she was paid not only for housekeeping but also for sexual favours when he wished for or demanded them. The UNDT was entitled to conclude on the evidence that this was, contrary to the way the Appellant had at times sought to portray, neither a purely employment relationship (housekeeper/house occupier) nor a purely romantic one (boyfriend/girlfriend/lovers), or even a combination of these two relationships.

(d) The UNDT was entitled to conclude from the evidence and to the appropriate high standard of probability, that the Appellant had been intending to engage in transactional sexual relations with several young local women on the specified December night, although there was no finding by the UNDT of sufficient certainty or even any evidence that these young women were minors (“girls”) or that the Appellant did indeed engage in transactional sexual relations with them on that occasion. Nevertheless, the reported conversations between the Appellant and these females, irrespective of whether they were girls or young adult women, were of a transactional sexual nature. The UNDT was entitled to conclude to the clear and convincing evidence standard on the Complainant’s account of these conversations that he attempted to engage in transactional sex with them.

(e) The most serious conclusion that the UNDT may reasonably have drawn from the evidence before it and about an assault, was that there was an argument between the Appellant and the Complainant, in the course of which the Appellant assaulted her but without causing serious injury. In that sense, it was established that the Appellant assaulted the Complainant but the degree of seriousness of this breach would not alone have warranted the sanctions that were imposed.

(f) Although there was evidence that, in her absence from his house later that night or on the following day, the Complainant’s possessions were put outside it (within the gated compound in which the Appellant lived, we assume from the photographs and other evidence), the UNDT made no findings about this and, significantly, did not reach conclusions of law as to how doing so constituted misconduct. While somewhat extreme and, for the Complainant, an upsetting way to end an employment and personal relationship, it is not arguable that this alone could reasonably have constituted serious misconduct. This leaves open the question whether the allegation of insulting or demeaning conduct could, on the evidence to the required high standard, reasonably have been established. More importantly, however, this allegation alone would similarly not have warranted the sanctions taken by the Administration.

(g) The UNDT was entitled to conclude to the appropriate standard that the Appellant had attempted to improperly influence the Complainant not to continue with her complaint, including by what amounted to bribery, that is to abandon or alter a true complaint in return for the payment to her of money. This was a serious breach of

expected standards of conduct which had to be, and was, proven to the high standard of clear and convincing evidence.

(h) As to the allegation of instances of misuse of vehicle operating procedures by the Appellant, he admitted them. They, too, would probably not alone have warranted the sanctions imposed on him, as a matter of proportionality.

98. Despite these insufficient findings of some individual instances of alleged serious misconduct to the clear and convincing standard, and the erroneous use of evidence as dubious corroboration, such was the seriousness of those charges that were established to that standard that the Respondent correctly sanctioned the Appellant as it did. The Appellant engaged in transactional sexual relations with the Complainant, attempted to do so with other local women, and attempted to pervert the course of the OIOS investigation by seeking to bribe and otherwise persuade the Complainant to falsely abandon her complaints in return for money. Individually and collectively, these acts clearly constituted serious misconduct, being significant breaches of codes of expected conduct by United Nations staff.

99. We address the remaining grounds of the Appellant's appeal as follows.

100. As to the admissibility of the conversation between the Appellant and the Complainant recorded covertly by her, we conclude that the UNDT correctly allowed the recording and the transcript to be admitted into evidence. Its contents were relevant in determining the Appellant's assertion that their relationship was of a business or employment nature only and, as he claimed, was not an intimate and sexual relationship. That was a relevant issue. We do not agree that the recording of the conversation was a breach of the Appellant's rights to privacy, warranting its exclusion from evidence. The conversation was between the Complainant and the Appellant, and any privacy right considerations were as available to the Complainant as they were to the Appellant. While the Appellant may have had a legitimate expectation of privacy of their conversation as against third parties, he could not reasonably have had such an expectation of the Complainant who was a known and legitimate party to the conversation. It was she who recorded it and she who disclosed its existence and contents to the investigators. That was a proper disclosure made for good reasons. The UNDT did not err in allowing this evidence as part of its considerations.

101. Associated with this conclusion, the UNDT justifiably found that the Complainant did not entrap the Appellant either into having the conversation with her, which she recorded, or into making any admissions or concessions that he would not otherwise have made. There was no evidence adduced that the recording or the transcript was other than full and accurate. It was the Appellant who put in issue the nature of his relationship with the Complainant and the recorded evidence was important in rebutting this contention. There was no unfairness in the Complainant's recording of the conversation despite this not being disclosed by her to the Appellant either before it commenced, during its course, or even for some time afterwards. In all circumstances, the UNDT was correct, after weighing its probative value and its prejudicial effect, to have admitted this evidence. In this connection, also, we conclude that the UNDT assessed, but rejected as unconvincing, the Appellant's claim (apparently unsupported by evidence) that the OIOS investigators provided recording equipment and persuaded the Complainant to record this conversation. We are not persuaded that the UNDT erred in admitting this evidence.

102. We can address briefly the argument about the UNDT's non-consideration of the psychological reports presented to it by the Appellant. The reports and their contents would only have been relevant if the UNDT had upheld the Appellant's case that he had been unlawfully dismissed and that he had thereby suffered harm. It was not the Appellant's case that his conduct towards the Complainant or others was affected forensically by his mental state. These reports would only have been relevant if the Appellant had been entitled to compensation, which he was not, so it was correct for the UNDT to not refer to them in its Judgment.

103. Although there were some errors by the UNDT, particularly in treating as corroborative, evidence that was of dubious quality and so did not meet the clear and convincing standard, the Complainant's evidence, taken from the OIOS report as it was also accepted by the Respondent, was clear and convincing. The Appellant's evidence from the same source was correspondingly unconvincing. That was enough for the most serious charges to have been established and upheld as they were by the UNDT.

104. In these circumstances, we see nothing objectionable or unlawful about the Respondent's referral of the OIOS's report to the authorities in Guinea-Bissau and in the Appellant's home country, although the OIOS report must now be tempered somewhat by the Administration's own conclusions and those of the UNDT and of this Appeals Tribunal, which may or may not support any subsequent response from those authorities.

105. For these reasons, the Appellant's appeal is dismissed.

Judgment

106. The Appellant's appeal is dismissed, and Judgment No. UNDT/2021/164 is hereby affirmed.

Original and Authoritative Version: English

Dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Colgan, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 19th day of May 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar