Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LUCCHINI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Susan Maddox, AAS/ALD/OHR, UN Secretariat
Elizabeth Gall, AAS/ALD/OHR, UN Secretariat

Introduction and Procedural History

1. The Applicant served as a Security Officer at the United Nations Multidimensional Integrated Stabilization Mission in Mali ("MINUSMA"). He held a fixed-term appointment at the FS-4 level and was based in Bamako.

2. On 21 December 2018, the Applicant challenged the Respondent's decision to separate him from service with compensation *in lieu* of notice without termination indemnity in accordance with staff rule 10.2(a)(viii).

3. The Respondent filed his reply to the application on 25 January 2019.

4. The case was assigned to the instant Judge in April 2020 and the Tribunal held a case management discussion ("CMD") on 4 May 2020. Order No. 086 (NBI/2020) recorded the contents of the discussion including agreement by the parties to attempt to resolve the matter *inter partes* failing which the matter could be determined on the papers.

5. The Applicant filed a rejoinder to his application on 11 May 2020.

6. On 15 May 2020, the parties jointly informed the Tribunal that this matter cannot be resolved *inter partes.* Order No. 102 (NBI/2020) was issued on 27 May 2020, pursuant to which both parties filed closing submissions concluding on 15 June 2020.

Facts

7. The genesis of the disciplinary proceedings that resulted in the Respondent's decision to separate the Applicant from service was a report of rape made to the Police in Mali by a 32-year-old Malian woman [the Complainant]. At the time of the incident, the Complainant worked for MINUSMA in Bamako as a cleaner. She held the status of an independent contractor from the time of her first contract - 18

January 2016 until 18 October 2016 - and subsequently received another contract which began on 10 April 2017 and was due to expire on 9 January 2018.

8. The Applicant claims to have made the Complainant's acquaintance in April 2016; he did not know that she was a private contractor at MINUSMA. She was proposing an intimate relationship and they had conversations which the Applicant recorded on 9 April 2016. At that time, he declined the Complainant's proposal of an intimate relationship.

9. He says that almost two years later, at the end of December 2017, he came across the Complainant again. This time he met her at his work place, the Main Operating Base in Bamako, when she was passing by his office. The Complainant says that this was the first time she met the Applicant. The Applicant and the Complainant engaged in a personal conversation. When asked about her work at the Mission, she mentioned that she was an individual contractor and that she would have to go on a three-month mandatory break in January 2018. There was some discussion about what she would do on her break. She said she was a mother of two children and preferred to stay with them. The Applicant told the Complainant that he would let her know if he heard of any job opportunities. They exchanged telephone numbers in his office and agreed to keep in touch.

10. At first the Applicant made no contact, but the Complainant followed up with text messages wishing him a Happy New Year on 31 December 2017. According to the Applicant, the Complainant also dropped in at his office on 2 January 2018, kissed him on the mouth and asked him to call her later. She denies this. However, later at around 11.59 p.m. on the same day, the Applicant called the Complainant, stating that he wanted to see her. She agreed though she felt it was quite late.

11. The Applicant then drove to the Complainant's apartment in his United Nations vehicle and, at 12.21 a.m., called the Complainant again. She came down to the car where they had a short conversation. According to the Complainant, the Applicant asked her to come to his apartment, so she would know where it was in

case he would have an opportunity for her. She agreed to go with him. In his apartment, the Applicant had sexual intercourse with the Complainant on his bed. According to the Complainant, the intercourse was non-consensual, and he verbally insulted her while penetrating her.

12. When he rose and went to the bathroom, the Complainant gathered her clothes and ran out. She had left behind her sandals. She approached a security guard at the Applicant's apartment complex, asking him to open the gate. She was shouting "the white man, he is crazy, he raped me". She wore only pants and had no shoes. She hid in the room of the security guard's colleague while the security guard located the keys for her to leave through the compound gate. Once the gate was opened, the Complainant ran out of the room and exited the apartment complex. She left in a taxi.

13. At around the same time, the Applicant left the apartment complex in his United Nations vehicle. While the Complainant was in the taxi, the Applicant tried to call her several times, but she did not answer the phone. On 4 January 2018, the Complainant filed a complaint of rape with the Mali Police. The same day, she received a text message from the Applicant stating that he was not angry and that she should come to see him in his office. She responded with several text messages suggesting that she was not one to be trifled with, and informed him that she had reported him to the police for rape. He wrote back to the Complainant, denying her accusation. On 5 January 2018, the Complainant visited the hospital and was examined by a physician. She says she waited to go because she needed to obtain some money. The results of an ultrasound and a gynecological exam were normal.

14. The Complainant's report to the Mali Police came to the attention of the Investigations Division of the Office of Internal Oversight Services ("OIOS") and the Special Investigations Unit ('SIU') at MINUSMA around 9-11 January 2018. The charges against the Applicant have not to date been pursued by the Mali Police despite urgings by MINUSMA that they should do so. However, it was based on the report made to the Mali Police that an investigation was commenced by MINUSMA.

15. On 25 January 2018, the Applicant was placed on administrative leave without pay ("ALWOP") pending completion of the disciplinary process on allegations of sexual intercourse by force and without consent. The OIOS investigation report completed on 30 April 2018 did not conclude that there was force or non-consensual intercourse. The investigation however found that the facts established grounds for findings that the Applicant failed to observe the standards of conduct expected of an international civil servant and that there had been a breach of staff rule 1.2(e) which prohibits sexual exploitation and abuse.

16. Allegations of misconduct were presented to the Applicant by the Assistant Secretary-General, Office of Human Resources Management ("ASG/OHRM") on 13 June 2018. The allegations differed from the initial misconduct that was being investigated. The Applicant was alleged to have had sexual relations with the Complainant "who he was aware was about to lose her job as an independent contractor with MINUSMA and to whom he had indicated that he might aid in finding employment."

17. The Applicant submitted his response on 26 July 2018 and on 5 October 2018 he was informed by letter from the ASG/OHRM of the decision to impose the sanction of separation challenged in this case.

Applicant's submissions

18. The Applicant's principal contentions may be summarized as follows:

a. He contends that there was a pre-existing relationship with the Complainant which started as a consensual one in 2016, was never exploited by him and that eventually he was the target of attempted exploitation in the relationship.

b. He challenges the decision on the basis mainly that the facts on which the sanction was based have not been established and such facts as were established do not amount to the alleged misconduct of sexual exploitation.

Instead he says the facts show that:

i. there was a pre-existing relationship [proven by an audio recording from 2016];

ii. the sex was consensual on the night of the incident;

iii. the Complainant was not in a vulnerable position;

iv. a difference in income between fellow employees does not per se provide proof of exploitation;

v. the Complainant knew the Applicant could only let her know of possible opportunities he heard of but could not secure her a new contract;

vi. the Complainant was generally not a credible witness having alleged rape without basis previously;

vii. having first made the complaint of rape she had never actually alleged that the Applicant was exploiting her by having sex in exchange for a new contract;

viii. the complainant's rape allegation contradicts the Respondent's case that she was a victim of sexual exploitation since for that to have been the case there had to be consensual sex as a *quid pro quo* for a benefit; and

ix. the Complainant's explanation for visiting the Applicant's apartment is not credible as she was still working at the Mission and could have met the Applicant there to be told of any opportunities he heard of.

c. The Applicant submits that there was procedural irregularity in the process leading to the sanction decision. Specifically, he says that certain

matters were not duly considered in the investigation e.g. the audio recording and whether the Complainant was truthful in denying it was her voice – this was relevant to her credibility. Further, it was irregular that at first the Applicant was placed on ALWOP for investigations on rape then eventually the charge changed to exploitation.

d. He challenges the proportionality of the sanction and seeks rescission of the decision with reinstatement or payment of compensation *in lieu*, including compensation for eight months leave without pay and without insurance to cover medical expenses while the matter [initially charges of rape] was being investigated.

Respondent's submissions

19. The Respondent submits that the Applicant's case is without merit and should be dismissed as such. Misconduct was fully established. It is undisputed that the Complainant and the Applicant had sex at a time when the Applicant knew of the Complainant's "precarious employment situation" which they had discussed. There was a vast power differential between them based on Malian societal conditions and their earnings. The Respondent contends that points raised by the Applicant are irrelevant e.g. whether the parties knew each other previously, whether the initial claim by the Complainant was of rape and how/why she was hired by the Mission.

20. The Respondent also takes the position that the Applicant's claim for compensation for having been placed on ALWOP is not receivable. He did not seek management evaluation of the decision and failure to do that places that part of the application beyond the Tribunal's jurisdiction.

Considerations

21. The function of the Tribunal in considering the challenged decision to sanction the Applicant with separation from service is that of judicial review. In reviewing the Secretary-General's exercise of discretion, the Tribunal is to follow the

well-established standard of review as provided in *Sanwidi* 2010-UNAT-084 at para. 40:

> [W]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

22. The United Nations Appeals Tribunal ("UNAT/Appeals Tribunal") explained in *Mbaigolmem* 2018-UNAT-819 that in a disciplinary case what is required is consideration of whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct and whether the sanction is proportionate to the offence. A *de novo* hearing into the findings on misconduct is not always necessary. It depends on the available evidence and the circumstances of the case.

23. In the instant case, neither party contended that there was need for an oral hearing. It was agreed that the case can be determined on the papers based on the factual record and the analysis of legal issues that flow directly from the relevant rules under which the Applicant was sanctioned.

24. Staff rule 1.2(e) provides that:

> Sexual exploitation and abuse is prohibited. … The exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. United Nations staff members are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse.

25. Section 1 of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) ("the SGB"), defines sexual exploitation as "any actual

or attempted *abuse of a position of vulnerability, differential power, or trust, for sexual purposes,* including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another."

26. Section 3.2 of the SGB provides that "in order *to further protect the most vulnerable populations, especially women* and children, the following specific standards which reiterate existing general obligations under the United Nations Staff Regulations and Rules, are promulgated:

> (a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal;
>
> (b) …;
>
> (c) *Exchange of money, employment, goods or services for sex,* including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. This includes any exchange of assistance that is due to beneficiaries of assistance;
>
> (d) *Sexual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics,* undermine the credibility and integrity of the work of the United Nations and are strongly discouraged; [Emphasis added]"

27. In *Gisage* 2019-UNAT-973 at para. 37, the mischief that rules against this type of conduct aim to address is explained as "the reputational harm to the Organization caused by its staff members engaging in exploitative conduct in disadvantaged communities subject to the protective mandate of the Organization."

28. Examples of the type of conduct considered as sexual exploitation under the rules can be found in prior cases. In *El-Khalek* 2014-UNAT-442, a United Nations staff member employed as a teacher was alleged to have abused a relationship of trust with children he was teaching. On review, the misconduct was held not to have been sufficiently proven. In *Oh* 2014-UNAT-480 the sanction of separation of a United Nations staff member for exploiting locals at a brothel in Côte D'Ivoire by exchanging money for sex was upheld. In *Gisage,* the decision to sanction a staff member for sexual relations with three Congolese sex workers in exchange for

promised payment is currently under review. Neither party in the instant matter has cited as precedent a case of separation of a staff member for sexual exploitation of a colleague employed in the Organization.

29. In *Applicant* UNDT/2019/187 a case concerning allegations of sexual abuse and exploitation as well as harassment involving two staff members, the Tribunal observed at para. 78 that:

> The Tribunal does not find a violation of staff rule 1.2(e), as it considers it applicable to sexual relations exploiting systemic inequality, such as between peacekeepers and local population, and particularly where transactional exchange is involved. Conversely, workplace relation between two staff members, even of uneven positions, are addressed under staff rule 1.2(f).

30. In light of the facts, rules and cases highlighted above, the Tribunal has identified that the issue to be determined is whether the Respondent in investigating the alleged offence and deciding on the sanction was seized of facts based on which it was clearly and convincingly proven that:

a. The Complainant was in a position of vulnerability and or differential power; and

b. If so, that the Applicant abused that position by the promise of exchange of employment for sex.

31. Having considered the factual matrix that would have been before the investigators and the Respondent, this Tribunal's determination is that the required facts for a finding of sexual exploitation were not proven clearly, or at all, such that a decision to impose the sanction of separation could have been justified. There was also a failure to consider relevant evidence as to a prior courtship relationship between the parties that if considered would have shed further doubt on whether the Complainant was exploited.

32. Furthermore, the fact that the Complainant at first complained of rape when it is now accepted by both parties that there was a consensual relationship, significantly damages the credibility of the Respondent's case that she was sexually exploited. Moreover, the Complainant did not herself complain that she was a victim of sexual exploitation in exchange for employment and there is no evidence she saw herself in that way. This lack of credibility was overlooked in deciding on the sanction. Thus, in addition to there being a dearth of factual or evidential material to support the sanction, the process based on which the finding of misconduct and resulting sanction were arrived at was flawed.

33. The reasons for this finding will now be explained.

Was there proven vulnerability based on which the finding of misconduct was made by the Respondent?

34. The Complainant falls within one of the most vulnerable populations highlighted in section 3.2 of the SGB as in need of protection from exploitation; namely women. However, on a purposive interpretation it cannot be that the rule intends to treat all women, regardless of their standing, as vulnerable for purposes of sexual exploitation. There must be factors in addition to the fact of being a woman based on which a person can be identified as being in a position of vulnerability.

35. The Applicant and the Complainant were colleagues in MINUSMA. There was no evidential basis for an inference to be drawn that solely because the Applicant was an internationally recruited staff member of Italian descent and the Complainant was a locally contracted Malian national, she was in a position of vulnerability.

Their job functions were different. The Applicant was a security officer and the Complainant provided cleaning services. It is not clear however, that an inference of vulnerability can be drawn from the fact that the Complainant was an independent contractor who provided MINUSMA with cleaning services. The Applicant's assertions that the Complainant was a mature middle-class person, a divorcee/single parent in receipt of alimony and living at the home of her father - a retired Malian

government official, and mother, a fabric entrepreneur - appear not to have been contradicted by evidence from the Complainant nor addressed by the Respondent. However, these factors were not considered in deciding whether she was in a position of vulnerability.

36. The most salient point considered by the Respondent in investigating the matter, and deciding on the sanction, was that the Complainant's contract was about to expire. This, they said, meant she was in a precarious circumstance and looking for help.

37. At paragraph 26 of the separation letter, a finding is made that the Applicant admitted he had discussed with the Complainant her "precarious employment situation". On a review of the interview transcript, I have not found such an admission. The Applicant is said to have admitted that independent contractors on contract break often live in fear because of uncertainty of contract non-renewal. On my review of pages 65 to 68 of the transcript of the Applicant's investigation interview at Annex R/2 to the Respondent's Reply, it is clear that the Applicant did not admit to speaking with the Complainant about a precarious situation she was facing. Instead, he said he did not remember discussing the Complainant's status as an independent contractor. It was on the prompting of the interviewer that he candidly spoke of having general knowledge that persons employed on contract are apprehensive at the time of a break in service. He was resolute in reiterating when asked repeatedly about offers made to the Complainant that he did not promise her a job. He said he merely mentioned to her that if he heard of any job openings, he would inform her.

In any event, the Complainant was not "losing her job" and thus not in a precarious position. She was merely approaching the end of her existing contract and the mandatory three-month break between contracts. On her own account, during the casual conversation that unfolded with the Applicant when they met by chance at the workplace, she said she was considering staying home with her children. She expressed no urgency to the Applicant about being re-employed.

38. Having, from her account, just met the Applicant at their workplace for the first time in a casual encounter, he clearly had not had a role in the award of her prior contracts. There was no basis for a finding that she could have believed the Applicant had authority over her employment. It is clear on both accounts that he did not say he could find employment for her. He said if he heard of anything, he would let her know.

39. That the Complainant's ability to secure renewed contracts was independent of the Applicant is borne out by the further renewals she was awarded at a time when the Applicant was on suspension and then dismissed due to her allegation of rape that was converted by the Organization to an investigation into exploitation. It ought to have been clear to the investigators that the Complainant would have known that both before and after the sexual encounter the Applicant had no role in award of contracts to her by the United Nations. He was in no position to exchange a new contract for sex. Hence the Complainant was not in a position of vulnerability vis-à-vis the Applicant.

Was there clear and convincing proof of Differential Power?

40. The Applicant and the Complainant can both be considered to have been colleagues, recruited in different ways, on different types of contracts and from different nationalities; but employed at the same United Nations mission. The Complainant was clearly not a beneficiary of United Nations assistance resulting in differential power, as envisaged at section 3.2(d) of the SGB.

41. The Respondent's sanction letter cited earning capacity as signifying the deferential power factor. No staff rule or case precedent was cited to support that earning capacity differences between staff members signified a power differential such that there could be no intimate relations between them. The Applicant's base annual salary of USD54,000 *per annum* was contrasted with the 2017 gross national income per capita in Mali of USD2000. However, there was no indication in the

sanction letter that the finding was based on the Complainant's actual financial position.

42. The Complainant's contractual earnings from work at the United Nations was not quantified in the sanction letter and there was no actual reference to either her other sources of income, if any, such as alimony, or her living standards. The highlighting by Counsel for the Respondent of the Complainant's daily earnings of USD15 based on contracts on record appears to have been an afterthought as it was not noted as a consideration prior to the sanction decision. In all the circumstances, there was no clear or convincing proof of a power differential based on different earnings that could have counted as a factor essential to the sexual exploitation allegation.

Was there basis for a finding of abuse of trust?

43. The fact of abuse of trust can only be established in the context of the relationship between persons. There are certain types of relationships, including supervisor-supervisee, doctor-patient, lawyer-client and teacher-student where the inference can be drawn that there is trust and confidence that can be abused. The SGB underscores that the relationship of United Nations staff with beneficiaries of assistance is based on inherently differential power dynamics hence such a relationship can be included in the category of relationships of trust that can be abused, in a manner that amounts to sexual exploitation.

44. In the instant case, there was no factual basis for the investigators and the Respondent to have found that there was a relationship of trust that could have been abused. The Complainant was not a beneficiary of assistance from the United Nations. She was an independent contractor who offered services in exchange for contractual payments. The Applicant and the Complainant were both working at MINUSMA in vastly different spheres of work, where the Applicant had neither a professional nor a supervisory relationship with the Complainant.

45. Accordingly, The Tribunal finds that the element of a relationship of trust that could have been abused by way of sexual exploitation was not proven by clear and convincing evidence before the Respondent decided on the sanction of separation.

Was there any basis for considering that sexual relations between the Applicant and the Complainant were intended by them to be in exchange for employment?

46. The Respondent's finding, as stated in the sanction letter, as to the basis for separation due to misconduct was

> It was established by clear and convincing evidence that […Complainant…] had told you that her contract was about to expire, and that you had told her, in conversation, that would [sic] let her know if you heard about any job opportunities.

47. These words cannot have been construed as a promise of employment in the sense that sex would have been any *quid pro quo*.

48. In any event, the findings set out in the sanction letter fail to consider that the Complainant did not mention this conversation in her initial report of the incident as a rape. Unlike the exploited sex workers in the case of *Oh* who complained to the United Nations that the staff member in that case had promised money for sex and then did not pay, the Complainant in this case never complained that she had been offered employment in exchange for sex. The sexual exploitation investigation was introduced not by the Complainant but by the Organization after discontinuing investigations into her complaint of rape.

49. Later, in the Complainant's 9 February 2017 interview, it was said that she only spoke about her pending three-month break in service when during their chance casual meeting at the workplace the Applicant engaged her in conversation. She told him she preferred to stay home and take care of her children during the break. She did not ask for his help, but he then volunteered that as a single mother it would be better to work and said he would let her know of opportunities.

50. There is nothing in this conversation from which the Respondent could have considered that the Complainant was in need of employment and the Applicant promised to find it for her in exchange for sex. There was no evidence that the Applicant had authority to secure employment for the Applicant and she did not say in her statement that she believed he was able to do so.

51. In addition to the foregoing, the investigators and the Respondent failed to duly consider the Applicant's evidence that the parties knew each other since 2016 when at first, he did not know she worked with the United Nations. They discussed having a relationship, which discussion she initiated. The Applicant took precautions to record her to avoid either of them being exploited.

52. The Respondent in closing submissions cites art. 18 of the UNDT Rules of Procedure in advocating that the transcript of the recording ought not to be treated as admissible evidence because it is non-probative as the recording itself is not part of the record. Furthermore, the Respondent contends that the recording did not form part of the evidence on which the contested decision was based. This is clearly not correct however, as the investigators did listen to the recording.[1]

53. The Respondent's investigators made a finding that the voice the Applicant had recorded in the conversation from 2016 sounded like the Complainant's voice and was a voice of someone who like her lived in a Bamako suburb. Despite this, they found that since she denied it, there was no confirmation that the Complainant was the person recorded. The state of this evidence was therefore such that it had to be investigated in deciding whether a clear and convincing case was made out. The burden of proving this was not on the Applicant.

54. The investigators however discounted the content of the recorded conversation as irrelevant. That finding cannot be rationally justified because the content was of the Complainant seeking a relationship with the Applicant. If that was

[1] See paragraphs E.52-54 of the OIOS Investigation Report at annex 4 of the application and paragraph 28 of the annex to the Sanction Letter at annex 1 of the application.

true, it not only discredited her stance in the instant matter that she only met him in December 2016 but undermines any possible treatment of their encounter as sexual exploitation. It introduces the probability that the encounter in January 2017 was a consensual re-kindling of the prior courtship that had nothing to do with the Complainant seeking employment from the Applicant.

55. The Complainant never intended to treat this as exploitation and have that addressed by MINUSMA. She reported rape to the Mali police on 4 January 2018, and it was they who reported her complaint of rape to MINUSMA. In the course of MINUSMA's investigations, rape became less plausible and the focus shifted to exploitation.

56. In the circumstances where the Complainant never reported exploitation and nothing in her report of the conversations between herself and the Applicant hinted that she expected employment in exchange for sex, there was no factual basis for the Respondent to have found that this aspect of exploitation was proven.

If such an exchange was intended was there basis for the Respondent to have considered the Complainant and not the Applicant as the target of exploitation?

57. It was the Complainant who, by New Year's text messages, initiated contact with the Applicant that led them to meet the next day for consensual sex. Inferences other than finding out where to go for job opportunities as suggested by the Complainant could be drawn from her driving with the Applicant to his home after midnight.

58. The text messages sent by the Complainant the day after the sexual encounter were not expressed in a tone of vulnerability. Instead in a strong forthright manner the Complainant, who at the time was alleging rape, threatened the Applicant by texting that she can put him in prison, he does not know who she is, she is in her own land and "je sais comment bouger les pions" in other words she knows how to move pawns in a chess game.

59. In these circumstances, there was information overlooked by the investigators and the Respondent which ought to have been considered since it showed that it was neither clear nor convincing that, if there was any exploitation, the Applicant was the exploiter.

Conclusion

60. Sexual exploitation of persons in positions of vulnerability within local populations where United Nations Missions are located is a serious issue that cannot be tolerated or condoned. However, the Organization's policy geared to protect vulnerable persons from exploitation can be undermined if it is applied to cases of consensual relationships between colleagues working within the United Nations.

61. There is merit to the statement in the Applicant's final submission that if there is to be an enforced code of conduct that prohibits intimate relations with nationals of a United Nations mission location, or between staff members in different earning or recruitment categories, then staff member must be provided with sufficient notice.

62. Additionally, in the circumstances of this case there was no clear and convincing evidence of either vulnerability or exploitation or even an attempt at exploitation. Accordingly, the Applicant's case that the sanction of separation from service ought not to have been imposed succeeds.

Remedies

63. The Applicant seeks reinstatement or payment of three years' salary *in lieu*. The quantum of payment in lieu of compensation sought is based on the circumstances the Applicant describes as "the egregious effects this matter has had on his personal and professional reputation, his career and livelihood." He further seeks compensation, in terms of salary and medical expense reimbursement, for the period

of ALWOP that commenced on 25 January 2018 and was last extended on 26 July 2018.

64. According to the Respondent, the Applicant's challenge against the decision to place him on ALWOP is not receivable. In accordance with staff rule 10.4(d), placement on ALWOP is not a disciplinary measure. The Applicant was therefore required to seek management evaluation of the decision prior to submitting his application before the Tribunal. He has failed to do so.

65. Similarly, the Applicant failed to seek management evaluation of any purported decision requiring him to remain in the duty station or the alleged failure to ensure continued coverage of his health insurance during his placement on ALWOP.

66. Although, as submitted by the Applicant in closing submissions, there is provision in staff rule 10.4(d) for repayment of earnings lost during ALWOP, that provision must be read in context of the Staff Rules as a whole. Staff rule 10.4(d) provides:

> Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. If administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal or separation, any pay withheld shall be restored without delay.

67. This must be read with staff rule 10.4(e)

> A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

68. Staff rule 10.4(d), read in context cannot be interpreted as obviating the need for the challenge referred to at staff rule 10.4(e). The import of staff rule 10.4(d) is that if at the end of the investigation the Respondent had found that the misconduct was not committed then the Applicant would have been entitled to receive the quantum of salary that was unpaid during his leave. In the instant case staff rule

10.4(d) does not apply as the allegation of misconduct was sustained after the investigation and the Respondent decided that it warranted separation.

69. The Applicant was entitled by virtue of staff rule 10.4(e) to challenge the ALWOP from the outset when it was imposed on 11 January 2018. In doing so he was required to follow the procedure set out in art. 11 of the UNDT Rules of Procedure, including filing a request for management evaluation in pursuing his challenge within the time frame provided. Since the Applicant did not challenge the decision to place him on ALWOP, that aspect of his claim is not receivable by the Tribunal which pursuant to art. 8 of the UNDT Statute cannot adjudicate on an application that ought first to have been submitted for management evaluation.

70. The Applicant's claim for repayment of the eight months' lost salary whilst on AWLOP is not receivable. The claim for reimbursement of medical expenses is also not receivable as a request for management evaluation was not made in a timely manner to bring to the Respondent's attention that his medical insurance had been discontinued during AWLOP.

71. There is merit however, to the submission by Counsel for the Applicant that the loss of salary for eight months and the proven medical difficulties can be considered as justifying moral damages.

72. In accordance with arts. 10.5(a) and (b) of the UNDT Statute, the decision to impose the sanction of separation from service is rescinded.

73. The Applicant held a one-year fixed-term appointment, with no expectancy of renewal, which was due to expire on 19 July 2019 which was within 10 months of the date when the sanction was imposed. An order for reinstatement of this duration is not practical in the circumstances. Compensation *in lieu* must therefore be considered.

74. The compensation limit is normally two years' net base salary, in accordance with art. 10.5(b) of the Statute. Only in exceptional circumstances can an enlarged

quantum be considered. As aforementioned, I have accepted the evidence of eight months without salary tied with medical expenses as uncontradicted proof of harm that would justify an additional award of damages. There are no exceptional circumstances however, that justify an award greater than the two years' net base salary provided for in the Statute.

75. As the Applicant's fixed-term appointment may not have been renewed or terminated for a number of reasons, the compensation awarded under arts. 10.5(a) and (b) will be limited to 10 months' net base salary *in lieu* of the remaining time to be served under his fixed-term appointment plus a further 10 months' net base salary as moral damages.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 19th day of June 2020

Entered in the Register on this 19th day of June 2020

(signed)

Abena Kwakye-Berko, Registrar, Nairobi