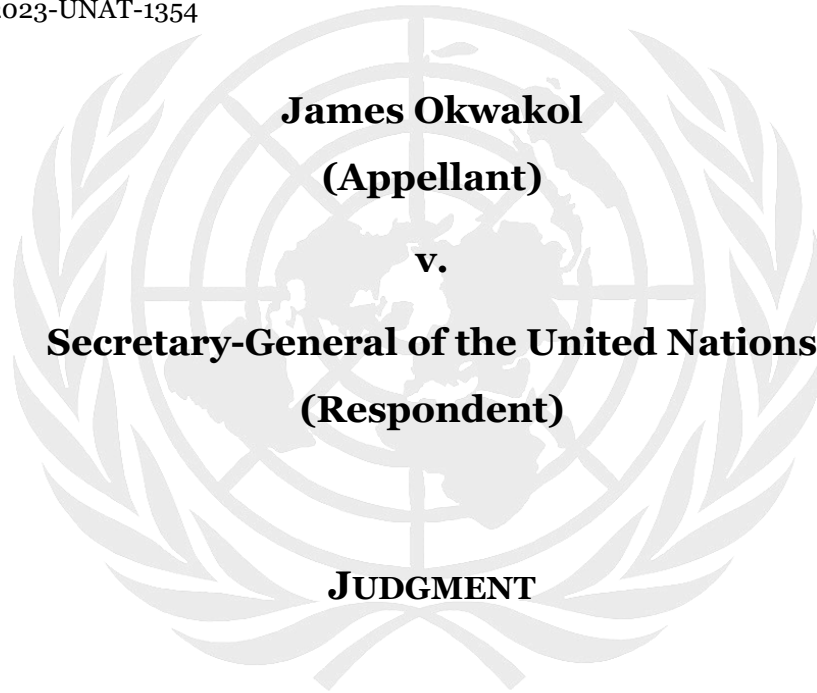




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1354



**James Okwakol
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Graeme Colgan Judge Gao Xiaoli
Case No.:	2022-1714 & 2022-1752
Date of Decision:	30 June 2023
Date of Publication:	13 July 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	Sètondji Roland Adjovi
Counsel for Respondent:	Angélique Trouche

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. Mr. James Okwakol, the former Chief Resident Auditor with the Office of Internal Oversight Services (OIOS) with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), appeals the dismissal of his application before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Judgment No. UNDT/2022/082 (impugned Judgment).¹
2. The UNDT dismissed Mr. Okwakol's challenge to the decision by the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/MSPC) to terminate his employment with the Organization as a disciplinary measure (contested Decision).
3. Prior to the impugned Judgment, Mr. Okwakol had also lodged an interlocutory appeal of Order No. 082 (NBI/2022) (impugned Order),² in which the UNDT denied his motion to strike an audio-recording and certain submissions by the Secretary-General.
4. The United Nations Appeals Tribunal (UNAT or Appeals Tribunal) has considered the foregoing appeals in this Judgment, and for the reasons set forth herein, the UNAT dismisses Mr. Okwakol's appeals and affirms the impugned Judgment.

Facts and Procedure

5. Mr. Okwakol joined the Organization in April 2011, and at the time of these events, was serving as the Chief Resident Auditor, at the P-5 level, with MONUSCO/OIOS in Goma, Democratic Republic of the Congo.
6. On 23 November 2019, when Mr. Okwakol was at the airport, he was briefly approached by Mr. R.L., a Mail Assistant at MONUSCO, requesting a meeting with him. Mr. B.K., a Resident Auditor at MONUSCO/OIOS picked Mr. Okwakol up at the airport and mentioned that while he had been away, Mr. R.L. had come by Mr. Okwakol's office looking for him.³

¹ *Okwakol v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/082 (20 September 2022).

² *Okwakol v. Secretary-General of the United Nations*, Order No. 082 (NBI/2022) (15 July 2022).

³ 29 January 2021 Interoffice Memorandum from Director, Administrative Law Division, Office of Human Resources to Mr. James Okwakol (Allegations Memorandum), para. 11.

7. On 25 November 2019, Mr. R.L. came to see Mr. Okwakol in his office. Mr. R.L. explained that a female employee (VO1) of a service vendor of MONUSCO had made an allegation of rape against a United Nations Volunteer (UNV), Mr. J.M., and that she had told Mr. R.L. about this, but that Mr. R.L. had not reported it to the Organization. Mr. R.L. went on to say that VO1 had since reported her rape allegation to the Conduct and Discipline Team (CDT) at MONUSCO, and that CDT had contacted Mr. R.L., and the conversation with CDT upset him.⁴

8. Mr. Okwakol told Mr. R.L. that CDT would send the sexual exploitation and abuse (SEA) complaint to the Investigations Division (ID) of OIOS, and not to the Internal Audit Division (IAD or OIOS Audit), where Mr. Okwakol worked.

9. Mr. Okwakol told Mr. R.L. that he should have reported the rape allegation as soon as he learned of it from VO1, and that Mr. R.L. was likely to be placed on leave while there was an investigation.

10. Mr. Okwakol and Mr. R.L. agreed to have VO1 and Mr. J.M. come to the IAD/OIOS office later that day.

11. At around 3:00 pm, Mr. R.L. and Mr. J.M. came to the IAD/OIOS office and discussed the SEA complaint made by VO1 with Mr. Okwakol and Mr. B.K. Mr. J.M. told his version of events. They then agreed to bring VO1 to hear her side of the story.

12. At around 5:00 pm, Mr. R.L. brought VO1 to the IAD/OIOS office to meet with Mr. Okwakol, Mr. B.K., and Mr. J.M.

13. Unbeknownst to the other participants, VO1 recorded the meeting on her phone. The transcript of the audio-recording contained the following excerpts:⁵

Mr. Okwakol: [Name of VO1], do you understand when I talk in English?
VO1: Yes, I understand, but to speak to be more difficult, because I will not explain myself very well, but to understand, I can understand
...
Mr. Okwakol: Okay, we are here because the case has already started, because you have

⁴ *Ibid.*, para. 13; impugned Judgment, para. 8.

⁵ Respondent's Answer, Annex No. 4 (Transcript of Audio Recording).

Mr. R.L.: Filed a complaint

Mr. Okwakol: Filed a complaint

Vo1: Yes

Mr. Okwakol: Okay. Now, what [will] happen, you know, things will come

Vo1: I don't know anything; we have filed a complaint; that's all

Mr. Okwakol: After receiving

Vo1: The investigation

Mr. Okwakol: The complaint

Vo1: Yes

Mr. Okwakol: There will be an investigation

Vo1: Yes

Mr. Okwakol: But [incomprehensible] regarding two persons, [Mr. J.M.] and [Mr. R.L.] because he is also in this case because he has, he has ["arranged"] the opportunity; he has paid money for all of you to drink alcohol and things; and he has heard that there was [incomprehensible word] and that

Vo1: Yes

Mr. Okwakol: But he did not report it, okay. So he has this case, he has this case

Vo1: Yes

Mr. Okwakol: Okay, I don't know if you know that in the process of the things...

Vo1: Hmmm

Mr. Okwakol: When we start to do the investigation, the two persons are going

Mr. R.L.: Suspended

Mr. Okwakol: Going home

Vo1: Hmmm

...

Mr. Okwakol: So, we [want to know], we want to know from you what you want in relation to this case?

Vo1: To say what I want right now, at this moment, I do not know yet what I want, all I wish is that [Mr. J.M.] will be punished, not [Mr. R.L.], that is all what I wish, it touches me a lot that [Mr. R.L.] is also implicated because he is like my dad

...

Vo1: What can I do to make [Mr. R.L.] apart of this problem?

Mr. Okwakol: It is you to, you see, the best you can do if you can go back where you put the case and say it was a misunderstanding; I don't want that case, please stop that case

Vo1: Hmmm

Mr. Okwakol: Okay, so in that case it will be stopped because you are the complainant

Vo1: Yes

Mr. Okwakol: [Background noise] if you do this, the case will be stopped; if you don't do that

Vo1: The case will continue

...

Mr. Okwakol: It is better now than before the case goes to New York, because when it reaches New York, New York will send a code cable and say "start the investigation." When New York says "start the investigation," out, out

Mr. R.L.: We go home [crosstalk] without pay

...

Vo1: All right [Mr. R.L.]

Mr. R.L.: And then when you go there, they are going to say to you "did he influence you? Did they intimidate you? Or did we call you to intimidate you? No, it was your h[e]art. If you love me, withdraw the case, you will always be my daughter for life, you don't have any idea what service you will give me and my whole family and all my generation and all of your brothers, you don't have an idea of the gift I can give you?

...

Mr. R.L.: I can even bring her to my place in New York one day for that gesture she will going to do

Vo1: Okay [Mr. R.L.], I already understood it, I want this man to accept what, first he did for me because he told [Mr. R.L.] he didn't do nothing, yes, I want him to accept and apologize first

...

Mr. J.M.: I'm sorry for all what happened.

Vo1: Hmmm

Mr. J.M.: You accept my apology?

Vo1: I accept.

...

Vo1: (...) What I can say, I want him to compensate me, this man here and then, tomorrow morning or even now I can go to CDU to withdraw.

...

Mr. Okwakol: You will go there and it is not say that people have

Mr. R.L.: Influenced you

Vo1: no no no, I understand

Mr. Okwakol: Or threatened, no it was your own will

Vo1: Yes

Mr. Okwakol: If you do that, okay; the case stop. Yes. If you don't do that, next week, the case is in New York and [incomprehensible, banging on table while speaking]

...

Vo1 I want him to compensate me, first he has been too stubborn, him there, he was too stubborn, you understand the word "stubborn?" He was stubborn towards me and if I do this, it is not for him but for [Mr. R.L.], okay? And for that, for this case, I will want him to pay me money for what happened, \$2,000 dollars

Mr. R.L. [Vo1], that is a lot

...

Vo1 You don't have to stand up for him [Mr. R.L.], if I withdraw the case from CDT it is for you and not for him; 2,000 dollars, I know, I do not want to discuss that further...

...

Mr. Okwakol: Okay. Okay, I see she is stuck on it, but I think, if she is agreeable to the instalments

Vo1: Yes, I agree

Mr. Okwakol: Okay. Let me see, if he is able to raise like 300 [another voice says 200] 200 dollars, are you happy, or will you not be happy? Is okay?

...

Mr. R.L. 250 dollars every end of the month, 250 dollars every end of the month

Vo1 Okay

...

Mr. Okwakol: Okay, you will go to them [incomprehensible] because I don't want to hear it's me who talked

Vo1: Yes

Mr. Okwakol: With us

Vo1: Okay

Mr. Okwakol Okay. So, something which is urgent now is to go there

Vo1 Yes, I will go.

14. After the meeting, Vo1 attempted to withdraw her complaint from CDT.⁶

15. On 10 December 2019, OIOS sent individual e-mails to Mr. Okwakol, Mr. R.L., and Mr. J.M., inviting them for interviews. Mr. Okwakol's interview was scheduled for 17 December 2019.⁷

16. On 11 December 2019, Mr. R.L. called Mr. Okwakol and Mr. J.M. and they arranged to meet. At that meeting, Mr. R.L. sought advice from Mr. Okwakol about what he should say. Mr. R.L. stated that Mr. Okwakol advised him not to discuss the arrangement to pay Vo1 USD 2,000, but instead to say that the dispute was a misunderstanding about money between Vo1 and Mr. J.M.⁸

17. On 13 January 2020, Mr. Okwakol was placed on administrative leave without pay (ALWOP) for three months or until completion of the investigation.⁹

18. On 29 January 2021, the Director, Administrative Law Division, Office of Human Resources sent Mr. Okwakol the Allegations Memorandum. Therein were three formal allegations of misconduct:¹⁰

- a. On 25 November 2019, [Mr. Okwakol] was informed by Mr. [R.L.] that Vo1 had filed a complaint with MOUNSCO CDT alleging that Mr. [J.M.] had raped her earlier that year. [Mr. Okwakol] was also informed that Mr. [R.L.] was implicated in the complaint as he had failed to report the allegation. [Mr. Okwakol] then agreed to participate in a

⁶ Appellant's Annex 1 ("Timeline of facts"), para. 1.

⁷ *Ibid.*, para. 2.

⁸ Allegations Memorandum, paras. 35-36; impugned Judgment, para. 18.

⁹ This administrative decision became the subject of a separate application to the UNDT by Mr. Okwakol, and ultimately, the subject of the appeal underlying *James Okwakol v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1293 (*Okwakol I*).

¹⁰ Impugned Judgment, para. 4.

meeting to be held later that day with VO1, Mr. [R.L.], Mr. [J.M.] and Mr. [B.K.] to discuss VO1's complaint.

- b. During that meeting, [Mr. Okwakol] urged VO1 to withdraw her complaint from the CDT, told her to say that she was withdrawing the complaint of her own volition, and facilitated an agreement pursuant to which Mr. [J.M.] would pay VO1 USD \$2,000, in return for the withdrawal of her complaint and/or in connection with her complaint of rape.
- c. On 11 December 2019, after having received notice from OIOS investigators of the investigation into [Mr. Okwakol's] conduct and of [his] upcoming interview, [Mr. Okwakol] participated in a meeting with Mr. [R.L.] and Mr. [J.M.]. During that meeting, [Mr. Okwakol] discussed the OIOS investigation and gave advice to Mr. [R.L.] regarding what he should say during his upcoming interview with OIOS.

19. Mr. Okwakol was provided a copy of the investigation report and an opportunity to submit any explanation, and upon his request, he was granted an extension of time.

20. On 14 April 2021, he submitted his comments.

21. On 4 October 2021, the USG/MSPC issued the sanction letter conveying the contested Decision. The sanction letter stated that the USG had concluded that the allegations were established by clear and convincing evidence, and that Mr. Okwakol's actions constituted serious misconduct in violation of Staff Regulation 1.2(b), Staff Rules 1.2(c), (e) and (g),¹¹ and Section 3.2(f) of Secretary-General's Bulletin ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse).

22. In determining the appropriate sanction, the USG/MSPC considered the Organization's zero-tolerance stance on SEA and its policies to address and prevent SEA. The USG/MSPC considered that Mr. Okwakol's position as the Chief Resident Auditor at MONUSCO/OIOS was an aggravating factor, although his long service was a mitigating factor. The Administration determined that the disciplinary measure of dismissal, with compensation in lieu of notice, and without termination indemnity, was appropriate and proportionate.

Dispute Tribunal proceedings

23. Mr. Okwakol filed an application with the UNDT to challenge the contested Decision on 4 January 2022.

¹¹ Secretary-General's Bulletin, ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations).

24. On 4 February 2022, the Secretary-General filed his reply, and included as annex 7, the brief of the Office of Legal Affairs (OLA) in the Administration's appeal of Judgment No. UNDT/2021/135, wherein the Dispute Tribunal had found Mr. Okwakol's placement on ALWOP to be unlawful. At the time, this was pending as Case No. 2022-1652 before the Appeals Tribunal.¹²

25. On 8 July 2022, a Case Management Discussion (CMD) was held. Counsel for Mr. Okwakol raised arguments regarding the admissibility of the audio-recording made by VO1 and also objected to the inclusion in the Secretary-General's reply of the OLA brief in Mr. Okwakol's then-pending UNAT appeal on the ALWOP decision. On the same day, Mr. Okwakol filed a motion to strike the recording and transcript, and paragraph 26 of the Secretary-General's reply and annex 7 to the reply.

26. On 15 July 2022, the UNDT issued the impugned Order rejecting the motion to strike. The UNDT held that the Secretary-General's reply and annexes were "mere submissions or proposed evidence at best", and "disagreements with the opposite party's submissions (...) do not constitute a ground for a motion to strike".¹³

27. The UNDT rejected the Appellant's request to have a separate hearing regarding the admissibility of the audio-recording, because this "would lead to an unhealthy situation where the Tribunal would conduct mini hearings and draft a multiplicity of micro judgments before the main hearing and final judgment [and] would be detrimental to judicial economy".¹⁴ The UNDT stated that the Appellant could address his arguments regarding the admissibility of the audio-recording in his submissions on the merits.

28. On 25 July 2022, Mr. Okwakol lodged an interlocutory appeal of the impugned Order with the Appeals Tribunal, which was assigned Case No. 2022-1714.

29. The Secretary-General responded, arguing that the interlocutory appeal was not receivable; and in any event, the UNDT was correct on the merits.

¹² The UNAT issued its judgment on this appeal on 16 December 2022 and reversed the UNDT's judgment (*Okwakol I*).

¹³ Impugned Order, para. 4.

¹⁴ *Ibid.*, para. 7.

30. A hearing was held on 4, 5, and 8 August 2022, and the UNDT heard testimony from Mr. Okwakol, Mr. R.L., VO1, a member of CDT, and one of the OIOS investigators.

31. On 20 September 2022, the UNDT issued the impugned Judgment. The UNDT held that Mr. Okwakol's failure to report VO1's complaint of rape and Mr. R.L.'s failure to report was established by clear and convincing evidence. The UNDT did not credit Mr. Okwakol's contention that Mr. R.L. never told him that VO1 had filed a rape complaint against Mr. J.M., and that Mr. R.L. never told him that Mr. R.L. had failed to promptly report this complaint when it came to his attention.¹⁵

32. The UNDT also rejected as "far from the truth" Mr. Okwakol's claim that the meeting of 25 November 2019 concerned a dispute about money between Mr. J.M. and VO1. Considering all of the evidence, the UNDT concluded that it was clearly established that Mr. Okwakol had pressured VO1 at this meeting to withdraw her SEA complaint.¹⁶

33. In terms of interference with the OIOS investigation, the UNDT was not inclined to rely on carlog and logbook data to find that Mr. Okwakol met with Mr. R.L. and Mr. J.M. on 11 December 2019 in order to discuss the OIOS interviews. However, the UNDT held that it was reasonable to rely on Mr. R.L.'s testimony that Mr. Okwakol advised him to say that the dispute between Mr. J.M. and VO1 was "all [] about money" and that he "stick to the money issue, whatever you say".¹⁷ The UNDT noted that Mr. R.L.'s testimony reaffirmed his original interview with OIOS, and that this evidence was inculpatory of him, that he was not seeking to exonerate himself by implicating Mr. Okwakol, and he had no ulterior motive to testify as he did.¹⁸ Thus, the UNDT concluded that it was established by clear and convincing evidence that Mr. Okwakol interfered with the OIOS investigation.

34. The UNDT noted that Mr. Okwakol did not address whether the established facts constituted misconduct, but nonetheless held that his actions violated Staff Regulation 1.2(b), Staff Rules 1.2(c), 1.2(e), and 1.2(g), and Section 3.2(f) of ST/SGB/2003/13.

¹⁵ Impugned Judgment, paras. 8-11.

¹⁶ *Ibid.*, paras. 14-16.

¹⁷ *Ibid.*, para. 18.

¹⁸ *Ibid.*, para. 21.

35. The UNDT reviewed Mr. Okwakol's five contentions regarding the alleged violations of his due process rights. First, the UNDT held that there was no violation of his presumption of innocence with regard to how the OIOS investigation report was titled.¹⁹

36. Second, the UNDT found that to the extent that Mr. Okwakol's first interview with the OIOS investigator felt like a "supervisor conducting a performance evaluation" in which he was "berated", this was remedied by having a second OIOS interview and a new OIOS investigation report issued.²⁰

37. Third, the UNDT addressed the "illegality" of the audio-recording, and Mr. Okwakol's contention that the beginning of the meeting was missing, and that it was at the beginning of the meeting that Mr. Okwakol introduced the subject of the meeting, which was the financial dispute between Mr. J.M. and VO1. The UNDT credited VO1's testimony regarding the recording, and noted that Mr. Okwakol had the opportunity to comment on it, and that the audio-recording had "no interruptions, editing or other modifications".²¹ The UNDT rejected Mr. Okwakol's reliance on Congolese laws as a basis for excluding the audio-recording, noting that its admissibility was appropriate pursuant to guidance from the UNAT.

38. Fourth, the UNDT dismissed Mr. Okwakol's complaint that the Allegations Memorandum was signed by an official without delegated authority as "factually incorrect".

39. Fifth, the UNDT rejected Mr. Okwakol's assertion that he was sanctioned for failing to report Mr. R.L.'s misconduct, but that this was not in the Allegations Memorandum. The UNDT noted that the Allegations Memorandum included the statement that: "You were also informed that [Mr. R.L.] was implicated in the complaint [by VO1] as he had failed to report the allegation." Mr. Okwakol's suggestion that he thought the Allegations Memorandum was charging him for not reporting VO1's rape complaint (as opposed to failing to report on Mr. R.L.) was "not credible".²²

40. The UNDT concluded that Mr. Okwakol's "procedural fairness rights were respected throughout the investigation and disciplinary process". He was "provided all supporting

¹⁹ *Ibid.*, para. 30.

²⁰ *Ibid.*, paras. 31-32.

²¹ *Ibid.*, paras. 34-35.

²² *Ibid.*, para. 42.

documentation, was informed of the allegations against him, his right to seek assistance of counsel and he was provided the opportunity to comment on the allegations”.²³

41. With regard to the sanction of dismissal, Mr. Okwakol had argued that the investigation was “vindictive” and that the Administration’s reliance on his position in OIOS Audit as an aggravating factor was “unfair and inappropriate”. The UNDT rejected these complaints and stated that it “fully agreed” with the Respondent that Mr. Okwakol had engaged in serious misconduct and that the sanction imposed was commensurate with the Secretary-General’s practices, and that it was a relevant factor to consider Mr. Okwakol’s position in OIOS Audit when determining the appropriate sanction.²⁴

42. The UNDT thus upheld the contested Decision and dismissed Mr. Okwakol’s application.

43. On 20 November 2002, Mr. Okwakol filed an appeal of the impugned Judgment with the Appeals Tribunal, which was lodged as Case No. 2022-1752.

44. On 16 December 2022, the Appeals Tribunal issued *Okwakol I*, whereby it granted the Secretary-General’s appeal and found that the UNDT erred in concluding that Mr. Okwakol’s placement on ALWOP pending the investigation was unlawful.

45. On 23 January 2023, the Secretary-General filed its answer in Case No. 2022-1752.

46. On 5 June 2023, the Appeals Tribunal consolidated Case Nos. 2022-1714 and 2022-1752 for all purposes.²⁵

Submissions

Case No. 2022-1714

Mr. Okwakol’s Interlocutory Appeal

47. Mr. Okwakol submits that the UNDT erred in denying his motion to strike the audio-recording made by VO1 without his knowledge. Mr. Okwakol argues that the audio-recording and transcript is the foundation of the Respondent’s case, and thus “the entire case turns heavily on the admissibility of this evidence”. Mr. Okwakol argues that contrary to the UNDT’s reasoning, it

²³ *Ibid.*, para. 43.

²⁴ *Ibid.*, paras. 45-47.

²⁵ *James Okwakol v. Secretary-General of the United Nations*, Order No. 518 (2023).

would be in the interests of judicial economy to have a separate hearing on the admissibility of the audio-recording, because if it is not admissible, then numerous witnesses would not need to be heard and large amounts of questions would not need to be asked.

48. Mr. Okwakol submits that the argument by the UNDT Judge that admissibility of the recording should be addressed in the final judgment was not supported by the current practices of the UNDT generally, or by the UNDT Judge in particular.

49. Mr. Okwakol submits that the UNDT erred in failing to strike paragraph 26 of the Respondent's reply to his application and annex 7, which was the OLA brief in appealing Judgment No. UNDT/2021/135, then pending as UNAT Case No. 2022-1652.

50. Mr. Okwakol claims that the Respondent has "blatantly included manifestly inadmissible materials" and that by including the OLA brief, the Respondent is trying "to get the UNDT to do the UNAT's job" and that such effort to influence the UNDT Judge "should not be tolerated".

51. By failing to strike paragraph 26 of Respondent's reply and the offending annex 7, Mr. Okwakol submits that the UNDT erred in fact and committed errors in procedure.

52. Mr. Okwakol requests that the UNAT find the interlocutory appeal receivable, vacate the impugned Order, grant his motion to strike, and assign his case to a different judge.

The Secretary-General's Answer on the Interlocutory Appeal

53. The Secretary-General submits that the interlocutory appeal is not receivable because it is clearly not an appeal of a final judgment, and it is well-settled in UNAT jurisprudence that only appeals against final judgments are receivable. The only exception is when it is clear that the UNDT exceeded its jurisdiction, which is not the case with the impugned Order.

54. The Secretary-General submits that the interlocutory appeal is challenging a case management decision, and the UNAT has held that appeals of interlocutory decisions on matters of evidence, procedure, and trial conduct are not receivable. The UNAT has previously rejected appeals of motions to strike.²⁶

²⁶ *Atogo v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-054, para. 9.

55. On the merits, the Secretary-General submits that as the contested Decision was based, *inter alia*, on the audio-recording and transcripts thereof, these materials must be available to the UNDT in order for it to decide on the lawfulness of the Administration's actions.

56. The Secretary-General argues that judicial economy does not support having a separate hearing just on the admissibility of the audio-recording, and that Mr. Okwakol can make his arguments in his closing submissions.

57. The Secretary-General submits that there is no legal basis to strike paragraph 26 of his reply, or annex 7, as these were in support of the Secretary-General's answer to Mr. Okwakol's arguments in his application. The Secretary-General points to *Bezziccheri*,²⁷ in which the UNAT stated that "it is indeed not up to a party to request that the Appeals Tribunal strike out each and every argument she or he does not agree with, since it is natural that the parties may dispute certain issues or matters at stake".

58. The Secretary-General requests that the UNAT dismiss the interlocutory appeal.

Case No. 2022-1752

Mr. Okwakol's Appeal

59. Mr. Okwakol submits that the UNDT committed an error of procedure because it "did not consider his arguments on due process seriously". Mr. Okwakol states that the way OIOS conducted its investigation shows bias.

60. Mr. Okwakol argues that the Tribunal "failed to draw the only conclusion" it should have from the "illegality of the recording", which he says was to "dismiss the procedure against the Appellant".

61. Mr. Okwakol refers the UNAT to paragraphs in his UNDT application, UNDT closing submissions, and to five annexes, all without any further argument or explanation.

62. Mr. Okwakol submits that the UNDT made numerous mistakes of fact that led to a decision that is not justified and should be set aside. Mr. Okwakol argues that he cannot be sanctioned for not reporting sexual misconduct when that sexual misconduct has not been

²⁷ *Bezziccheri v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-948/Corr. 1, para. 34.

established. He asserts that the core allegation is that Mr. J.M. raped VO1, but that there “was a major flaw which is the missing carlog data”. Mr. Okwakol notes that the Respondent did not even try to establish that the rape occurred and, more importantly, “VO1 could not be trusted”. He concludes that “it is logically impossible to find that a failure to report something that did not happen constitutes a misconduct”.

63. Mr. Okwakol submits that the UNDT made a clear factual error in stating that VO1 “was also offered \$2,000” when the audio-recording “clearly proves” that VO1 demanded the USD 2,000 (“I will want him to pay me money for what happened. \$2,000.”). Mr. Okwakol argues this demonstrates that VO1 committed attempted extortion, a criminal act for which she has not been charged, and protests that the Organization has not referred her to the Congolese authorities.

64. Mr. Okwakol submits that the UNDT failed to consider suggestive messages that VO1 sent to Mr. J.M., including inviting him to the swimming pool after the night of the alleged abuse and inviting Mr. J.M. to have an affair with her sister. Mr. Okwakol also says VO1 lied about whom she went to the swimming pool with.

65. Mr. Okwakol contends that the UNDT erred in finding that VO1 was pressured to withdraw her complaint, arguing that the conversation during the meeting on 25 November 2020 was “cordial and nobody made any threat against [her]”.

66. Mr. Okwakol objects to the fact that the UNDT found Mr. R.L. credible when Mr. R.L. testified against him, but then considered Mr. R.L. unreliable in all other respects. Mr. Okwakol complains that the UNDT failed to ascertain when and where the alleged meeting between Mr. R.L. and Mr. Okwakol occurred (to discuss the upcoming OIOS interviews). Mr. Okwakol disputes the UNDT’s credibility assessment of Mr. R.L. and submits that the UNDT should have concluded that no meeting occurred.

67. Mr. Okwakol requests rescission of the contested Decision and reappointment to a suitable position, and compensation for the harm to his career and self-respect. If the UNAT still considers the sanction of separation was appropriate, Mr. Okwakol requests that the sanction is modified to be sanction *with* a termination indemnity.

The Secretary-General's Answer

68. The Secretary-General submits that the UNDT properly held that the disciplinary sanction was within the Administration's discretion and was lawful. The Respondent submits that the UNDT correctly found that Mr. Okwakol was informed by Mr. R.L. of the SEA complaint and knew of Mr. R.L.'s failure to report that complaint.

69. The Secretary-General further relies on the UNAT's finding in its prior judgment that Mr. Okwakol was duty-bound to report what he knew about this incident.²⁸

70. The Secretary-General submits that the UNDT was likewise correct to find that there was clear and convincing evidence that Mr. Okwakol pressured VO1 to withdraw her complaint, and that he interfered with the OIOS investigation by having the 11 December 2019 meeting with Mr. R.L.

71. Respondent submits that the UNDT rightly found that the established facts amounted to misconduct pursuant to Staff Rules 1.2(b), 1.2(c), 1.2(e) and 1.2(g) as well as Section 3.2(f) of ST/SGB/2003/13.

72. The Secretary-General submits that Mr. Okwakol's arguments that his due process rights were not respected because the OIOS investigation report was titled "investigation report on prohibited conduct" instead of "allegations of prohibited conduct" were properly rejected by the UNDT as not amounting to evidence that his presumption of innocence was not respected.

73. The Secretary-General contends that the UNDT correctly determined that Mr. Okwakol's concerns about his first interview with OIOS had been addressed with the re-interview and new investigation report.

74. The Secretary-General submits that the UNDT rightly found that the audio-recording was admissible, based on UNAT jurisprudence, given its evidentiary value, and the fact that Mr. Okwakol accepted material elements of the content.

²⁸ *Okwakol I*, para. 63.

75. The Secretary-General submits that the UNDT properly found that, contrary to Mr. Okwakol's claim, the Allegations Memorandum was signed by an official with proper authority.

76. The Secretary-General submits that the UNDT was right to reject Mr. Okwakol's claim that he was sanctioned for something that he was not charged with (failing to report Mr. R.L.'s failure to report the alleged rape).

77. The Secretary-General argues that the UNDT did not err in finding that the sanction of dismissal was proportionate to the established misconduct.

78. The Secretary-General submits that Mr. Okwakol has failed to demonstrate any error in the UNDT's review and merely disagrees with the outcome and restates his unsuccessful arguments before the UNDT. In accordance with long-standing UNAT jurisprudence, the appeal should be dismissed for these reasons alone.

79. With regard to specific alleged errors, the Secretary-General states that Mr. Okwakol is incorrect that he cannot be sanctioned for not reporting an allegation of sexual misconduct if such misconduct has not been established. The Secretary-General says that to hold otherwise would "put the cart before the horse, as misconduct would never be established if it were not first reported".

80. Relying on AAA,²⁹ the Secretary-General submits that the question is not whether the staff member has evidence of misconduct, but rather whether the staff member subjectively has a concern or suspicion of misconduct.

81. The Secretary-General rejects Mr. Okwakol's argument that there was no pressure applied on VO1 to withdraw the complaint because no "threats" were made. The Secretary-General states that pressure can be applied, as it was here, without there being "threats". The Secretary-General submits that the UNDT was correct to find that Mr. Okwakol "told VO1 that it was urgent and that she should state to CDU that her withdrawal of her complaint was of her own volition".

82. The Secretary-General submits that Mr. Okwakol's argument that he and his colleagues were the victims of an attempted extortion scheme was "unbecoming" when it was they who

²⁹ AAA v. Secretary-General of the United Nations, Judgment No. 2022-UNAT-1280, paras. 50-57.

initiated this meeting with her with the intent to pressure her, and that they encouraged her request for compensation and helped organize the payment through instalments.

83. The Secretary-General submits that the UNDT explained in detail why it found Mr. R.L.'s testimony reliable with respect to Mr. Okwakol's advice to him about how to handle the OIOS interview, and the Appellant has failed to demonstrate any error in these findings. In addition, Mr. J.M. was also present at the 11 December 2019 meeting and confirmed the discussion around Mr. R.L.'s invitation from OIOS for the interview.

84. The Secretary-General submits that Mr. Okwakol has failed to show any error by the UNDT and requests that the UNAT uphold the impugned Judgment and dismiss the appeal.

Considerations

Whether the separate appeal of the impugned Order is proper

85. Our jurisprudence is clear: "Only one appeal is to be filed after the final judgment has been delivered."³⁰ This jurisprudence developed in the context of dual appeals in the same case from separate judgments rendered by the UNDT on the merits and on the relief.³¹

86. That rationale applies equally to the situation presented in this case, in which Mr. Okwakol challenges the impugned Order and the impugned Judgment on the merits. Only one appeal should be filed, and that is after the entry of the final judgment. This conclusion is consistent with our jurisprudence.

87. As established in our jurisprudence,³² interlocutory appeals on matters of evidence, procedure, and trial conduct are not receivable. Nevertheless, the Appeals Tribunal has received interlocutory appeals arising from preliminary proceedings "in those exceptional

³⁰ *Hunt-Matthes v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-444/Corr.2, para. 21; see also *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266, para. 53.

³¹ See, e.g., *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-280, para. 34; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121 (full bench), para. 36; *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-076, para. 24.

³² See, e.g., *Ashraf Ismail abed allah Zaqqout v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2021-UNAT-1116, para. 22; *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-560, para. 25; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005, para. 8.

cases where the Dispute Tribunal has clearly exceeded its jurisdiction or competence”.³³ As we have often stated:³⁴

... The Appellant has the onus of proving the Dispute Tribunal ‘clearly’ exceeded its jurisdiction or competence. This will not be the case in every interlocutory decision by the UNDT, even when the UNDT makes an error of law: ‘[i]f the UNDT errs in law in making this decision and the issue can be properly raised later in an appeal against the final judgment on the merits, there is no need to allow an appeal against the interlocutory decision’.

88. In the present case, the Appeals Tribunal sees no reason to depart from the general rule that only appeals against final judgments are receivable. Mr. Okwakol’s complaints about what the UNDT decided it would admit in evidence and what submissions it would consider in deciding his substantive case, were and are now remediable if they were wrongly decided. There is no question that the UNDT acted within its jurisdiction in considering and deciding these questions. We will accordingly determine them as aspects of Mr. Okwakol’s second appeal.

89. The appeal against the impugned Order must be and is accordingly dismissed.

Whether the UNDT erred in rejecting Mr. Okwakol’s motion to strike the audio-recording and its transcripts, as well as paragraph 26 in the Secretary-General’s reply and annex 7 to the reply

90. The UNDT rejected Mr. Okwakol’s motion to strike out the secret audio-recording and transcription, and paragraph 26 of the Respondent’s reply and annex 7 by holding that “[t]he objection to the reception of the audio and transcript is premature and would be best raised during the main hearing and in closing submissions and addressed by the Tribunal as part of the final judgment preparation process”.³⁵

³³ *Staedtler* Judgment, *op. cit.*, para. 27; see also *Bastet v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-423, para. 13.

³⁴ *Yves P. Nadeau v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1058, para. 27, quoting *Chemingui v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-641, para. 18, and *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060, para. 19.

³⁵ Impugned Order, para. 6.

91. In the same line of reasoning, the UNDT found that:³⁶

... It is the role of the Dispute Tribunal to determine the admissibility of evidence and the weight to be attached to it. This should be done in the final judgment preparation process rather than being done in the piecemeal manner proposed by the Applicant. The suggestion that there should be a hearing to determine the admissibility of specified pieces of evidence if granted would lead to an unhealthy situation where the Tribunal would conduct mini hearings and draft a multiplicity of micro judgments before the main hearing and final judgment, which would be detrimental to judicial economy.

92. We agree with and uphold the UNDT's conclusion and reasoning. The impugned Order clearly comes within the UNDT's competence to issue appropriate case management orders.

93. Pursuant to Article 19 of the UNDT Rules of Procedure, the UNDT "may at any time, either on application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties".

94. It is our settled case-law that the UNDT has broad discretion under its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence.³⁷ As we noted in *Abdeljalil*:³⁸

... Our jurisprudence has consistently held that the Appeals Tribunal will not lightly interfere with the broad discretion conferred on the first instance tribunal in the management of its cases to enable cases to be judged fairly and expeditiously and for dispensation of justice. We will intervene only in clear cases of denial of due process of law affecting a party's right to produce evidence.

95. In the instant case, we do not accept Mr. Okwakol's argument that this threshold has been met. As the Secretary-General rightly argues, the specific evidentiary material, namely

³⁶ *Ibid.*, paras. 6-7.

³⁷ *Abdeljalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-960, para. 43; *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, para. 37, citing *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 26.

³⁸ *Abdeljalil* Judgment, *op. cit.*, para. 43, citing *Uwais v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-675, para. 27 (internal citations omitted), and *Wu v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-597, paras. 34 and 35.

the audio-recording and the transcripts thereof, had been relied on by the Administration in taking the decision to impose on Mr. Okwakol the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity, and it should have been available to the UNDT for it to decide on its lawfulness in the appeal against the contested Decision. Indeed, this was not a matter for a preliminary ruling, but rather it should be considered along with the merits of the case, as the UNDT did.

96. Further, the UNDT was correct in finding that: “The contents of paragraph 26 of the Respondent’s reply and annex 7 to the reply are mere submissions and/or proposed evidence at best. Objections to such materials can only amount to mere disagreements with the opposite party’s submissions and proposed evidence which is natural. Such disagreements do not constitute a ground for a motion to strike out the contested materials.”³⁹ This finding perfectly aligns with our jurisprudence in *Bezziccheri*,⁴⁰ in which we held that “it is indeed not up to a party to request that the Appeals Tribunal strike out each and every argument she or he does not agree with, since it is natural that the parties may dispute certain issues or matters at stake”. This was also a matter for consideration by the UNDT in its final judgment on the merits.

97. Thus, contrary to Mr. Okwakol’s claims, the UNDT did not exceed its competence or jurisdiction, or err in law by rejecting Mr. Okwakol’s motion.

Whether the UNDT erred on a question of law or fact in establishing Mr. Okwakol’s misconduct

Standard of review in disciplinary cases

98. In disciplinary matters, we follow the settled and unambiguous case law of this Tribunal⁴¹, as laid down in *Applicant*:⁴²

³⁹ Impugned Order, para. 4.

⁴⁰ *Bezziccheri* Judgment, *op. cit.*, para. 34.

⁴¹ See, e.g., *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 15; *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. 46; *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700, para. 18.

⁴² *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29 (internal footnotes omitted). See also *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.

... Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”. “[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.

99. We have further explained in *Negussie*:⁴³

... Clear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards. The first (“clear”) is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard (“convincing”) requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.

... In determining whether these evidential standards have been established in any case, the UNDT must consider and weigh not only the evidence put forward by witnesses produced for the Secretary-General, but also any countervailing evidence adduced for the staff member, and any relevant and probative documentary evidence which may either corroborate or cast doubt on the recollections of witnesses.

100. The foregoing analysis has to be applied by the UNDT not only to each individual piece of disputed evidence, but it must then be applied likewise to the totality of the evidence in support of the allegation of misconduct. The judge can only then answer the fundamental question: “Is there clear and convincing evidence to enable the Tribunal to conclude that the allegation(s) of misconduct have been established?”⁴⁴

⁴³ *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, paras. 45-46.

⁴⁴ *Ibid.*, para. 47.

101. The UNAT's task on appeal is to determine whether the UNDT did not apply the correct tests and whether the UNDT could reasonably have reached the decisions it did about what happened.⁴⁵

102. Furthermore, this Tribunal has held that in a system of administration of justice governed by law, the presumption of innocence has to be respected.⁴⁶

103. It is in the context of these definitions and principles that Mr. Okwakol's appeal against the UNDT's conclusions must be assessed.

Clear and convincing evidence established that Mr. Okwakol committed the offences

104. Applying the above-mentioned standards and criteria to the present case, we find that the facts on which the Administration based its decision to separate Mr. Okwakol from service were established, in full respect of his due process rights. The records show clear and convincing evidence establishing facts which amount to misconduct and these facts have not been successfully rebutted by Mr. Okwakol.

Failure to report misconduct

105. Staff Rule 1.2 sets out the basic rights and obligations of staff, in particular that "(c) 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 and to cooperate with duly authorized audits and investigations".⁴⁷

106. The duty to report is confirmed and repeated in administrative issuances. Section 3.2(e) of ST/SGB/2003/13 provides that "[w]here a United Nations staff member develops concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker, whether in the same agency or not and whether or not within the United Nations system, he or she must report such concerns via established reporting mechanisms".

⁴⁵ *Ibid.*, para. 48.

⁴⁶ *Ladu Judgment, op. cit.*, para. 16; *Bagot Judgment, op. cit.*, para. 47; *Hallal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-207, para. 28.

⁴⁷ ST/SGB/2018/1.

107. Again, Section 4.1 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) provides that “[p]ursuant to staff rule 1.2(c), 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 and to cooperate with duly authorized audits and investigations”.

108. In the present case, it is common cause that, on 10 July 2019, VO1 told Mr. R.L. that she had been raped by the alleged perpetrator (Mr. J.M.) and that on 20 November 2019, VO1 reported the incident to the CDT. Following that, on 25 November 2019, Mr. R.L. visited Mr. Okwakol in his office and informed him that VO1 had filed a rape complaint against Mr. J.M. and that she had reported this rape to him in July 2019 but that he (Mr. R.L.) had not reported it to the Organization at that time. Later, on the same day, VO1 attended a meeting with Mr. R.L. (at his invitation), Mr. J.M., Mr. Okwakol and another MONUSCO colleague, Mr. B.K.

109. In these circumstances, there was clear and convincing evidence that Mr. Okwakol had committed the alleged misconduct. It is a matter of record that on 25 November 2019, Mr. Okwakol became aware from Mr. R.L. that VO1 had allegedly been raped by Mr. J.M. and that he did not report this SEA allegation to the competent United Nations authorities. Mr. Okwakol admitted that he had become aware of this, and further that he erred by failing to end the meeting on 25 November 2019 there and then. Instead, the meeting continued, including attempts at dissuasion of VO1 to withdraw her complaint, and by reference to the payment to her of a sum of money for doing so. Against this background, which objectively should have raised concerns and suspicions that sexual abuse had occurred, Mr. Okwakol was duty-bound to meet his obligation and report the alleged misconduct, but he did not. At any rate, Mr. Okwakol’s active participation in this meeting, where he strongly pressured VO1 to withdraw her report to the Administration (CDT), and participated in negotiating the terms of compensation in the amount of USD 2,000 to VO1, corroborates that Mr. Okwakol was at the very least suspicious that sexual abuse might have taken place. Moreover, the evidence shows that Mr. Okwakol was aware of Mr. R.L.’s failure to report this possible sexual abuse in a timely manner, a fact that he also should have reported.

110. The Appeals Tribunal does not accept Mr. Okwakol’s defense that his failure to abide by said obligation is excused because sexual misconduct had not been established, or due to the views of the other meeting participants that VO1 had designed an extortion scheme, or other

factors, such as the purported other “real” motive of VO1. There is nothing in the relevant Section 3.2(e) of ST/SGB/2003/13 that requires that staff members ensure that they have objective or sufficient evidence to support a concern or suspicion that SEA has occurred in order to be obligated or have a duty to report possible SEA.⁴⁸ As the Secretary-General rightly argues, whether VO1’s allegations were eventually established, i.e. whether rape had really been committed, was not for Mr. Okwakol to assess and the UNDT was not required to make any pronouncement on the alleged perpetrator’s conduct in order to establish Mr. Okwakol’s failure to report.

111. In conclusion, the Dispute Tribunal did not err in fact or in law when it held that there was clear and convincing evidence of Mr. Okwakol’s failure to report the rape allegations against Mr. J.M., as well as Mr. R.L.’s dereliction of his duty to make a timely report.

Pressuring VO1 to withdraw her rape complaint

112. Next, in terms of the count of Mr. Okwakol’s pressuring of VO1 to withdraw her complaint, it is not in dispute and Mr. Okwakol admits that he hosted and participated in the meeting of 25 November 2019 in which the attendees of the meeting included VO1, Mr. R.L., Mr. J.M., and Mr. B.K.

113. At the outset, the UNDT rejected Mr. Okwakol’s assertion that “the meeting was not about VO1’s rape complaint”, on the ground that it contradicted his testimony in which he had re-affirmed statements in his OIOS subject interview, in which he had admitted that this meeting in fact concerned a rape complaint, as well as the logical chronology of events as relayed by Mr. R.L. and corroborated by Mr. Okwakol himself.⁴⁹

114. Then, the UNDT engaged in a comprehensive and analytical assessment of the material facts of the instant case. In this context, the UNDT found, *inter alia*, that during that meeting on 25 November 2019, which was recorded by VO1, Mr. Okwakol “opened the discussion and explained to VO1 the next steps that would follow her complaint to CDT”, and that the relevant account “leaves no doubt that the meeting concerned VO1’s rape complaint”.⁵⁰

⁴⁸ AAA Judgment, *op. cit.*, para. 52.

⁴⁹ Impugned Judgment, para. 13.

⁵⁰ *Ibid.*, para. 14.

115. Notably, with regard to Mr. Okwakol's alleged pressuring of VO1 to withdraw her complaint, the UNDT exhaustively examined Mr. Okwakol at the hearing of 5 August 2022 about what transpired and the statements he reportedly made during this meeting as these are evident on the relevant transcript of audio-recorded conversations. The UNDT found on the established evidence on file, namely Mr. Okwakol's testimony before it, that he "told VO1 that it was urgent and that she should state to CDU that her withdrawal of her complaint was of her own volition". He also had specifically told her that: "You will go there and it is not to say that people have..." [RL "Influenced you."...] or threatened you... no, it was your own will." Mr. Okwakol was recorded again saying: "it is you to, you see, the best you can do if you can go back where you put the case and say it was a misunderstanding; I don't want that case, please stop it".⁵¹

116. Having regard to all the evidence on file, the UNDT reached the conclusion that the facts of Mr. Okwakol's pressuring of VO1 to withdraw her rape complaint had been established by clear and convincing evidence. The UNDT was not at all convinced by Mr. Okwakol's explanation that, when he asked VO1 "what she wanted for withdrawing her complaint" at the meeting, he was asking VO1 what she really wanted to achieve out of this whole case, because this statement of Mr. Okwakol contradicted his admission that he had said, "Okay, okay. I see she's stuck on it, but I think she's agreeable to instalments." "Okay, let me see, if he's able to raise like 300, 200, are you happy or will you not be happy? Is okay?". In the UNDT Judge's evaluation, these statements clearly showed that Mr. Okwakol was in fact negotiating VO1's withdrawal of her complaint.⁵²

117. 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 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 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's conclusion is consistent with the evidence.

⁵¹ *Ibid.*, para. 15.

⁵² *Ibid.*, para. 16.

Mr. Okwakol has not put forward any persuasive grounds to warrant interference by this Tribunal.

118. Be that as it may, this Tribunal has gone by itself through the evidence on file and found the UNDT's reasoning and conclusion to be correct. Not only was Mr. Okwakol remiss in not ending the 25 November 2019 meeting when these matters emerged, but he was complicit in seeking to persuade VO1 to withdraw her complaint in these circumstances. Contrary to Mr. Okwakol's assertion that he did not pressure VO1 to withdraw the rape report because no threats were made to VO1, the evidence demonstrates that such pressure existed and no threat was needed to substantiate it, as the Secretary-General rightly argues. Put another way, threats are a usual means but not always a constituent element of pressure, as occurred here.

119. Indeed, in the present case, Mr. Okwakol, a senior OIOS staff member, and his colleagues, pressured VO1 by calling her to a meeting on the United Nations premises, in which the dire consequences of the rape report on Mr. R.L. were underscored to her, repeatedly and in a persisting manner. It was Mr. Okwakol along with the other participants, who encouraged VO1's request for compensation and helped organize the payment through instalments. Thus, they organized VO1's compensation in return for her withdrawal of the rape report and told her that it was urgent and that she should proceed with withdrawing her complaint by stating that "it was of her own volition".⁵³

Interfering with the investigation

120. Turning to the count of Mr. Okwakol's interference with the OIOS investigation, i.e., that at a meeting of 11 December 2019 with Mr. R.L. he discussed the OIOS investigation with him and Mr. J.M. and advised them what to say at the relevant interview, the UNDT Judge placed considerable probative value on Mr. R.L.'s testimony before her at the hearing of 4 August 2022, in which Mr. R.L. affirmed his prior statements to the OIOS investigators that Mr. Okwakol had advised him to tell them that:⁵⁴

this is all it's about money issue, so you stick to the money issue, whatever you say, whatever James say, they will know even himself, they will call him later also, maybe they will call the girl... they will call everybody and him, they will call him last. So its ...

⁵³ *Ibid.*, para. 15.

⁵⁴ *Ibid.*, para. 18.

he will tell them it's a misunderstanding about money, because they didn't share the money, right, and that's why the girl want to punish James[.]

121. The UNDT found Mr. R.L.'s testimony reliable in this respect for two reasons. In the first place, Mr. R.L. re-affirmed his OIOS interview statement at the hearing before the UNDT. Secondly, his evidence was inculpatory of him. He did not seek to exonerate himself by implicating Mr. Okwakol. He therefore had no ulterior motive in testifying in the way he did.⁵⁵

122. We share the UNDT Judge's assessment of the critical facts and hold that it would be improbable that Mr. R.L. fabricated the whole story on account of lack of any motive on his part. Moreover, the credibility of Mr. R.L.'s account of events has not been damaged by any countervailing evidence. In sum, the documentary evidence on file, as well as the strong circumstantial evidence and the inherent probabilities of the situation, taken cumulatively, suggest to the appropriate evidentiary standard of clear and convincing evidence, as correctly held by the UNDT that Mr. Okwakol committed the alleged misconduct of interfering with the investigation. Therefore, his contentions to the contrary are rejected as being without merit.

Whether the established facts amount to misconduct

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

124. Notably, as the UNDT correctly held, in terms of the first count, when Mr. Okwakol failed to report the information that Mr. R.L. had been aware of a rape allegation, he violated Staff Rule 1.2(c) and Section 3.2(f) of ST/SGB/2003/13. He also violated Staff Regulation 1.2(b) since he failed to uphold the highest standards of integrity required of staff members. In terms of the second count, we agree with the UNDT that Mr. Okwakol violated Staff Regulation 1.2(b), Staff Rule 1.2(e) and Section 3.2(f) of ST/SGB/2003/13 when he hosted and participated in a meeting during which he pressured VO1 to withdraw her rape complaint in exchange for compensation, and instructed her to say that she had not been influenced or threatened, and ultimately negotiated a financial payment of USD 2,000 to VO1 by Mr. J.M. in exchange for the withdrawal of the rape complaint. In terms of the third count, by attempting to interfere with the OIOS investigation, Mr. Okwakol violated Staff Rule 1.2(g) and Staff Regulation 1.2(b) when he participated in the meeting on 11 December 2019 with Mr. R.L.

⁵⁵ *Ibid.*, para. 21.

and Mr. J.M. to discuss the OIOS investigation and provided advice about what they should say during his upcoming OIOS interview, including telling him to withhold information from OIOS.

Proportionality of the imposed sanction

125. Mr. Okwakol does not raise on appeal any specific challenge to the UNDT's holding on the proportionality of the imposed sanction of separation from service with compensation in lieu of notice and without termination indemnity. He does not even put forward grounds against that holding or show why the findings or reasoning of the UNDT could have been erroneous. He simply requests us to modify the sanction with a termination indemnity, a request that we deny.

Due process issues

126. Next, we do not find merit in Mr. Okwakol's claims that the UNDT erred in fact and law when it found that his due process rights were not violated during the investigative process. Specifically, Mr. Okwakol submits that the UNDT did not consider his arguments on due process seriously. He argues that the way in which OIOS conducted the investigations shows a bias that negated the presumption of innocence and led to how OIOS framed its work in the report that purported to establish misconduct. He further contends that "the illegality of the recording that was at the heart of the accusation is not in dispute even though the Tribunal failed to draw the only conclusion: dismiss the procedure against the Appellant".

127. First, the UNDT considered whether Mr. Okwakol's due process rights had been violated during the investigation and the disciplinary process, and rejected his claim that his presumption of innocence had not been respected. As the UNDT correctly held, the title of the investigation report "investigation report on prohibited conduct" (instead of "allegations of prohibited conduct") did not amount to evidence that Mr. Okwakol's presumption of innocence had been breached.⁵⁶

128. The UNDT also correctly dismissed Mr. Okwakol's claim that his due process rights had not been respected during his OIOS interviews in that "the OIOS investigator did not ask questions, rather he abused, berated and lectured....as if he was his supervisor conducting a

⁵⁶ *Ibid.*, paras. 29-30.

performance evaluation meeting”.⁵⁷ In this context, the UNDT found that Mr. Okwakol’s concerns had been addressed, in that he had been re-interviewed, and a new investigation report, not relying on his initial OIOS interview, was issued on 18 September 2020.

129. Moreover, we find that Mr. Okwakol has failed to demonstrate in what way the alleged violations of his due process rights prejudiced him or impacted the outcome of his case. Additionally, we take note that the due process rights of a staff member are complied with as long as s/he has a meaningful opportunity to mount a defense and to question the veracity of the statements against him. The Appeals Tribunal is satisfied that the key elements of Mr. Okwakol’s right to due process were met and that the interests of justice were served in this case.

130. Indeed, there is no evidence that Mr. Okwakol’s rights had been infringed in any way during the investigation. The Administration diligently undertook the investigation, Mr. Okwakol was fully informed of the charges against him and was able to mount a defense and had ample opportunities to make his case. He was provided with the allegations of misconduct and was given, and availed himself of, the opportunity to answer them.

131. With regard to the alleged illegality of the audio-recording of the 25 November 2019 meeting, the UNDT, relying on our judgment in *Asghar*⁵⁸ correctly found that the audio-recording was admissible, given its evidentiary value to show Mr. Okwakol’s misconduct, that he could have no expectation that the meeting, which he hosted, would stay secret and that he had accepted material elements of the audio-recording’s content. We remind the Appellant of our holding in *Asghar* that:⁵⁹

... There is no difficulty in principle regarding the admissibility of the recorded conversation on the basis of the manner in which it was procured, even though it perhaps involved an element of entrapment. Where evidence has been obtained in an improper or unfair manner it may still be admitted if its admission is in the interests of the proper administration of justice. It is only evidence gravely prejudicial, the admissibility of which is unconvincing, or whose probative value in relation to the principal issue is inconsequential, that should be excluded on the grounds of fairness. Hence, the problem in this case is not the secret recording of the conversation; it is rather the weight to be given to it. ...

⁵⁷ *Ibid.*, para. 31.

⁵⁸ *Asghar v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-982.

⁵⁹ *Ibid.*, para. 43.

132. In compliance with our jurisprudence above, the UNDT admitted the hearsay evidence of the recorded conversation after having taken stock of and critically analyzing the following factual parameters, which also constituted the subject of the evidentiary examination before it at the hearings on 4, 5 and 8 August 2022: (i) the fact that Mr. Okwakol had the opportunity to comment on the recording, which had no interruptions, editing or other modifications; it had been shared with him together with the transcripts, as part of the annexes to the formal allegations; his comments on these documents had been duly considered by the Administration; and (ii) the purpose of the meeting at which the recording was done, which was to negotiate the withdrawal of a SEA complaint against a UNV and money had been offered to the victim in exchange for its withdrawal. In this regard the UNDT noted that:⁶⁰

... There can be no doubt that a SEA complaint is high stakes, considering the Organization's SEA zero-tolerance policy. The Applicant's actions of trying to secure a withdrawal of the complaint was, therefore, similarly high stakes and could only be executed under very high levels of secrecy. These factors support a conclusion that the recording was the only reasonable way of obtaining credible evidence about the Applicant's misconduct. This alone would ground the reception of the recording in evidence.

133. In addition, the UNDT credited VO1's testimony who stated that she was the one who had decided to record the meeting, and that "it was my own idea, to be able to prove". She also stated that she had recorded the meeting from its onset to the end, leaving out nothing. In her words: "From the start to the end, when I got in, and they said hello to me in Kiswahili, that's when I started recording. I missed nothing. "I had a right to use my phone, nobody could have stopped me, when I got in -- in the room, because I did not know why they had invited me to the meeting."⁶¹

134. Moreover, as stated, the UNDT did not rely exclusively on the transcript of the recorded conversation of the 25 November 2019 meeting, but it extensively and thoroughly examined the purpose and the probative value of the content of the audio-recording at the hearings before it where all the implicated persons, including Mr. Okwakol, Mr. R.L. and VO1, who had introduced it into evidence, gave their testimonies in relation to what had occurred during the recorded meeting and the content of their conversations therein.

⁶⁰ Impugned Judgment, para. 37.

⁶¹ *Ibid.*, para. 34.

135. Consequently, we see no error in that approach and in the determination of the facts, either. As already noted, we are satisfied that the UNDT's conclusions are consistent with the evidence. Mr. Okwakol has not put forward any persuasive grounds to warrant interference by this Tribunal. Therefore, we reject the arguments advanced by Mr. Okwakol to the contrary, and the appeal fails on this ground.

136. In view of the foregoing, the appeal fails.

Judgment

137. Mr. Okwakol's appeals in Case Nos. 2022-1714 and 2022-1752 are dismissed, and Judgment No. UNDT/2022/082 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 30th day of June 2023 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Gao

Judgment published and entered into the Register on this 13th day of July 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar