



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

KHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Salim Shaikh

Counsel for Respondent:
Bartolomeo Migone, WFP
Simone Parchment, WFP

Introduction

1. The Applicant is contesting the decision of 1 December 2010 taken by the Director of Human Resources Division, World Food Programme (“WFP”) to separate him from service with compensation in lieu of notice and without termination indemnity following a finding that he had engaged in misconduct in violation of the United Nations Staff Rules and Regulations, WFP’s Policy on Harassment, Sexual Harassment and Abuse of Authority (“HSHAP”) and the Standards of Conduct for the International Civil Service.

2. The Applicant requests rescission of the contested decision, reinstatement to his original position with retroactive effect and payment of a sum equal to 24 months’ net base salary as compensation for moral and career damages. The Applicant also requests that the Organization initiate disciplinary proceedings against the staff members who filed complaints against him (“the complainants”), and against the Staff Counselor Asia, WFP, for breach of conduct and perjury.

Background

3. On 15 July 2008, the Applicant joined WFP under a fixed-term contract as Logistics Officer and Head of the Sub-Office, grade NO-B, based in Quetta, Pakistan.

4. On 22 December 2009, the Office of Inspections and Investigations (“OSI”) received an email from the Staff Counselor Asia, WFP, stating that he had received complaints from three female staff members alleging harassment, sexual harassment and abuse of authority by the Applicant in violation of HSHAP.

5. By letter dated 29 December 2009, the Director, Human Resources Division, WFP, informed the Applicant that “WFP is currently conducting an investigation into allegations of improper conduct on your part in violation of WFP’s Policy on Harassment, Sexual Harassment and Abuse of Authority, and specifically sexual

harassment”, and that he would be placed on administrative leave pending investigation “[i]n order to ensure that a proper investigation is conducted and given the seriousness of the allegations”. The following day the Applicant was placed on administrative leave with full pay, pending the completion of the investigation.

6. In January 2010, OSI commenced an investigation into the allegations submitted against the Applicant with a team travelling to Quetta where it conducted initial interviews with the complaining staff members. During the first week of January 2010, OSI received three additional complaints alleging harassment and abuse of authority by the Applicant.

7. On 7 April 2010, based on the evidence collected, OSI sent the Applicant a memorandum advising him that he had “been made the subject of allegations which, if proven, could lead to administrative or disciplinary action against [him]”.

8. On 14 June 2010, the Chief, OSI, issued its investigation report which was provided to the Director, Human Resources Division (“HR”), WFP, whereby it recommended that “[a]dministrative or disciplinary action be taken against [the Applicant] for his violation of the WFP HSHAP Policy ... [and] [c]areful consideration should be given as to whether [the Applicant]’s future service at WFP in any capacity would be in the best interest of the organization”.

9. On 12 August 2010, the Applicant was notified, by memorandum dated 6 August 2010, that he was charged with specific instances of “serious misconduct” and that the “findings are sufficiently serious to the initiation of disciplinary action [and that] ... [g]iven the gravity of the charges ... if confirmed, the measure that is proposed in connection with the charges is that of ‘Dismissal’ ... in accordance with UN Staff Rule 10.2(a)(viii)”. The Applicant was asked to provide a written response to the memorandum, and the investigation report, within 10 working days.

10. On 22 August 2010, the Applicant received a copy of the investigation report referred to in the 6 August 2010 memorandum, with the applicable annexes being provided to him the following week.

11. On 20 September 2010, following the granting of an extension of time, for the purpose of obtaining relevant documentation, of the initial 10 working days, the Applicant submitted his response to the 6 August 2010 memorandum charging him with misconduct.

12. On 30 November 2010, the Director, HR, WFP, sent the Applicant a memorandum affirming the charges against him and implementing the disciplinary measure of “separation from service with compensation in lieu of notice and without termination indemnity”. The memorandum noted that the 12 August 2010 memorandum referred to the disciplinary measure of “Dismissal” but referenced staff rule 10.2(a)(viii) which concerns a disciplinary measure of separation from service either with or without pay. WFP therefore decided to apply the lesser of the two measures.

13. On 24 February 2011, the Applicant filed an application with the Dispute Tribunal contesting the administrative decision to separate him from service on disciplinary grounds. The Applicant submitted that the “allegations were not proved with verifiable facts, cogent convincing evidence, elements of doubt did exist and despite innumerable contradictions in the complaints and the testimonies, these were relied upon and likewise unjustly/illegally accepted”.

14. On 30 March 2011, the Respondent submitted his reply in which he stated that the disciplinary decision was fair and reasonable and requested that the application be dismissed in its entirety.

15. On 23 July 2011, the Applicant filed observations on the Respondent’s reply and, on 5 August 2011, the Respondent filed a response to the Applicant’s observations.

16. On 30 August 2011, the Applicant filed a motion for leave to file comments on the Respondent’s 5 August 2011 response. The Applicant’s filing included the requested comments.

17. On 4 June 2012, the undersigned Judge was assigned to the present case.

18. On 5 October 2012, the parties, pursuant to the Tribunal's Order No. 174 (NY/2012) of 30 August 2012, submitted a joint statement of agreed facts and legal issues. The parties also submitted that there was no need to convene a hearing. The joint statement also identified facts and legal issues on which the parties did not agree.

19. On 26 July 2013, the parties, pursuant to Order No. 170 (NY/2012) filed their closing submissions.

Consideration

Receivability

20. By the application filed with the Tribunal on 24 February 2011, the Applicant contests the disciplinary decision to separate him from service. The application was filed within 90 days from the date of 1 December 2010, when the decision was notified to him. The Tribunal considers that the application meets all the receivability requirements from art. 8 of the Dispute Tribunal's Statute and is receivable.

Scope of the legal review

21. In the present case, the parties agreed, as part of their joint submission in reply to Order No. 174 (NY/2012) of 30 August 2012 that an oral hearing was not necessary. Consequently, the Tribunal considered that it was not necessary to hold a hearing, and the case is to be decided on the papers before it.

22. As stated in *Yapa* UNDT/2010/169, when the Tribunal is seized of an application contesting the legality of a disciplinary measure, it must examine whether the procedure followed is regular, whether the facts in question are established, whether those facts constitute misconduct and whether the sanction imposed is proportionate to the misconduct committed.

Burden of proof

23. In the present case, the Applicant's contract was terminated as a result of the application of the disciplinary sanction of separation from service.

24. The ILO Convention, C158 on Termination of employment (1982), which is applicable to all branches of economic activity and to all employed persons (art. 2) states in art. 9.2:

In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation ... shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of valid reason for the termination ... shall rest on the employer

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for termination having regard to the evidence provided by the parties and according to procedures ... and practice.

25. Similarly to the principle of the burden proof in disciplinary cases in the ILO Convention, the Tribunal, in *Hallal* UNDT/2011/046, held that:

30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred. (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

31. Where a *prima facie* case of misconduct has been established, the burden is on Applicant to provide satisfactory evidence justifying the conduct in question

32. Thus, it is for the staff member who is challenging a decision of the Administration to show sufficient grounds to interfere in the disciplinary measure. In other words, the staff member is required to produce evidence to show that the Administration's decision was biased, improperly motivated or flawed by procedural irregularity or error of law.

26. Further, as expressed in *Fernandez de Cordoba Briz* UNDT/2013/069, "[t]he onus of proving ill-motivation or extraneous factors rests with the Applicant

(*Parker* 2010-UNAT-012) who has to discharge his burden on a preponderance of evidence (*Azzouni* 2010-UNAT-081)”.

27. In *Zoughy* UNDT/2010/204 and *Hallal* UNDT/2011/046, the Tribunal decided that it is not sufficient for an Applicant to allege procedural flaws in the disciplinary process. Rather, s/he must demonstrate that these flaws have affected her/his rights.

Applicant’s grounds for contesting the administrative decision

28. The Tribunal will analyze the Applicant’s contentions regarding the regularity of disciplinary procedure; the facts and evidence established for each of the three allegations of sexual harassment, harassment and abuse of authority; and finally the proportionality of the disciplinary sanction.

29. The Tribunal notes that it reproduces parts of the Respondent’s Reply from 30 March 2011 which extensively presented the facts and supporting evidence related to each of the Applicant’s allegations and, where applicable, states the ones that it adopts.

Regularity of the procedure

30. The Applicant stated that the complaints filed against him are not legally receivable because the Staff Counselor for Asia, instead of being a mediator, abused his position by adopting the position of a partisan and conducting his own vendetta with *mala fide* intentions. After receiving the complaints, the Staff Counselor disregarded the mandatory channels established in the 1 October 2003 memorandum concerning “Sexual Exploitation and Abuse Complaints and Investigation Protocols by, instead of forwarding the complaints to OSI, sending the complaints to the Regional/Country Head of Office and Head of DHR together with his own comments thereby retaliating and attempting to destroy the Applicant’s reputation and career.

31. According to WFP's Policy on Harassment, Sexual Harassment and Abuse of Authority adopted on 14 February 2007, the first step in the formal process consists of the submission of a complaint as follow:

Step 1 – Submission of complaint

27. The complainant must submit a complaint in writing to the Director ADH, the Inspector General, the local human resources officer at the duty station, a peer support volunteer, a staff counselor, or the confidential WFP Hotline operated by [OSI].

28. Whichever route is used, the complaint must immediately and confidentially be notified to the Director ADH”

29. A formal complaint must be submitted within six months from either the date of the incident of alleged harassment or abuse of authority or the most recent alleged incident, if the complaint is about a persistent pattern of inappropriate behaviour.

32. The Tribunal concludes that the staff members respected the procedure and they exercised their legal option to send the complaints in writing to one of the persons identified in the legal provisions, namely the Staff Counselor.

33. After receiving the written complaints, the Staff Counselor respected his mandatory obligations: he preserved the confidentiality of the documents and immediately informed both Human Resources and OSI. He was also not allowed to inform or speak with the Applicant about the complaints that had been filed and there is no evidence that he acted in a “partisan” manner.

34. The Applicant also stated that he conveyed his concerns when, during one of his visits, the Staff Counselor started to preach his religion in front of other staff members.

35. As expressed by the Respondent,

OSI specifically investigated the Applicant's claim that he was the victim of an ethnic conspiracy to manufacture complaints and ... established through independent testimonial evidence that [the Applicant] engaged in similar complained of behaviour when dealing with several staff of the [Sub-Office], whether they were from the Hazara community or the Punjabi community.

36. The Tribunal finds no evidence that the Staff Counselor did not respect his duties and abused his position in order to manipulate the complainants and to retaliate against the Applicant.

37. The Applicant also stated that the investigation procedure was arbitrary and unfair because he was placed on administrative leave with pay pending investigation with effect from 31 December 2009 with the allegation of “improper misconduct” on account of violation of WFP Policy on HSHAP and this abrupt act violated the law.

38. The Applicant states that, consequently, the staff members who had filed a complaint were left free to manipulate the evidence which affected the fairness and the impartiality of the process. He claims that the confidentiality of the investigation was not respected by two of the complainants because one of them—Mr. ZA— informed the security guards and drivers on 31 December 2009 that the Applicant was suspended and the same information was provided by another complainant, Ms. TR, to a person who called at the office and wanted to discuss the allegations with the Applicant. Approximately forty witnesses were interviewed by OSI in the absence of the Applicant thereby depriving him of his due rights.

39. Pursuant to staff rule 10.4 (ST/SGB/2009/7):

(a) A staff member may be placed on administrative leave ... at any time pending an investigation until the completion of the disciplinary process,

...

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.

40. The meaning of the expression “any time pending investigation” is that at any time a request for an investigation is filed following the receipt of a complaint until the disciplinary process is completed by the Office of Human Resources Management, the investigated staff member may be placed on administrative leave.

41. The Applicant was informed on 29 December 2009 that WFP was conducting an investigation into allegations of improper conduct. Consequently, taking into consideration the seriousness of the allegations, the Applicant was placed with immediate effect on administrative leave with full pay, pending the completion of the investigation. The investigation had already started when the Applicant was placed on administrative leave and the Applicant has submitted no evidence that would suggest that the Administration abused its discretion in placing the Applicant on administrative leave pending the completion of the disciplinary process.

42. Taking into consideration the complexity of the case and the Applicant's position in relation to the complainants, it was correctly determined that, in order to conduct a neutral fact-finding investigation and to obtain the relevant preliminary evidence, the Applicant had to be placed on administrative leave without access to emails or mobile phones. There is no reference in the rule that such a measure cannot be implemented prior to the Applicant having had the opportunity to respond to the allegations.

43. The Tribunal notes that even though the Applicant was informed that he had the right to challenge his suspension in accordance with Chapter XI of the Staff Rules, he never contested it prior to the filing of the present application. Consequently he cannot invoke any irregularities related to it as a ground of appeal against the disciplinary sanction.

44. The Respondent correctly stated that the former Administrative Tribunal "rejected an applicant's argument of improper administrative leave that was implemented before the applicant had the opportunity to respond to the allegations. See, e.g., former United Nations Administrative Tribunal Judgment No. 1498, *Abu El Fahem* (2009), p. 9)".

45. The Tribunal held in *Applicant* UNDT/2011/054 that the disciplinary part of the process, including the interview of the alleged offender, should only occur

once all the preliminary evidence has been made available to the staff member and the specific allegations against her/him have been finalized. If there is to be an interview it should be the last step in the investigation.

46. Staff rule 10.3 (ST/SGB/2009/7) states in part:

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. In such cases, no disciplinary measure or non-disciplinary measure, except as provided under staff rule 10.2 (b) (iii), may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the charges against him or her, and has been given the opportunity to respond to those charges. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

47. OSI interviewed the witnesses during the course of the investigation, which is a preliminary step in the process of determining whether the alleged misconduct may have occurred.

48. The Applicant was interviewed on 7 and 8 April 2010 once OSI had gathered all the preliminary evidence. At the beginning of his interview, the Applicant was informed that “what has been reported ... are allegations, not proven facts”. From the content of the interview results that before the interview, the Applicant received all the relevant details, had the opportunity to respond to all of the allegations and was offered an explanation as to why he was the subject of an investigation and was being interviewed. At the end of the interview he never mentioned that he wanted to cross-examine the complainants. Furthermore, he stated that the investigators had acted professionally and he provided them with the names of persons who could give evidence in his favor.

49. The investigators re-interviewed some of the complainants and they interviewed the witnesses proposed by the Applicant in order to verify

his arguments. Furthermore, in the present case, as correctly expressed by the Respondent:

87. ... the Applicant was provided with a full statement of the charges against him, together with all of the evidence supporting those charges. He was given over five weeks to respond to those allegations, and he indeed responded with a 26-page brief prepared with the assistance of counsel, as well as 24 additional annexes, confronting the witness statements and other evidence against him in detail ... the Applicant was therefore afforded a full and fair opportunity to challenge the evidence against him.

50. The investigation report was sent to the Applicant for his comments on 14 June 2010 and he had the opportunity to respond to the allegations contained therein and to review all evidence against him. The Applicant's response to the charges from 19 September 2010 was taken into consideration in the drafting of the final memorandum dated 30 November 2010 regarding the imposition of the disciplinary measure.

51. The Tribunal notes that the Applicant did not request to cross-examine the witnesses or to be re-interviewed in presence of his counsel after he was charged with misconduct or after he was sanctioned. He responded in writing to the charges held against him and, with regard to appeal filed with the Tribunal, he decided to waive his right to a hearing afforded by art. 16.2 of the Tribunal's Rules of Procedure.

52. The Tribunal also considers that contrary to the Applicant's assertion, the vacancy announcement for a logistics post that was posted shortly after the Applicant was placed on administrative leave did not demonstrate prejudgment of his case. The applicant held a fixed-term contract expiring on 31 December 2009, which was extended pending the disciplinary process. The position that was advertised was for a service contract and, as stated by the Applicant, there had already been a plan in place since the prior year to relocate him to Islamabad due to threats of violence from a local terrorist group. Furthermore, the Tribunal notes that the administrative decision to post a vacancy announcement for a post which the

Applicant considered to affect his contractual rights was never contested by the Applicant and cannot be considered a valid ground of appeal.

53. The Applicant also complains that the length of his administrative leave, 11 months, was excessive and affected many of his work related privileges. However, the evidence shows that the length of the administrative leave was necessitated by the amount of allegations and the investigators need to address in detail the Applicant's responses to those allegations. The Tribunal therefore considers that the extended period of the Applicant's administrative leave was reasonable because it was not caused unilaterally by the Administration and it was in the interest of a fair and complete investigation. As previously stated, an administrative leave with pay pending disciplinary process is considered to be without prejudice and the Applicant failed to prove the contrary.

54. The Applicant alleges that his placement on administrative leave enabled the complainants "to manipulate evidence oral or documentary and muster support and exert influence which is evident from the observation made by fact finding mission". The Applicant further alleges that his lack of access to WFP premises and property prejudiced his ability to gather evidence in support of his defense. The Applicant's submissions are not supported by the facts. He was given access to all the documents used in the investigation (including copies of the records of interviews during the initial Country Office Investigation) and was provided with a reasonable amount of time, more than five weeks from the date on which he was charged and provided with a copy of the investigation report to submit his response.

55. The Applicant also states that while he was placed on leave, there were breaches of the confidentiality requirement of the investigative process. However, as expressed by the Respondent, the staff members

95. ... [in] the Quetta Sub-Office were informed that [Mr. B.K.] would be Officer-in-Charge because the Applicant would be going on administrative leave. This was necessary in view of the Applicant's position as Head of the Sub-Office, and the need to identify an officer-in-charge of the Sub-Office during his absence. ...

56. In conclusion, the Tribunal considers that there is no evidence that the complainants manipulated the evidence held against the Applicant during his suspension, both the investigative and disciplinary proceedings in this case were conducted fairly, neutrally and in accordance with WFP's procedure and the Applicant's due rights were respected.

57. In *Molari* 2011-UNAT-164, the United Nations Appeals Tribunal recalled that when a disciplinary sanction is imposed by the Administration, and when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing evidence means that the truth of the facts asserted is highly probable.

58. In order to determine whether the facts were established, and in light of the Applicant's submissions, the Tribunal will analyze the facts and the relevant evidence presented by the Respondent.

Sexual harassment and abuse of authority against Ms. TR and Ms. AA

59. As stated by the Respondent,

19. The Applicant supervised [Ms. TR], an administrative assistant in the Quetta Sub-Office. In her written complaint and interview with OSI, [Ms. TR] stated that the Applicant repeatedly subjected her to unwelcome sexual comments, touching and requests for sex, starting in December 2008.

20. ... the Applicant offered her his "friendship", which she refused. [Ms. TR] stated that her refusal "did not stop him, he persisted", asking for her "friendship" again in January 2009. [Ms. TR] stated that, "[j]udging from his attitude, [she] felt that he did not want just general friendship, but more such as sexual relationship.

21. ... the Applicant would ask her to shake his hand. When she refused, "[h]e would argue with [her]" and tell her "you must shake hand". On one occasion in March 2009, the Applicant "forcefully kissed [her] hand". [Ms. TR] understood the Applicant's insistence on shaking her hand and kissing her hand to be "about his intentions, that he [was] step-by-step going ahead towards what he wanted).

22. ... [i]n response to her refusal of his sexual advances, “he tortured [her] a lot”, including calling her into his office, and in front of a colleague, he “started shouting on [her]”.

23. ... [i]n June 2009, the Applicant called her into his office and “he said, you have to have me ... [a]nd even, he asked [her] to meet him somewhere in the hotel”. She stated that when she questioned him about why he wanted to meet at a hotel, he responded to her, “[w]e can be more close and I’m your friend. I have the right to sex, have sex with you”. The Applicant’s requests for her “friendship” continued over the following months.

24. On or around 2 November 2009, the Applicant called [Ms. TR] into his office and asked her “whether [she] had ever been involved in him”. When she answered “[n]o”, he replied, “Ok then do not keep any expectations from me too”. ... from that day on, the Applicant ordered her to report to the office on a regular basis, even though the [United Nations Department of Safety and Security] had advised that due to the prevailing security situation in Pakistan at the time (after recent bombings, including one at a WFP office), non-essential staff should work from home.

25. ... the applicant informed her that he would not extend her contract beyond 31 December 2009 “because [she] had refused his friendship”. On or about 3 December 2009, [Ms. RA] and [another female colleague] discussed whether to complain about the Applicant’s behaviour to the staff counselor ... [as it appeared] that the Applicant “listened to [their] conversation and came out of his room and asked [her] not to come to office from that day onward”.

26 ... on or about 17 December 2009, the Applicant asked her to return to the office for a meeting where he asked her, “what are your plans after 31st December? You still have time to discuss with me any matter, official, personal or even contract. You still can keep the friendship”. She stated that he “again demand[ed] for the sexual relationship”, and added “[if] you accept my friendship, I might think about your job”. She understood this to mean that “if [she] accept[ed] his sexual friendship, then he would extend [her] contract”.

29. [Ms. TR] stated that later that day when she returned to the Applicant’s office, he “tried to get closer, he kissed [her] on the face and hugged [her]”. She “protested” and he replied, “now you do not let me but on the 23rd night when we will be at the Serena Hotel for the retreat we will be together”.

30. [Ms. T.R] stated that a few days later, the Applicant asked her to make the room arrangements at the hotel for the staff retreat in such a way that his room would be close to her room. ...

...

60. Prior to their last conversation of 17 December 2009, Ms. TR decided to record it. Following the events, Ms. TR decided to use the recording of the conversation in support of her allegations against the Applicant. The Tribunal considers that, in view of the content of the transcript of the recording, Ms. TR might have provoked the Applicant by suggesting the topic of conversation. The Tribunal will therefore not take the content of the audio recording into consideration.

61. The Tribunal notes that even if there is some uncertainty with regard to the exact date on which the above conversations took place, the imputations are not generic. Ms. TR presented sufficient and credible details about the conversations initiated by the Applicant during the time period of December 2008–December 2009.

62. In his interview from 7–8 April 2010, the Applicant stated that he completed the training course on harassment, sexual harassment and abuse of authority and he instructed the female staff never to come into his office unaccompanied by a male colleague. The Tribunal notes that the Applicant recognized in his interview that he “shook her hands twice” even though he knew that in Pakistan these gestures are not allowed. Ms. SR declared that the Applicant use to receive female staff members alone in his office and Mr. FR declared that “Mr. AK said that she [Ms. TR] would directly report to him”...

63. In *Hallal* UNDT/2011/046, the Tribunal held that the subjective belief of the victim must be taken into account in determining whether sexual harassment has occurred. It is very clear from Ms. TR’s statements that on several occasions, the Applicant directly expressed his intentions and that there was no other possible interpretation as to the intent behind them other than the one presented by her.

64. Consequently, the Tribunal considers that it is clear from the evidence that the Applicant’s verbal and physical conduct was continuous and was sexual in nature and was neither welcomed nor desired by Ms. TR.

65. In conclusion, Ms. TR was a victim of sexual harassment and her statements, even without the recorded conversation from 17 December 2009, are relevant in the present case. As expressed by the Respondent:

38. [Ms. TR's] statement is also corroborated by two other staff members who told OSI that she had previously confided in them regarding the Applicant's sexual harassment. [A] Program Officer in the Quetta Sub-Office, stated that she told him in early December about the non-extension of her contract and [he] understood that she was saying the Applicant was requesting sexual favors. ... [A] Field Monitor in the Quetta Sub-Office, recalled in his interview with OSI that [Ms. TR] had confided in him in September or October 2009 that she did not feel comfortable around the Applicant and that the Applicant was "*prompting ... to make personal relations, apart from the professional relation*".

66. The Applicant stated that the authority to renew Ms. TR's contract vested exclusively with the Country Director and that he, as a head of the office who occupied a lower level position was only authorized to make a functional assessment of her performance and convey that assessment to the Country Director for consideration. The Applicant indicated that in practice such recommendations are made in November.

67. The Respondent correctly established that according to the evidence the Applicant threatened to recommend that Ms. TR's contract not be renewed. In accordance with HSHAP, such a threat of non-renewal constituted an attempt to influence Ms. TR's career and thereby aggravated the sexual harassment committed by the Applicant.

68. Further, the Tribunal will analyze the evidence related to the Applicant's behaviour with Ms. AA.

69. As expressed by the Respondent

39. [Ms. AA], another Administrative Assistant in the Quetta Sub-Office whom the Applicant supervised, also submitted a complaint that she was sexually harassed by the Applicant. In her written complaint to the Staff Counselor, she stated that the Applicant asked

her for a “friendship” and asked her to meet him outside the office at hotels in the evening or during office hours to “make a relationship which [was] totally based on sexual desires”.

40. [Ms. AA] stated that the Applicant first asked him [sic] for her “friendship” in July 2008, which she did not accept. The Applicant asked her to meet him outside the office “[m]any times”, and said that he would meet her anytime or place. [Ms. AA] stated that when she would enter his office he “was always trying to get closer to [her], to shake hands, touch [her] shoulders”. She stated that she understood that the Applicant wanted to establish a friendship with her “totally based on sexual desires”.

41. [Ms. AA] stated in April 2009, shortly before her wedding, the Applicant “emphasized and asked to meet him for a sexual purpose” and said to her “[c]ome and meet me somewhere. It’s time to teach you. I will teach you how to handle your husband on the night”. After her wedding, the Applicant called her into his office and said “now you are married, everything is open and clear to you, now let us meet”. [Ms. AA] stated that she “strongly refused him”.

42. [Ms. AA] stated that after these encounters, she tried to avoid the Applicant, including by hiding in the office. She also stated that in the following months the Applicant kept “torturing” her, including by raising “unnecessary official issues” and “threaten[ing her] of not extending [her] contract”.

43. In an interview with OSI, the Finance Assistant Islamabad, stated that when he commented on her performance to the Applicant, the Applicant himself responded that, [she] “is much more better than anyone else in the office at that time in the administration and finance section” and one of her supervisors told OSI that “her performance has always been satisfactory.

70. Consequently, the Tribunal considers that Ms. AA’s complaint was not made to divert attention from her poor performance.

71. The Applicant invoked the fact that Ms. AA referred to events from July 2008 and that she did not report them for 18 months rendering them too late to be taken into consideration. As results from her statement that “throughout these months he kept torturing [her] in different ways”, there were other similar incidents in April and May 2009 through December 2009. The Tribunal notes that the Applicant is not denying the facts as they are presented, but he considers that the complaint related to those events is out of time. Since the Applicant’s

behaviour started in July 2008 and the last incident was in December 2009, the complaint was made within the deadline established by WFP's Policy on HSHAP.

72. The Applicant also stated that Ms. AA made the complaint in order to avoid the payment of a loan to the Applicant. Regardless of whether or not Ms. AA made any false statements, the Tribunal has not been provided with any evidence that would support this claim. Further, Mr. FR stated that Ms. AA paid back the money, giving a check to the Applicant after her wedding.

73. The Tribunal considers that the Respondent correctly appreciated that

45. ... [Ms. AA and Ms. TR's] statements corroborate each other and are also corroborated by other women, who testified to having received similar requests from the Applicant. [Ms. HG], Field Monitor in Quetta Sub Office, stated that the week after she joined the office, the Applicant called her into his office and "pinched her cheek and tried to sit very close to [her]. [Ms. MK], Field Monitor in Quetta [stated that] the Applicant also offered her his "friendship" and that he "could get [her] a very good position if [she] became [his] friend". [Ms. SK], a Field Monitor and Peer Support Volunteer, stated that the Applicant asked her for her "friendship" and invited her to his home for tea.

74. In conclusion, as summarized by the Respondent,

47. ... the Applicant's numerous requests for [the complainants'] "friendship" ... constituted sexual harassment in violation of WFP's HSHAP Policy as they amounted to "unwelcome sexual advance[s] or unwanted verbal or physical conduct of a sexual nature [and] this sexual harassment was aggravated by the fact that the Applicant was "in a position to influence the career or employment conditions of [Ms. TR]" and threatened to exercise that influence to recommend against renewal of their contract.

75. The Tribunal considers that the Applicant acted intentionally and continuously, and there are no exonerating or mitigating circumstances for his actions. The Applicant breached the mandatory legal provisions related to the behaviour of an international civil servant. The complaints were properly made

by the two female staff members, Ms. TR and Ms. AA in December 2009, within, as required by the para. 29 of WFP's Policy on HSHAP, six months of the date on which the latest events occurred.

76. The Tribunal finds that WFP correctly determined that the Applicant breached the mandatory legal provisions and that he committed sexual harassment.

Harassment of staff members

77. The Applicant was accused of using offensive language against Mr. IA, a Logistics Assistant in the Quetta Sub-Office. As stated by the Respondent, Mr. IA "complained that the Applicant used offensive and insulting language with him on several occasions. During an office meeting in December 2008, in response to a work-related suggestion by [Mr. IA], the Applicant [made a very insulting statement]. [Mr. IA] said that this statement was made in front of others and "shocked" him. He stated that he considered it "the biggest insult [he] ever ha[d] in [his] whole career".

78. The Tribunal notes that this incident which took place in December 2008 was an isolated incident and had no connection with the one from October 2009. Further, it was not reported within six months from either the date of the alleged incident of harassment, abuse of authority or the most recent alleged incident which would indicate a persistent pattern of inappropriate behaviour. Taking into consideration that the complaint was made in December 2009, the Tribunal will not take it into consideration in the present due to it being time-barred.

79. Further, as expressed by the Respondent:

57. [Mr. IA] also reported that in a separate occasion in October 2009 when official documents pertaining to a WFP food distribution were lost from Quetta office, the Applicant blamed [Mr. IA] and threatened to report him to the Federal Investigation Agency—a Pakistani agency that specializes in the investigation of terrorism—as well as the local police. [Mr. IA] said that he felt threatened and frightened. He also stated that the threat was unwarranted since

he had nothing to do the loss. The Applicant stated in his Application that “the documents mentioned by [Mr. IA] for which he was allegedly threatened, were not in his possession nor he was (sic) responsible for it and as such did not warrant referral to the law enforcing agencies for investigation”.

80. The Tribunal considers that intimidating and aggressive behaviour, whether physical or verbal, can take place between colleagues, regardless of their professional relation, in either a public or private space. The behaviour can occur at the workplace or in another location, so long as it is, as expressed by the HASAP policy, “identified or connected ... to working for [the Organization]”. It can also be directed to one or more persons. Such acts can be isolated or repeated, reflecting, as in the present case, a behavioural pattern.

81. The existence of verbal harassment is determined by the content of the statement and the intention of the offender. It is sufficient that such a statement/message be addressed directly to the subject(s). In this sense the following events were correctly considered relevant by the Respondent:

60. [Mr. RI], another Logistics Assistant in the Quetta Sub-Office, also stated that the Applicant subjected him to offensive verbal abuse. [Mr. RI] stated that the Applicant shouted at him in front of other staff members. Specifically, [Mr. RI] stated that on one occasion in late 2009, he told the Applicant that another staff member—[Mr. MA], a Senior Logistics Officer—[used an insulting language] and instead of taking action against [Mr. IA], the Applicant yelled that Mr. RI needed to give due respect to [Mr. IA.]. [Mr. RI] stated that he was “humiliated” by the Applicant’s behaviour.

61. ... [Mr. RI] subsequently informed OSI that the Applicant had contacted him during the investigation to suggest that he change his statement, but [Mr. RI] confirmed to OSI that he did in fact intend to complain about the Applicant’s behaviour.

82. The Tribunal agrees with the Respondent that “[t]he language the Applicant used with [two of his colleagues]—including ... demeaning orders, and unfounded threats—was ... offensive, and the Applicant accordingly knew or should have known that it would cause offence or harm to them in violation of the HSHAP Policy” even if these discussions were only related to their work performance.

83. The Tribunal notes that the Applicant was described by some of the witnesses as being a supportive person with a military tone and a strong personality, but also as a good manager who must give more attention to his subordinates and that this description is also reflected in his behaviour at the Quetta office.

84. Verbal abuse is an affront to the human dignity and is against the mandatory behaviour of an international civil servant. The charge of harassment against the Applicant is considered by the Tribunal as being correctly determined and supported by the evidence. The complaint was also made within six months from the occurrence of the last event.

Abuse of authority

85. The Respondent presented as relevant the following facts:

67. [Ms. SA], ICT Assistant in the Quetta Sub-Office, and [Mr. ZA], ICT Assistant in the Sub-Office, submitted written complaints to the Staff Counselor alleging that the Applicant had abused his authority as their supervisor and as HOSO.

68. [Ms. SA] stated in her complaint that the Applicant had threatened to deny her leave and terminate her contract if she did not tutor his children. [Ms. SA] stated that in January 2009, she asked the Applicant to approve leave for her to attend a pilgrimage. The Applicant responded that “[she] should teach his son 4 computer subjects ... otherwise [she] would not go”. [Ms. SA] agreed and tutored the Applicant’s son for three consecutive days, and subsequently she was permitted to take her leave. [Ms. SA] stated that in June 2009, the Applicant again asked that she tutor his children, this time his daughter. She stated that the Applicant brought his daughter with her friend into the office, stating they were “interns”, which they were not, and that “from that day henceforth [she] would have to teach his daughter”. [Ms. SA] stated that two different staff members complained about her tutoring the children at the work place.

69. [Ms. SA] stated that shortly after she tutored the Applicant’s daughter in the office, he asked her to travel to his home to tutor his daughter, she tried to refuse but the following day there was a car waiting to take her to his home. [Ms. SA] stated that she “had no choice so left [the office] at 11 am”. She went to the Applicant’s

house three times during working hours to tutor the Applicant's daughter. However, in August 2009, [Ms. SA] refused to go to the Applicant's home to tutor his children. She stated that in response, the Applicant was "seriously harsh" with her and stated to her "[y]ou have refused me very officially; don't take any expectations from me". In October 2009, she received a call from the Applicant telling her "[i]f you want your job, you should teach my daughter or find a new tutor for her". [Ms. SA] stated that shortly after this conversation, the Applicant informed her that he was not renewing her employment contract.

70. The Applicant admits that he brought his daughter to the office as an "intern", in violation of WFP's Directive Governing the Internship Programme, and that he asked [Ms. SA] to tutor his daughter during that time, [but] he denies that he asked [Ms. SA] to tutor her or his son, however.

71. He asserts that [Ms. SA's] claims must be false because she was absent from the office for a significant part of the year and "no such request could be made to a person who is absent from the venue".

86. The Tribunal considers that Ms. SA's inability to recall the precise number of times the Applicant directed her to tutor his children together with the fact that she was absent from the office does not change the nature of the Applicant's misbehaviour. The Applicant recognized during his interview that "he got his daughter and her colleague to internship in his office for three days" without respecting the mandatory rules. So long as at least one such request took place the Applicant is responsible for having abused his authority. There is no evidence that Ms. SA's performance was unsatisfactory. To the contrary, the fact that the Applicant chose her to tutor his children is an indication that he trusted and appreciated her performance.

87. The Tribunal further agrees with the Respondent's submission that

73. [Mr. ZA], Information Technology Assistant, [in his statement] stated that around May 2009, the Applicant called him into his office and "asked [him] to check [Mr. R's] email", on two different occasions, [and] that around 17 December 2009, the Applicant demanded that he check [Ms. TR's] official emails and telephone records.

74. [Mr. ZA] stated that the Applicant told him that the reason he wanted to monitor these staff members' email and phone accounts was to ensure that they had not made complaints about his behaviour to the Country Office or WFP Headquarters. Consequently, [Mr. ZA] stated that he refused because "it could become a problem for [him]" [and] "[s]oon after this, [the Applicant] started threatening him saying I am the one signing your contract, if you do not obey my orders, I will not renew your contract".

75. The Applicant alleges in his application that [Mr. ZA] was involved in the hacking of the Applicant's emails, stating that he had reported this issue "for disciplinary action but no action had been taken". ... [but he also stated] that the Country Director informed him that the issue had been investigated and the "tracking system [did] not make any indication" that [Mr. ZA] had accessed or manipulated the Applicant's email.

88. In conclusion, the Applicant's allegations that Mr. ZA wanted to retaliate against him are not supported by the evidence.

89. The Applicant stated in his application that the witnesses were "malafidely [sic] inducted in the proceeding to cause maximum injury to the Applicant, [Mr. ZA and Ms. AM] belong to the same clan and their separation from the server room as well as recommendations on non-renewal of the contract of [Ms. AM] annoyed [Mr. ZA] and as of inheritance nature of the clanship, became revengious".

90. It appears that the Applicant used the same defense during the disciplinary proceedings and, as stated by the Respondent:

76. ... OSI specifically considered and investigated the Applicant's claim that he was the victim of an ethnic conspiracy to manufacture complaints and evidence against him. OSI expressly stated in its investigation report, "OSI explored the conspiracy theory and gathered no evidence that any Quetta [Sub-Office] staff members agreed to make or did in fact make false allegations against [the Applicant]. On the contrary, OSI established through independent testimonial evidence that [the Applicant] engaged in similar complained of behaviour when dealing with several staff of the [Sub-Office], whether they were from the Hazara community or the Punjabi community".

91. These arguments were repeated by the Applicant in his closing submission, namely: that the contested disciplinary action was a result of a staff conspiracy because “during initial months of his appointment at Quetta, [he] apprehended/unearthed [sic] pilferage, misappropriation and fraud of programme funds/resources, truck-loads of food items”. The documents presented by the Applicant do not represent evidence that one of his ICT assistants accessed his emails or that the staff members who filed complaints against him were aware of the content of his correspondence with the Country Director.

Whether the established facts amount to misconduct

Applicable law

92. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) defines in sec. 1 what the Organization considers as harassment, sexual harassment and abuse of authority. Sections 2 and 3 identify the general principles, duties of staff members, managers, supervisors and heads of department/office/mission:

Section 1

Definitions

...

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

1.3 Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or

humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

...

Section 2

General principles

2.1 In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2(a) and staff rules 101.2(d), 201.2(d) and 301.3(d), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, any form of discrimination, harassment, including sexual harassment, and abuse of authority is prohibited.

2.2 The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.

2.3 In their interactions with others, all staff members are expected to act with tolerance, sensitivity and respect for differences. Any form of prohibited conduct in the workplace or in connection with work is a violation of these principles and may lead to disciplinary action, whether the prohibited conduct takes place in the workplace, in the course of official travel or an official mission, or in other settings in which it may have an impact on the workplace.

2.4 The present bulletin shall apply to all staff of the Secretariat. Complaints of prohibited conduct may be made by any staff member,

consultant, contractor, gratis personnel, including interns, and any other person who may have been subject to prohibited conduct on the part of a staff member in a work-related situation.

Section 3

Duties of staff members and specific duties of managers, supervisors and heads of department/office/mission

3.1 All staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations.

3.2 Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfill their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

3.3 Heads of department/office are responsible for the implementation of the present bulletin in their respective departments/offices and for holding all managers and other supervisory staff accountable for compliance with the terms of the present bulletin

93. Any form of harassment, whether based on sexual orientation or gender, as well as physical or verbal abuse at the workplace or in connection to work, is prohibited by staff regulation 1.2(a), which states:

Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental rights, in the dignity and worth of the human person and in equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

94. The Tribunal notes that the Appeals Tribunal and the Dispute Tribunal have affirmed the right of staff members to a harmonious work environment that protects

their physical and psychological integrity (*Nwuke* 2010-UNAT-099, *Corbett* UNDT/2011/195).

95. WFP's Directive ED2007/003 (Policy on Harassment, Sexual Harassment and Abuse of Authority) dated 14 February 2007, defines workplace, hostile workplace, abuse of authority, harassment and sexual harassment as follows:

DEFINITIONS

...

Workplace: ... includes any place where the occasion (relating to the harassment or bullying) can be identified or connected to either the requirements of WFP or with events outside but directly linked to working for WFP.

...

Hostile work environment: A hostile working environment is both one that a reasonable person would find hostile, intimidating and abusive. Hostile work environment is determined by looking at all of the circumstances, including the frequency of the allegedly harassing conduct, its severity, whether it is physically threatening, or humiliating, and whether it can be reasonable interfere with a staff member's work performance.

Retaliation is a malicious act to inflict emotional or physical distress and/or harm to another person. It is often a form of intimidation or attempted revenge.

...

6. **Harassment** is any improper conduct by an individual that is directed at and offensive to another person in the workplace and that the individual knew, or reasonably ought to have known, would cause offence or harm to that person.

7. **Sexual harassment** includes any unwelcome sexual advance or unwanted verbal or physical conduct of a sexual nature.

8. Abuse of Authority is when an individual improperly uses the power and authority inherent in his/her given position to endanger another person's job, undermine the person's performance in that job, threaten the person's economic livelihood, or in any way maliciously interfere with or influence a person's career.

96. WFP's directive states, amongst other, that the following behaviour constitutes harassment: Verbal abuse, insults and name-calling; shouting and

aggressive behaviour; use of derogatory or offensive nicknames.

97. Sexual harassment includes any unwelcome sexual advance or unwanted verbal or physical conduct of sexual nature.

98. Additionally, the directive also states that “[e]mployees with supervisory and/or management responsibilities [such as the Applicant] are responsible for:

- maintaining a high standard of personal conduct in dealing with all employees, and lea[d] by example in maintaining the personal dignity of employees;
...
- intervening promptly when alerted to actual or potentially inappropriate or offensive conduct, and reiterating the required standards of conduct;
...
- using normal supervisory and appraisal processes to examine any perceived concerns about personal behaviour that might be harassing or offensive, and discussing what action may be needed to improve standards of behaviour;
...
- helping complainants and alleged perpetrators to obtain appropriate support while a complaint is being resolved, and ensuring that the remaining team members are also appropriately supported and managed.

99. HSHAP states that “[w]hen [sexual] harassment is committed by a person in a position to influence the career or employment conditions of the victim, the sexual harassment is more offensive as it may also constitute abuse of authority”. The policy also defines workplace as including any place where the harassment can “be identified or connected ...directly ... to working for WFP”.

100. Staff Regulations (ST/SGB/2008/4) of 1 January 2008 state:

Article X

Disciplinary measures

Regulation 10.1

The Secretary-General may establish administrative machinery with staff participation which will be available to advise him or her in disciplinary cases.

Regulation 10.2

The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.

Sexual exploitation and sexual abuse constitute serious misconduct.

The Secretary-General may summarily dismiss a member of the staff for serious misconduct.

101. Staff Regulations (ST/SGB/2009/6) of 27 May 2009 state:

Article X

Disciplinary measures

Regulation 10.1

(a) The Secretary-General may impose disciplinary measures on staff members who engage in misconduct;

(b) Sexual exploitation and sexual abuse constitute serious misconduct

Disciplinary Measures—Disciplinary liability

102. Disciplinary liability has a contractual nature. It consists of a constraint applied by the employer, mainly physical or moral, and exercises both sanctioning and preventive (educational) functions.

103. The necessary and sufficient condition for the disciplinary liability to be determined by the employer is the existence of misconduct.

104. The employer has the right to establish the requirements of the organization, including the proper operation of the unit(s), the corresponding duties of each staff

member, the mandatory regulations and rules, including the correlative disciplinary sanctions.

105. By virtue of the subordination requirement that characterizes labour relations, staff members have the obligation to observe and respect not only general obligations specified in the individual contract and the applicable regulations and rules, but also general principles of a moral conduct. The staff member must comply with the general rules of conduct that flow from all the norms and principles such as: the general principle of equal treatment, non-discrimination, respect of the dignity and conscious of each staff member. Otherwise the staff member will commit misconduct which will result in disciplinary liability.

106. The existence of misconduct is determined by the following cumulative conditions:

- a. The *objective element* which consists of either:
 - i. an illegal act (when the staff member takes an action which violates a negative obligation);
 - ii. an omission (when the staff member fails to take a positive action); or
 - iii. a mixture of both. An illegal act and/or omission which negatively affects other staff members, including the working relationships and/or the order and discipline in the workplace.
- b. The *subjective element* which consists of the negative mental attitude of the subject/staff member who commits an act of indiscipline either intentionally or by negligence.
- c. The *causal link* between the illegal act/omission and the harmful result.

d. The *negative effect* on labour relations, order and discipline in the workplace.

107. The individualization of a sanction is very important because only a fair correlation with the gravity of the sanction will achieve the educational and preventive role of disciplinary liability. Applying a disciplinary sanction cannot occur arbitrarily but rather it must be based solely on the application of rigorous criteria. The Tribunal also considers that the purpose of the disciplinary sanction is to punish adequately the guilty staff member and to prevent other staff members from acting in a similar way.

108. In relation to the offence committed, the consequences produced and the degree of guilt can directly result in the application of even the harshest sanction—dismissal, regardless of whether or not this is a staff member's first offence.

109. The Tribunal considers that in some cases a staff member's failure to comply with his or her obligations entitles the employer to apply a disciplinary sanction, not only to sanction the staff member but also to prevent the production of negative/harmful effects of his actions on others, whether staff members or beneficiaries of services, as well as the reputation and standing (public confidence) of the employer (see *Streb* 2010-UNAT-080).

110. The Tribunal considers that the Applicant, as Head of the Sub-Office, grade NO-B, based in Quetta, Pakistan, was required to respect high professional and moral standards. He had direct responsibility to both prevent and ensure that the workplace he managed was free of offensive and harmful behaviour. Contrary to his obligations, he not only disregarded the interest of the staff members in his office, but he was actually directly responsible for creating a hostile working environment.

111. The Applicant should have reasonably been aware that his conduct constituted an abuse of authority and harassment and breached WFP's Directive

ED2007/003 (Policy on Harassment, Sexual Harassment and Abuse of Authority). The Applicant willfully committed acts that qualify as misconduct, namely sexual harassment. His actions were aggravated by the fact that as the Head of the Sub-Office, in Quetta, Pakistan, he was in a position to influence the employment conditions of the staff members towards whom he exhibited the prohibited conduct. Furthermore, the Applicant has not provided the Tribunal with any evidence that could support a finding that there were exonerating or mitigating circumstances that would justify some of his actions.

112. As the Tribunal stated in *Hallal* UNDT/2011/046, “as a United Nations employee, the Applicant surely was aware of his obligation under former staff regulation 1.2(f) that he was to conduct himself at all times in a manner befitting his status and should not engage in any activity that is incompatible with the proper discharge of his duties”.

113. In conclusion, the evidence produced by the Respondent demonstrates that the Applicant’s behaviour was unlawful, violated the standard of conduct of an international civil servant and the expectations that an employer such as the United Nations may have of its staff member, especially one in a senior position.

114. There is a direct link between the Applicant’s behaviour and its negative effect on the rights of other staff members. The dignity of the staff members and their working relations were seriously affected by the Applicant’s actions.

115. In conclusion, the decision to initiate the formal disciplinary process was justified by the preliminary fact-finding investigation report.

116. The Tribunal finds that the Applicant was correctly charged with serious misconduct based on OSI’s findings which, with the exception of the finding related to the use of offensive language against Mr. IA, were all supported by the evidence. Since the cumulative elements of misconduct and the Applicant’s disciplinary liability were legally established, the Respondent lawfully exercised his right to sanction the Applicant with misconduct.

Proportionality of the sanction

117. Staff rule 10.3(b) states that one of the rights in the disciplinary process is that “any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”. This legal provision is mandatory since the text contains the expression “shall”. The Tribunal must therefore ensure that a staff member’s right to a proportionate sanction was respected and that the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct.

118. The Tribunal considers that the rule reflects not only the staff member’s right to a proportionate sanction, but also the criteria used for individualization of the sanction.

119. The nature of the sanction is related to the findings of conduct which is in breach of the applicable rules.

120. The “gravity of misconduct” is related to the subjective element of misconduct—guilt and to the negative result/impact of the illegal act/omission. If there is no guilt, there cannot be a misconduct and consequently no disciplinary liability.

121. In order to appreciate the gravity of a staff member’s misconduct, all of the existing circumstances that surround the contested behaviour are of equal importance and have to be analyzed in conjunction with one another. Namely: the exonerating, aggravating and mitigating circumstances.

122. The Tribunal notes that there are some circumstances which can exonerate a staff member from disciplinary liability such as: self-defense, state of necessity, force majeure, disability or error of fact.

123. As stated by in *Yisma* UNDT/2011/061:

Both aggravating and mitigating circumstances factors are looked at

in assessing the appropriateness of a sanction. Mitigating circumstances may include long and satisfactory service with the Organisation; an unblemished disciplinary record; an employee's personal circumstances; sincere remorse; restitution of losses; voluntary disclosure of the misconduct committed; whether the disciplinary infraction was occasioned by coercion, including on the part of fellow staff members, especially one's superiors; and cooperation with the investigation. Aggravating factors may include repetition of the acts of misconduct; intent to derive financial or other personal benefit; misusing the name and logo of the Organisation and any of its entities; and the degree of financial loss and harm to the reputation of the Organisation. This list of mitigating and aggravating circumstances is not exhaustive and these factors, as well as other considerations, may or may not apply depending on the particular circumstances of the case.

124. The consequences of the misconduct, previous behaviour, as well as any previous disciplinary sanctions imposed can either constitute aggravating or mitigating circumstances.

125. The sanctions which can be applied to a staff member are listed under staff rule 10.2. They are listed from the lesser sanction to the most severe and must be applied gradually based on the particularities of each individual case:

Rule 10.2

Disciplinary measures

(a) Disciplinary measures may take one or more of the following forms only:

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

126. In *Applicant* UNDT/2010/171, the Tribunal held that, given the range of permissible sanctions for serious misconduct, it is necessary to consider the totality of the circumstances, including any mitigating factors, to assess where to pitch the appropriate sanction.

127. The Tribunal finds that the Respondent correctly determined that:

77. ... the Applicant's conduct amounted to abuse of authority in violation of the HSHAP Policy and ... abuse of authority has been held to constitute misconduct warranting disciplinary action. *Applicant v. Secretary General*, [former United Nations Administrative Tribunal] Judgment No. 1428 (2009) (upholding disciplinary measure of separation from service for applicant's abuse of authority in initiating an unwarranted investigation against another staff member).

78. ... the Applicant's admitted actions in directing [Ms. SA] to tutor his daughter amounted to violations of the WFP Directive on the Intern Programme, which explicitly provides, "[s]pouses, sons, daughters, brothers or sisters of staff members will not be considered eligible for this Programme". ... the Applicant's directing [Mr. ZA] to monitor the email and telephone of another staff member violated the WFP Directive on Usage of Network Services and Internet, which provides that "[t]he monitoring and logging of staff activities on computer systems, and retrieval of related information are allowed when a legitimate corporate need exists".

128. As a supervisor, the Applicant was required in accordance with sec. 5.3 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority) "to take prompt and concrete action in response to reports and allegation of prohibited conduct". Instead of taking such measures when he received a complaint from one of the staff members, he humiliated him.

129. Section 5.5 of ST/SGB/2008/5 states:

Aggrieved individuals are encouraged to notify the offender of their complaint or grievance and ask him or her to stop as, in some instances, the alleged offender may not be aware that his or her behaviour is offensive. However, disparity in power or status or other considerations may make direct confrontation, and aggrieved individuals are not required to confront the offender.

130. The Applicant used offensive language on several occasions and on a number of occasions there were inappropriate physical contacts with two female colleagues, Ms. TR and Ms. AA. The Applicant asked the complainants for their “friendship” while making unwelcome sexual advances. As the Tribunal stated in *Perelli* UNDT/2012/034, “the nature of the sexual harassment is such that it may be difficult to provide the exact time of each alleged instance, particularly where it consists of an ongoing pattern of behaviour. ... It takes account of the dynamics of power, authority and hierarchy that may inhibit staff members from confronting a harasser”. The Applicant was not directly put on notice of the offensive nature of his comments and actions towards his colleagues, but his offending behaviour was clearly unwelcomed by the recipients. The claims regarding the facts highlighted above were submitted to the Staff Counselor within the time limits—six months from the most recent alleged incidents related to a pattern of inappropriate behaviour: Ms. T.R.’s—sexual harassment from January to November 2009; Ms. SA’s—abuse of power and harassment—in July and August 2009; Mr. IA’s—harassment—in October 2009; and Ms. SR—abuse of authority—in August 2009.

131. In conclusion, and as expressed by the Respondent,

47. ... sexual harassment was aggravated by the fact that the Applicant was “in a position to influence the career or employment conditions of [Ms. TR]” and threatened to exercise that influence to recommend against renewal of their contract.

132. The Applicant acted intentionally and the continuous nature of his actions breached the legal provisions related to the behavioural requirements for international civil servant. The existence of minor inconsistencies regarding the date on which the alleged incidents took place does not affect the credibility of the complainants’ statements. The staff members believed in good faith that they

were dealing with an offensive, hostile and intimidating working environment created by the Applicant and the lack of prior official complaints was due to the fact that the concerned staff members feared that they could be subject to potential repercussions and/or retaliation from the Applicant.

133. The Tribunal considers that the disciplinary sanction applied to the Applicant—separation from service with compensation in lieu of notice and without termination indemnity—is proportionate with the nature and gravity of the misconduct. He was correctly found guilty of sexual harassment, harassment and abuse of authority, and each of these allegations, according to the applicable law, constitutes serious misconduct.

134. In the present case, the Secretary-General legally exercised his discretion to separate the Applicant after taking into consideration all of the relevant mitigating and aggravating circumstances. Indeed, the fact that the Applicant was never sanctioned before was balanced against the serious nature and length of his misbehaviour, the number of employees affected by his actions and the negative effects those actions had on the working relations. There are no exonerating circumstances applicable in the present case and the decision to terminate the Applicant's contract and to apply the sanction of separation from service was proportionate to the nature and gravity of the misconduct and reflects the irreversible breach of trust between the employer and the staff member.

135. The Tribunal notes that the labor contract is *intuitu personae* and the Secretary-General has the right to terminate a contract under staff regulations 9.3 and 10.1 and rule 9.3(c)(iv) for disciplinary reasons, when a staff member does not respect his obligations and no longer has the specific qualities required to be employed by the Organization.

136. In *Sow* UNDT/2011/086, the Tribunal found that the principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar

offences, in general, the penalty should be comparable.

137. Taking the above into consideration, the Tribunal notes in the present case the sanction applied by WFP is in line with the ones applied in similar cases by the Secretary-General (see the Secretary-General's 2008–2010 reports on disciplinary cases as well as the Tribunal's relevant jurisprudence).

138. ST/IC/2010/26 (Practice of the Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2009 to 30 June 2010), dated 7 September 2010, states:

Abuse of authority/harassment

17. A staff member sexually harassed another staff member, abused his authority with respect to her, and sent her offensive and threatening emails and text messages, including through the organization's information and communications technology (ICT) resources. The staff member also distributed offensive material to other staff, using the Organization's ICT resources.

Disposition: dismissal.

Appeal: none filed as of the date this circular was submitted for processing.

18. A staff member abused his authority and sexually harassed an intern who served under his authority.

Disposition: dismissal.

Appeal: filed with the Dispute Tribunal, where the case remains under consideration.

139. In *Hallal* UNDT/2011/046, the Tribunal stated:

1. The Applicant contests the decision of the Executive Director of the United Nations Children's Fund ("UNICEF") to separate him without notice following a recommendation to do so by the Joint Disciplinary Committee ("the JDC"). The JDC found that the Applicant had committed a serious act of misconduct on the grounds that he had engaged in sexual harassment of a United Nations Volunteer ("the Complainant").

...

70. Separation without notice is proportionate to a finding of serious misconduct on the grounds of sexual harassment according to UNICEF's practice, particularly with regard to staff rule 101.2(d), which is a prohibition on harassment.

140. The Tribunal concludes that the contested disciplinary decision was taken by the Secretary-General in accordance with the applicable regulations and rules that govern disciplinary matters. Furthermore, the Tribunal notes that the sanction applied in the present case was in line with sanctions applied in other matters of similar nature.

141. The Applicant's due process rights were respected throughout the preliminary investigation and the ensuing disciplinary process; he had access to all of the documentary evidence (including the witness testimonies) and he had the opportunity to make comments and to propose witnesses in his defense while also being assisted by counsel. The Applicant's presumption of innocence was respected and the disciplinary process, including the investigation, was conducted in an objective manner. The contested decision contained the legal reasons and factual explanations and was neither biased nor improperly motivated or flawed by procedural irregularity or errors of law. The reasons were sufficient to justify a termination and both misconduct and the Applicant's disciplinary liability was correctly determined and the disciplinary sanction was proportionate to the misconduct committed by the Applicant.

Conclusion

142. In view of the foregoing, the Tribunal DECIDES:

143. The application is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 12th day of November 2013

Entered in the Register on 12th day of November 2013

(Signed)

Hafida Lahiouel, Registrar, New York