UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2016/009
Judgment No.: UNDT/2017/051
Date: 29 June 2017
Original: English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

MBAIGOLMEM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Edward P. Flaherty

Counsel for Respondent:
Elizabeth Brown, UNHCR
Lance Bartholomeusz, UNHCR

Introduction

1. The Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR") in the Democratic Republic of Congo ("DRC"), challenges the decision to separate him from service, with termination indemnities and compensation in lieu of notice, as a disciplinary measure notified to him by letter dated 6 July 2015.

2. By way of remedy, he seeks:

a. Rescission of the impugned decision, with his retroactive reinstatement in his former position with effect from 9 July 2015, together with payment of all amounts that he would have received, including salaries, benefits, pension contributions, entitlements and any other emoluments;

b. If necessary, initiation of a new investigation into the allegations against him, ensuring full respect of his due process rights;

c. Moral damages in the amount of two years' net base salary on account of the professional and personal suffering he endured, in particular anxiety, humiliation and stress, as well as harm to his credibility and dignity as a result of the impugned decision and the manner in which the investigation was conducted;

d. A recommendation letter highlighting the Applicant's achievements and contribution throughout his four years of service with UNHCR, based on his performance evaluation reports since 2012;

e. Interest on all amounts awarded at the rate of 5% per annum, from 9 July 2015 through the date of full satisfaction of this Judgment; and

f. Such other relief as the Tribunal deems proper, necessary and just.

Facts

3. The Applicant joined UNHCR in November 2011 as its Assistant Regional Representative (Supply) in Kinshasa, DRC, at the P-5 level.

4. From 17 to 27 June 2014, the Applicant attended a UNHCR Workshop for Emergency Management ("WEM") in Starum, Norway. All participants stayed in accommodations on-site and were divided into teams for various exercises. The Applicant was named as the head of his team, which included a female staff member serving as Supply Associate (G-6) in Budapest, Hungary.

5. On the evening of 20 June 2014, after dinner and an all-team meeting, the above-mentioned female staff member went to the Applicant's room to work with him on part of their team's assignment.

6. A few days before the end of the workshop, the Applicant met a Staff Welfare Counsellor, who advised him orally that certain workshop colleagues had complained about inappropriate behaviour on his part.

7. On 17 July 2014, the staff member who had been working in the Applicant's room in the evening of 20 June 2014 (hereinafter, the "Complainant") lodged a complaint for sexual harassment against the Applicant with the Inspector General's Officer ("IGO"), UNHCR, alleging that, on the evening in question, during their work session, the Applicant enquired if she would be interested in P-2/P-3 positions in RDC and later, as she gathered her things to leave, the Applicant proposed taking a hotel room together and spending the weekend following the end of the workshop together in Oslo.

8. The Complainant further alleged that, as she approached the door of the Applicant's room to leave, the Applicant hugged her and tried to kiss her. Reportedly, as she turned her head to avoid it, she told the Applicant that she did not want that and tried to back away, while he kept his arms around her and tried to kiss her again, after which he moved his arms downward, putting his hands on her buttocks, whereas she repeatedly told him that his actions made her feel uncomfortable. She finally left the room.

9. IGO launched an investigation into the allegations. Seven witnesses were interviewed between August and October 2014 as part of the investigation, including the Complainant and the Applicant, as well as two trainers and three participants to the WEM, in which the Complainant had confided about the alleged incident either the following day or within three days of it. Two of them (two female fellow participants to the WEM) stated, after the Complainant recounted the incident to them, that the Applicant had also acted in an inappropriate manner with them during the training—namely, for one of them, touching her neck during a coffee break and, for the second one, explicitly proposing to spend the night together as they came across in their hotel's corridor one evening—although none of these participants brought a complaint on these purported incidents.

10. The IGO investigator's email of 13 October 2014 convening the Applicant to his interview advised him that he was the subject of an investigation for possible misconduct. The investigator reiterated this point at the beginning of the interview and the Applicant confirmed that he had understood that.

11. On 5 December 2014, the IGO investigator shared with the Applicant the draft investigation findings and invited him to comment on them. The message stated that the Director, Division of Human Resources Management ("DHRM"), could initiate disciplinary procedures based on the investigation report. The Applicant provided comments on 14 December 2014.

12. The Investigation Report was rendered on 18 December 2014. It concluded as follows:

> The IGO considers that the evidence, using the preponderance of evidence standard, supports a finding that [the Applicant] engaged in misconduct by sexually harassing [the Complainant] at the end of a working session in his bedroom during the Workshop on Emergency Management in Starum, Norway, 17-27 June 2014.

13. By letter dated 5 February 2015, the Director, DHRM, informed the Applicant that disciplinary charges for sexual harassment were being brought against him. She transmitted the Investigation Report to the Applicant and gave

him an opportunity to answer to the allegations and produce countervailing evidence.

14. After some exchanges with a Legal Officer of the Office of Staff Legal Assistance, who gave the Applicant his own assessment of the situation, the Applicant submitted comments on 28 February 2015, denying all the allegations. He joined a brief written statement by one of the participants to the WEM indicating that the Applicant spent the evening in his room having drinks with a number of other colleagues. It was in this evening that one of the female participants purported that the Applicant proposed spending the night with her.

15. On 26 June 2015, the Director, DHRM, transmitted to the High Commissioner for Refugees, who alone has the authority to make decisions regarding the imposition of disciplinary sanctions to UNHCR staff, a memorandum titled "Recommendation for a disciplinary measure". The latter contained a legal analysis of the case and advised that the Applicant be issued a disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. The High Commissioner approved this recommendation on 3 July 2015.

16. By letter dated 6 July 2015, received by the Applicant on 9 July 2015, the Director, DHRM, informed the Applicant that the High Commissioner had decided to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice, and with termination indemnity, for serious misconduct. In particular, the decision was based on the finding that he engaged in sexual harassment, specifically, making unwelcome sexual advances towards a colleague, the Complainant, during his attendance at the WEM in Starum.

17. On 13 August 2015, the Applicant requested management evaluation of the disciplinary measure imposed on him and, on the following day, 14 August 2015, he formally requested a revision of such measure.

18. By letter dated 2 October 2015 in response to the Applicant's management evaluation request, the Deputy High Commissioner, UNHCR, advised that no management evaluation request was required with respect to a decision imposing

a disciplinary measure and that, hence, the Applicant could proceed directly to file an application before the Tribunal.

19. On 14 August 2015, the Local Staff Association, Regional Representation, DRC, sent a letter, accompanied by signatures of 130 staff members of different branch offices of UNHCR in DRC, stressing the "exemplary behaviour" and "moral and personal integrity" of the Applicant.

20. The present application was filed with the Nairobi Registry of the Tribunal on 6 October 2015, that is, within 90 days as of the date the Applicant received the notification of the contested decision. The Respondent replied on 6 November 2015. The Applicant filed additional submissions on 9 December 2015.

21. After consultation with the parties, who raised no objection, the case was transferred to the Geneva Registry of the Tribunal, by Order No. 164 (NBI/2016) of 23 March 2016.

22. Pursuant to Order No. 232 (GVA/2016) of 5 December 2016, the Respondent filed additional information and materials on 12 December 2016.

23. A case management discussion took place on 16 December 2016. A substantive hearing was held on 28 February and 17 March 2017, at which four witnesses were heard, out of the seven initially suggested by the parties.

Parties' submissions

24. The Applicant's principal contentions are:

a. The contested decision was made without full consideration of all relevant facts and was thus based on erroneous conclusions. Despite the absence of other direct witnesses and/or concrete evidence corroborating the allegations, the Administration did not examine the exculpatory witnesses suggested by the Applicant. Specifically, it failed to consider the Applicant's character, personality and professional history, and his previous conduct at work with female colleagues or supervisees, although it is highly

unlikely that a man harasses three different women in just a few days while he has never showed such kind of conduct before in 25 years of career;

b. IGO and the Administration omitted to consider evidence submitted by the Applicant. They gave no weight to the explanations that he would not have promised any post to the Complainant because he lacked the authority to select her, and that he would not have proposed to spend the following weekend in Oslo because he had a return flight ticket and it would have been complicated to change it. Further, it is not believable that the Applicant would have hugged, put his arms around and tried to kiss the Complainant as she raised her voice while the door was open without anyone noticing. Equally hard to believe is that his alleged gestures toward two other colleagues would have gone unnoticed;

c. The procedure was partial and biased, given that:

i. Besides the Complainant and the Applicant, only five participants to the WEM, all women, were interviewed. It is unclear why only these six people were chosen for interview and not, for instance, other participants to the WEM such as those who accompanied the Applicant in the evening when he allegedly proposed to spend the night with one of the female participants, those who occupied the rooms next to his and could have heard the Complainant and himself during the incident, those who saw that the room door remained opened as the Complainant was there, other staff members to whom the Applicant advised about the professional openings in African francophone countries, or the women who had worked with him in Kinshasa and other field offices for the last four years. Also, it was wrong to consider that there was no need for IGO to interview other participants to the WEM on the assumption that they did not have information directly related to the allegations made against the Applicant;

ii. All witnesses interviewed were "prosecution witnesses". None was interviewed to give evidence in favour of the Applicant, including after he provided comments and pointed to some people that could have provided evidence favourable to him;

iii. None of the witnesses that IGO choose to interview had direct knowledge of the facts. They gave information based on their perceptions and judgments of value, if not rumours, on the way the Applicant interacted with women;

iv. No due consideration was given to the possibility that the Applicant's attitude could correspond to a communicative staff member, open and concerned about his colleagues, suggesting the option of joining operations in Kinshasa with no hidden intentions, and by no means trying to use his position to solicit sexual favours;

v. While the Complainant lodged her complaint in July 2014, the Applicant was informed of it only on 13 October 2014, and he was made aware of the details of the allegations only at his interview. Moreover, he did not have access to the Complainant's statements and interview record before 5 December 2014;

vi. The Applicant was not advised by an independent and impartial legal counsel. The OSLA counsel only advised him to resign;

d. The credibility of the Complainant and the Applicant's assertions were unequally evaluated. While the Complainant's assertions were deemed credible, mainly because of the lack of any apparent reason for her to invent such a story and because she seemed believable in the eyes of the other staff members interviewed, when the Applicant denied all allegations against him no investigation was undertaken to determine if he had any reasons or was the kind of person to behave in such inappropriate way. Had IGO made such enquiries, it would have found evidence to the contrary. The presumption of innocence was breached by the great reliance placed on the Applicant's inability to explain why the Complainant would have invented such a story;

e. The facts that formed the basis for the disciplinary measure have not been established by clear and convincing evidence, which is the required standard when separation is a possible outcome of the disciplinary procedures. Yet, the burden of proof rests with the Respondent;

f. The only evidence provided by four women interviewed in addition to the Applicant and the Complainant was that they had been informed by the Complainant about the incident and that some of them perceived the Applicant as a "charmer" or "a man who likes himself". That the Complainant's story seemed credible to other colleagues and that she reported it to some colleagues in the days thereafter does not mean that such facts occurred. The consideration that she had no reason to invent such a story as she did not know the Applicant before the WEM should equally benefit the Applicant. The allegations by two other women were facts alleged but not confirmed; in addition, neither of them decided to make a complaint against the Applicant. Yet, they were taken into account in arriving at the contested decision. The Complainant's attitude, smiling and relaxed, during the days that followed the alleged incident contradicts the allegations of stress and trauma advanced by the Respondent, seemingly based exclusively on the assertions by two other female colleagues;

g. The measure imposed was severely disproportionate to the alleged but non-proven facts. The fact that the Applicant had not taken the on-line training on sexual harassment was not considered as a mitigating factor; and

h. As regards compensation, the fact that the Applicant's fixed-term appointment was due to expire on 31 December 2015, that is, less than six months after its effective termination, does not demonstrate that it would not have been renewed. Hence, this is not a reason to limit damages to this period. Furthermore, while the Respondent holds that the Applicant failed to evidence moral damage, he could not ignore the moral prejudice that such false and outrageous accusations caused to the Applicant's personal and professional life. Serious accusations of sexual harassment can only damage his reputation and future career. In addition, moral harm was exacerbated by

the irregularities committed during the investigation process and the Organization's lack of care.

25. The Respondent's principal contentions are:

a. The record in this case contains sufficient basis to conclude that the facts constituting the basis for the disciplinary measure were established through clear and convincing evidence. IGO should have investigated both inculpatory and exculpatory evidence. The record of the Complainant's interview is direct evidence of the allegations. Its credibility is supported by its coherence and the trauma and stress she expressed, as well as by her having contemporaneously reported the unwelcome sexual advances. Indeed, she reported them to two facilitators on the next day and to three fellow participants within the following three days, who all subsequently provided a consistent account of the Complainant's reporting of the incident and who each was convinced of the truth of her account. Although the investigator asked many of them whether they "believed" the Complainant's account, when read in context, it is clear that such question referred to her emotional state, as the following question is precisely about their perception of her emotional state. The credibility of her account was further supported by the reports from other WEM participants regarding the Applicant's acts, which indicate a pattern of behaviour towards female colleagues. Additionally, the Complainant had nothing to gain by providing a false account, and the lack of any such interest has been viewed in the past by the Tribunal as reinforcing the credibility of a complainant's account;

b. Moreover, the Applicant's credibility was undermined by some inconsistencies in his statements. For instance, he said in his interview that he did not know one of the participants who testified that he had also had an inappropriate behaviour with her, whereas, in his comments following the charge letter, the Applicant knew exactly who this witness was;

c. The credible testimony of the victim alone may be sufficient to constitute clear and convincing evidence, *a fortiori*, if reinforced by additional circumstantial evidence;

d. The investigator has wide discretion to determine the evidence that is relevant to obtain. There was no indication that anyone beyond those actually interviewed had any relevant information. It was not unreasonable for him to not pursue the leads that the Applicant now points out as being *lacunae* in the investigation, as they were not foreseeably relevant or added to the information already gathered. Likewise, visiting the scene once the WEM had ended and its participants were no longer there, and conducting the interviews in person, to fully see the witnesses' demeanour months after the events had limited added value;

e. The Applicant's assertions that, he claims, counter the findings of fact regarding the incident are without merit:

i. Assuming that the Applicant was indeed not in a position to assist in obtaining a P-2 or P-3 post in Kinshasa, it does not exclude that he could have told so to the Complainant in an attempt to convince her to welcome his sexual advances;

ii. Even if the Applicant had a return flight ticket on 28 June 2014, it was possible to change it, especially since it was not a flight to Kinshasa but a relatively short trip to Geneva;

iii. The fact that the door of the room was open does not rule out the possibility that the Applicant made advances to the Complainant;

iv. Whereas the Applicant asserts that on the evening in which he purportedly made explicit allusions to spending the night with a colleague he was having drinks with other participants in the room of one of them, it is known that he was also at a different gathering at the room of another colleague's room. Hence, his presence in this social event does not disprove that he could have made the reported advances, and rather suggests that on that evening he actually walked by the corridor where this incident reportedly happened;

v. It is not "unthinkable" that the Applicant could have caressed one of his colleagues' neck without being seen by the rest of the participants, this being a very brief action. Moreover, this would be consistent with the statement by one of the witnesses that the Applicant regularly encroached on the personal space of female colleagues;

vi. Although the Applicant asserts that no full consideration was given to his character, personality, professional history and previous conduct, these factors could not explain why three separate female colleagues reported inappropriate conduct by him;

vii. Whilst the Applicant avers that the Complainant and other colleagues made false serious accusations against him, he has not met the burden of proving ill-motivation. Unlike the Complainant, the Applicant, as the subject of the investigation, had an obvious reason to make false statements during the investigation, namely, trying to avoid a disciplinary measure;

f. The established facts amount to misconduct within the meaning of staff rule 10.1(a). Precisely, such facts constitute sexual harassment as defined in Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), in significant disregard of the Applicant's obligations under staff rule 1.2(f) and UNHCR's former Policy on Harassment, Sexual Harassment, and Abuse of Authority, dated April 2005;

g. Regarding proportionality, it is not the Tribunal's role to substitute the Secretary-General's appraisal by its own. Accordingly, a disciplinary measure can only be reviewed in cases of obvious absurdity or flagrant arbitrariness. In this respect, a sanction is not rendered disproportionate simply because a lesser one could have been imposed. The measure imposed in the present case was not obviously absurd or flagrantly arbitrary, but rather commensurate to the serious misconduct committed. It was not the most severe measure available, and both the Appeals and the Dispute

Tribunal have upheld separation from service, and even dismissal, as being proportionate in sexual harassment cases;

h. There were no procedural irregularities warranting a rescission of the impugned disciplinary measure. The record shows that The Applicant's procedural rights were respected. During the investigation, he was given ample opportunity to give his version of events. He was interviewed and commented on a draft of the Investigation Report. During the disciplinary process, he was notified of the allegations and given the final Investigation Report, and was given a chance to respond. His response was taken into account;

i. The Applicant's claim that the procedure was partial and biased has no merit. Moreover, even if there were flaws in the investigation, they must be such as to affect the subject's rights;

j. While the Applicant asserts that IGO should have interviewed other WEM participants, he only suggested someone who did not have direct knowledge of the incident under investigation. Also, although the Applicant holds that the Administration failed to investigate/take into account the Applicant's character, personality, and previous professional conduct, these aspects were taken into consideration through his fact sheet and the evidence he submitted in his response to the misconduct charges. In any event, such information was not directly related to the specific allegations against him. IGO was not required to take further investigatory steps in this regard. Despite the Applicant's claim that no consideration was given to the possibility that his conduct could have been misinterpreted, the actions alleged were such that they could not possibly be construed as a cultural misunderstanding;

k. Moreover, contrary to the assertion that he was not timely made aware of the minimum details of the allegations against him, the Applicant was informed in writing and in advance that he was the subject of an investigation in the email convoking him to an interview, as well as of the nature of the allegations against him, and he was given the details of the

allegations during his interview. He had all the information he was required to be given pursuant to the UNHCR's *Guidelines on Conducting Investigations and Preparing Investigation Reports* dated 28 September 2012 ("UNHCR Guidelines");

l. The right to assistance by legal counsel arises only once disciplinary proceedings have been initiated. The Applicant was informed of this right in the letter of 5 February 2015, and his submission that the OSLA counsel he consulted implicitly took sides is unsubstantiated. Furthermore, the Applicant was duly informed of the charges against him and given an opportunity to respond thereto; and

m. As to the remedies sought, the Applicant held a fixed-term appointment, which had previously been renewed normally on a one-year basis, and never beyond 14 months at once. The contract he held at the time of his separation was set to expire in less than six months. In this light, any compensation in lieu of reinstatement should be limited to six months of net base salary at the P-5 level, minus the termination indemnity and compensation in lieu of notice that he was paid upon his separation. Also, any award of compensation for moral damages requires that the harm suffered be supported by evidence, and the Applicant adduces none. Lastly, the requested 5% of interest rate *per annum* from 9 July 2015 to the date of full satisfaction of the Judgment on all amounts awarded is excessive, especially since the United States Prime Rate is at or about 0.2%.

Consideration

26. Pursuant to a well-settled jurisprudence, in cases concerning the imposition of a disciplinary measure, the Tribunal must verify if a three-fold test is met, to wit: whether the facts on which the disciplinary sanction was based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence (*Haniya* 2010-UNAT-024, *Wishah* 2015-UNAT-537, *Portillo Moya* 2015-UNAT-423, *Applicant* 2013-UNAT-302, *Kamara* 2014-UNAT-398, *Walden* 2014-UNAT-436, *Koutang* 2013-UNAT-374,

Nasrallah 2013-UNAT-310, *Mahdi* 2010-UNAT-018, *Abu Hamda* 2010-UNAT-022, *Aqel* 2010-UNAT-040, *Maslamani* 2010-UNAT-028). It is also incumbent on the Tribunal to determine if any substantive or procedural irregularity occurred (*Maslamani* 2010-UNAT-028, *Hallal* 2012-UNAT-207), either during the conduct of the investigation or in the subsequent procedure.

27. In the instant case, there is no doubt that if the alleged facts occurred, they would amount to sexual harassment as defined in ST/SGB/2008/5. In respect of proportionality, the Applicant asserts that separation from service with termination indemnities and compensation in lieu of notice was too severe a measure for facts not solidly demonstrated. This argument is misconceived, though, since proportionality relates to the gravity of the offence, once established at the proper level, not to the solidity of the proof supporting the allegations. The other two prongs of the analysis, namely the establishment of the facts held against the Applicant and the respect of due process, call for a closer examination.

28. The key question arising in this case is whether the facts at issue were established to the required standard. Additionally, the Applicant contends that the process was tainted by various shortcomings. These two matters are in fact closely interrelated, since procedural shortcomings, especially at the investigation level, may impact the quantity and/or quality of the evidence gathered, hence, the reliability of the resulting findings.

29. As the Appeals Tribunal has held:

> Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration (*Applicant* 2013-UNAT-302, *Nyambuza* 2013-UNAT-364, *El-Khalek* 2014-UNAT-508).

Due process

30. After review of the record, the Tribunal is satisfied that the investigation respected the formal requirements set out in the applicable texts, particularly in the UNHCR Guidelines. Notably, the Applicant was informed in a timely manner and to an adequate extent of the allegations against him, he was aware that he was

the subject of an investigation in advance of his interview, interviews were duly recorded, shared for comment and signed, and he was provided with a copy, first, of the draft investigation report and, once completed, of the final report. At every appropriate stage, the Applicant was given adequate time and opportunity to comment and provide countervailing information. He was fully and properly notified of the charges pressed against him and was informed of his right to be assisted by counsel at the earliest stage where this right legally arose.

31. As to the duration of the process, a distinction must be made between the investigation and the subsequent procedure. Five months elapsed from the submission of the complaint, on 17 July 2014, to the issuance of the final report, on 18 December 2014. This timeframe appears not to be unreasonable considering that the investigation in question did involve some degree of complexity. The subsequent procedure took over six months, until the issuance of the impugned disciplinary measure on 6 July 2015.

32. The Tribunal understands that approximately three weeks in February 2015 were afforded to the Applicant for his defence, but no particular explanation has been provided for the nearly four months that elapsed from 28 February 2015, when the Applicant submitted his comments, until the case file and recommendation were transmitted to the High Commission for decision on 26 June 2015. Whilst it would be highly desirable that cases of serious misconduct be addressed within a shorter period, the Tribunal is not persuaded that, in the circumstances of this application, six months was an inordinate or unreasonable delay.

33. In fact, the flaws raised by the Applicant revolve around the collection of evidence and its appraisal, which, he submits, were incomplete and skewed. In this connection, the Applicant argues that the Administration failed to consider pertinent information and systematically afforded greater weight to incriminatory elements than to exculpatory ones, both during and after the investigation.

During the investigation

34. Regarding the investigation, the Applicant claims that it was deficient, since several relevant leads remained unexplored, and, worse, that the investigator privileged inculpatory evidence.

35. At the outset, the Tribunal recalls that duly authorised investigators have a discretion to determine the information that they deem relevant to gather and probe further. That said, such discretion is not unfettered. Investigations must be conducted in a fair, balanced and impartial manner.

36. As a matter of fact, only six witnesses were interviewed, and save for the Applicant, they all gave evidence unfavourable to him. These six witnesses were in fact those mentioned by the Complainant since her initial account. Hence, it is not surprising that the investigation started with them. The IGO investigator declared in evidence that he did not seek additional witnesses because nothing indicated that anyone else beyond the six interviewed staff members had knowledge of the relevant events. He also pointed out that one of the concerns he bore in mind was avoiding to unnecessarily tarnish the Applicant's reputation by disclosing the allegations to a larger circle of persons.

37. Be it as it may, the Tribunal observes that none of the other numerous participants to the WEM was interviewed, including those who occupied the rooms adjacent to the Applicant's, that is, the scene of the alleged facts, or who may have been nearby on the night of 20 June 2014, and could have possibly seen, at least, if the door remained open or not. In the same vein, despite the fact that the investigation recorded allegations by other female participants of other occasions where the Applicant purportedly displayed inappropriate behaviour towards women, no one likely to have witnessed such alleged incidents was approached.

38. Furthermore, there was no interview of the staff member that the Applicant identified as having spent with him the evening on which one of the reported episodes took place, even though he came forward ready to testify. The Tribunal takes note of the investigator's explanation that what this potential witness could

have known, that is, that the Applicant was present in a social event at this person's room during the evening where he reportedly proposed to spend the night with a female colleague, were accepted as true, thus did not need to be demonstrated. It cannot be excluded, however, that the details he could have provided might have had an added value or pointed to more witnesses.

39. The investigator also made the choice not to seek information on the Applicant's "character". It subsequently appeared that his colleagues from DRC office were prepared to attest of his general appropriate conduct. It is a given that this was not direct evidence on the 20 June 2014 incident. Nevertheless, insofar as it could be relevant, its indirect nature is not necessarily a reason to exclude it. Circumstantial evidence is permissible (see reference to indirect evidence in *Aqel* 2010-UNAT-040, para. 33. See also the use of indirect evidence made in *Molari* 2011-UNAT-164), and often crucial, provided that it is not attached excessive weight. It is noteworthy, in this respect, that other circumstantial evidence was admitted in the investigation, such as the reports of inappropriate conduct incidents with two other participants to the WEM. In fact, significant reliance was placed on those reports, which were taken as supporting that the Applicant had a certain pattern of behaviour.

40. Similarly, the Applicant takes issue with the statements of the WEM participants and facilitators in whom the Complainant confided about the incident in the Applicant's room, which he views as no more than hearsay. Firstly, the Tribunal wishes to emphasise that these statements are not mere hearsay. They are direct evidence as regards the fact that the Complainant promptly reported the alleged incident to several people, in great detail and with remarkable consistency. In any event, hearsay is admissible in the Organization's internal justice system. However, it only has limited value (*Nyambuza* 2013-UNAT-364, para. 37, *Borhom* UNDT/2011/067, para. 89. See also ILOAT Judgment No. 2771 (2009)). Therefore, again, the difficulty resides in not ascribing to it excessive probative value.

41. Nevertheless, the Tribunal doubts of the pertinence of some of the questions put to said witnesses. For instance, asking if the witnesses "believed" the Complainant's narration, calls for an "opinion" answer that does not help clarifying the objective facts. The Respondent holds that that this question alludes to the Complainant's emotional state and that this flows from the sequence of the questions. The Tribunal finds that such a questions was, at best, ambiguous and, at worst, leading.

42. In addition, the Applicant submits that all interviews were conducted by phone. By definition, the investigator was deprived of the possibility to see the witnesses' demeanour and body language, as well as their reactions to the different questions, which can be instrumental in assessing their credibility. Furthermore, he never met the Applicant or the Complainant in person, and he did not visit the venue where the incident allegedly took place. The investigator stated that, given the time that had passed since the event and as those present at the WEM were no longer in the premises, in-person interviews and a visit *in situ* were not anticipated to shed much light to the investigation, whereas they would have significantly increased its cost.

43. After having carefully examined the alleged shortcomings in the investigation, together with the explanations provided about them, the Tribunal is left with the clear view that, while the investigator cannot be said to have exceeded the scope of his discretion, he made a series of choices that seriously weakened the completeness and reliability of his conclusions. Among others, he acted on the assumption that various pieces of information, including some provided by the Applicant in response to his initial findings, were irrelevant or not worth being further explored.

44. The Tribunal is mindful that the Organization has limited human and material resources which must thus be judiciously allocated to numerous investigations. However, this case, where direct evidence is scarce and contradictory, would have benefited from a more exhaustive research and testing of evidence, if only to dispel doubts, thereby providing more solid grounds for any subsequent decisions. Given the seriousness of the allegations made, and the

possible consequences to the Applicant, it was essential that the investigation was as thorough as reasonably possible.

During the procedure following the investigation

45. The Applicant claims that the appraisal of evidence was one-sided. His position, in essence, is that, not only the gathering of evidence tended to exclude evidence favourable to the Applicant, but that, later, in considering the evidence collected, too much weight was attributed to elements playing against him and too little to others pointing to his innocence.

46. This case was described at the hearing as a one of "she says-he says". The Complainant asserts that she was subject to sexual harassment, and the Applicant plainly denies any such behaviour. Admittedly, the determination of these cases often lies in comparing the respective credibility of the complainant's and the alleged offender's account. Circumstantial evidence may become particularly important in this context.

47. The investigation report in this case contains a very meticulous analysis backing its conclusion that the Complainant's version deserved more credit than the Applicant's. The memorandum to the High Commissioner dated 26 June 2015, shows that the Director, DHRM, endorsed this analysis, and so did the High Commissioner as he adopted the recommendation of the Director, DHRM.

48. In reaching this view, they relied on several factors: the very detailed description of the events provided by the Complainant, contrasting with the Applicant's pretty vague, at times elusive, and not free of contradiction statements, the fact that she told about the incident to four different people, holding different capacities, in the immediate aftermath of the alleged events, and who all found her attitude coherent with the circumstances she described, and the fact that the accounts she gave to each of the witnesses, as relayed by them, were particularly consistent, and also consistent, to the detail, with the account she gave many weeks later to the investigator. The Tribunal agrees that the aforementioned factors may legitimately be taken into account in assessing the credibility of the

statements from the Complainant and the Applicant and that, they tend, indeed, to reinforce the Complainant's version. Likewise, the fact that the Complainant had nothing to win in inventing the accusations is a valid consideration (*Choi* UNDT/2011/181).

49. In fact, the Director, DHRM, added in her oral evidence that the Complainant could even have feared that bringing a sexual harassment complaint would hindered her career precisely at a critical point, as it is well known among UNHCR staff that the WEM is generally the precursor step for their assignment to field missions. The Tribunal also considers that this circumstance may indeed explain that the Complainant hesitated for a few weeks before lodging a formal complaint under ST/SGB/2008/5. By contrast, the Applicant's submission that the Complainant and two other women, who did not know him prior to the WEM and who did not work in the same office or department, would collude to make up malicious accusations against him, while not completely impossible, objectively appears highly unlikely. It is thus open to the Administration to take into consideration the improbability of this scenario.

50. The Administration, nonetheless, relied quite heavily on the statements of two other WEM participants who said that the Applicant had behaved inappropriately with them some days almost contemporaneously to the Complainant's incident. Moreover, their statements were relied upon to infer a certain pattern of behaviour. While the decision-maker in disciplinary cases is not prevented from considering prior instances of similar conduct (see *Aqel* 2010-UNAT-040, para. 33. See also former United Nations Administrative Tribunal Judgment No. 1032, *Rahman* (2001), para. VI.), in this case, the Administration committed the error of taking these statements, not as indicia, but as proven facts. The probative value of simple statements, which were never investigated since these witnesses never brought complaints, cannot but be very restricted. If they were to be relied upon as proven facts, further inquiries were needed to verify whether they confirmed a pattern, or that, at least, they were not contradicted by other evidence, before taking them as basis for a "pattern" of conduct.

51. The Applicant complains that his statements countering the allegations, such as the fact that he already had a return ticket purchased, or that he had no authority to select any staff member alone, or else the facts that the Complainant continued in his WEM team and generally showed a calm attitude and smiled in some pictures, or that the Applicant spent several hours in a colleague's room on the evening where one of the witnesses alleged he came across her in one of the hotel's corridor, were lightly set aside.

52. Having reviewed each of the Applicant's allegations in his defence, the Tribunal considers that these elements were not excluded. Instead, they were simply given little weight or relevance, and rightly so, because none of them were of such nature as to seriously call into question the statements they were supposed to belie. The Tribunal is unable to see in this way of proceeding any indication of bias or ill-will against the Applicant.

53. In light of the above, it is the Tribunal's finding that, while the Administration correctly identified various valid considerations tending to justify the Complainant's account of facts, more than the Applicant's, its assessment was tainted by an improper and excessive reliance on statements regarding different alleged incidents with other participants to the WEM.

Establishment of the facts

54. The burden of demonstrating that the actions for which a sanction was issued truly occurred rests with the Administration (*Liyanarachchige* 2010-UNAT-087, *Nyambuza* 2013-UNAT-364, para. 31, *Diagabate* 2014-UNAT-403, para. 35). As consistently ruled in the relevant case-law, when termination is a possible sanction, the misconduct must be established by clear and convincing evidence (*Molari* 2011-UNAT-164, para. 30; *Applicant* 2013-UNAT-302 para. 29; *Nyambuza* 2013-UNAT-364, para. 30; *Diagabate* 2014-UNAT-403, para. 29).

55. Therefore, there is no question that the standard of proof required in the case at hand, which as a matter of fact led to the Applicant's separation from service, was that of clear and convincing evidence. In this regard, the Director, DHRM, in her recommendation to the High Commissioner dated 26 June 2015 accepted that

"[i]n light of the seriousness of the allegations … "'clear and convincing evidence' is required to establish the factual findings in the [Investigation Report]".

56. The crux of the matter thus comes down, in sum, to whether the evidence supporting that the Applicant sexually harassed the Complainant indeed reached the threshold of clear and convincing evidence. As clarified in *Molari* 2011-UNAT-164 (para. 30), clear and convincing evidence is a standard higher than preponderance of the evidence but less than proof beyond reasonable doubt; it means that "the truth of the facts asserted is highly probable".

57. It is relevant that the IGO investigator, far from holding that the evidence gathered during the investigation met the level of clear and convincing evidence, rather stated in his Report's conclusions that the allegations were established under "the preponderance of evidence standard". It was only well afterwards, when the Director, DHRM, provided written advice to the High Commissioner on 26 June 2015—once the Applicant had received the letter of charge and commented on it—that she asserted, for the first time in the procedure, that the evidence collected amounted to clear and convincing evidence.

58. The IGO investigator testified that the wording of his conclusions was simply the result of his closely following the terms of para. 9.4.1 of the UNHCR Guidelines then in force, which read:

> If the investigation produces a preponderance of evidence to reasonably conclude that it is probable that misconduct has occurred, the investigator will prepare an Investigation Report, setting forth the findings of the investigation.

59. Against this background, the Tribunal is prepared to accept that, plausibly, in referring to preponderance of evidence in the Investigation Report, the investigator merely meant to answer the question of whether or not the test was met to trigger the drafting of an Investigation Report. From this prism, it would be unwise to construe such reference as representing a positive conclusion that the available evidence fell short from reaching the higher standard of clear and convincing evidence.

60. This notwithstanding, it remains that, in her advice to the High Commissioner, the Director, DHRM, took the stance that a higher standard of proof was satisfied, albeit she had essentially the same evidence before her, and, certainly, no additional incriminatory elements. In this sense, she proceeded to an elevation of the standard considered to be met. It is for the Tribunal to ascertain if such elevation was well-founded.

61. Evidence must be assessed on a case-by-case basis, in light of the circumstances of the specific case.

62. The only pieces of direct evidence on the alleged incident are the respective statements of the Complainant and the Applicant, which are almost diametrically opposite. The Complainant claimed that the incident took place and made a detailed and coherent description of events. By contrast, the Applicant admits that the Complainant came to his room to work on the evening in question, as well as having made some vague references to potential professional options in the DRC or other francophone countries, while categorically denying any sexual advances and/or unwanted contact or solicitation for favours.

63. Additionally, there are the statements of two WEM facilitators/trainers to whom the Complainant had recounted the incident the day after, and of three other participants in whom she confided within the three days that followed. Moreover, two of these fellow participants stated that the Applicant had an inappropriate conduct in separate occasions of a lesser gravity than the Complainant's incident, but of comparable nature insofar as they involved unwelcome sexual advances or contact. As noted above, these witnesses' statements constituted direct evidence of what the Applicant had reported to them and how, but were only hearsay with respect to the incident itself. As such, their statements in respect of hearsay should have been given very limited weight.

64. As regards the letter by 130 staff members of UNHCR's RDC office on the stating Applicant's probity, it is noted that this letter was prepared and submitted after the impugned decision had been made. Consequently, the High Commissioner could not have taken it into account.

65. In short, the evidence effectively before the decision-maker presented two contradictory statements by direct witnesses, that of the Complainant being more credible for the reasons developed in paragraphs 48 and 49 above, and some indirect evidence. Most of this indirect evidence, and especially the most relevant and on point, supported the finding that the Applicant sexually harassed the Complainant. However, this circumstantial evidence, even when considered collectively, was not abundant and, more importantly, carried an extremely limited weight. Accordingly, in the Tribunal's opinion, this evidence is enough to satisfy the preponderance of evidence or balance of probabilities standard, because the Applicant's responsibility appears indeed more likely than not, but falls short of meeting the standard of clear and convincing evidence, which presupposes a determination of high probability for a given action.

66. On these grounds, the sanction imposed to the Applicant was unlawful.

Remedies

67. Having found that the facts forming the basis for the contested disciplinary measure were not established to the required standard, the decision to impose it should be set aside. However, this is not a case where there was no proof at all, but one where the standard applicable to a certain level of sanction was incorrectly elevated. While the Appeals Tribunal has made it clear that when separation from service is at stake nothing less than clear and convincing evidence is acceptable, it is arguable, *a contrario*, that a lesser sanction could have been imposed, if the High Commissioner was satisfied that the allegations of serious misconduct were established by preponderance of evidence.

68. Although the Tribunal has the power to replace a disciplinary measure by one that it considers more appropriate, this sort of remedy has typically been applied where the sanction was deemed disproportionate. The Tribunal is not inclined to use its prerogative to replace the sanction imposed in a case such as the present one, where the issue identified concerns the appraisal of the evidence level. It is more appropriate to remand the decision to the Administration, ordering the latter, as specific performance, to resume the disciplinary procedure, with complementary investigative action if deemed necessary, for the High

Commissioner to make a new decision in light of the findings in this Judgment and considering any additional evidence that may be relevant and lawfully gathered (similar to the remedy ordered by the Appeals Tribunal in *Ademagic et al.* 2013-UNAT-359). For fairness and given the time that the Applicant has already spent in litigation, the reconsidered decision must be taken within a reasonable period, that is, the final outcome must be notified to the Applicant within five months from the issuance of this Judgment.

69. Nevertheless, since this case concerns the termination of the Applicant's appointment, art. 10.5 of its Statute requires the Tribunal to set an amount that the Respondent may elect to pay as an alternative to the rescission and the specific performance ordered. Accordingly, and considering that the Applicant's fixed-term appointment was due to expire in six months of the implementation of the contested decision, the alternative compensation is fixed at the amount corresponding to six months of emoluments, understood as his gross salary plus his post adjustment, deducting the staff assessment, at the grade and step that he held at the time of his separation as per the salary scale applicable as of 1 January 2015. From this amount should be deducted the termination indemnity and compensation in lieu of notice that he received upon his separation in July 2015.

Conclusion

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

a. The disciplinary measure of separation from service with termination indemnities and compensation in lieu of notice is rescinded;

b. The decision to impose the above-referred disciplinary measure will be remanded to the Administration, that shall resume the disciplinary procedure, with complementary investigative action if deemed necessary, for the High Commissioner to make, within five months of the issuance of this Judgment, a new decision in light of the Tribunal's findings and considering any additional evidence that may be relevant and lawfully gathered;

c. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision and carrying out the aforementioned specific performance, the Applicant shall be paid, as an alternative, a sum equivalent to six months of emoluments as specified in para. 69 above;

d. Unless the Administration opts for the specific performance, the compensation set at sub-paragraph (c) above, shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable.

(*Signed*)
Judge Rowan Downing
Dated this 29th day of June 2017

Entered in the Register on this 29th day of June 2017

(*Signed*)

René M. Vargas M., Registrar, Geneva