



**Before:** Judge Margaret Tibulya

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

MODEY-EBI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

George G. Irving

**Counsel for the Respondent:**

Elizabeth Brown, UNHCR  
Francisco Navarro, UNHCR

## **Background**

1. The Applicant is a former Deputy Regional Representative at the United Nations High Commissioner for Refugees (“UNHCR”) Regional Office (“RO”) in Pretoria, South Africa Office.
2. On 4 February 2019, she filed an application challenging the High Commissioner’s decision to dismiss her from service pursuant to staff rule 10.2 (a) (ix) for serious misconduct (“the contested decision”).
3. The Respondent filed a reply on 8 March 2019.
4. The parties informed the Tribunal that an oral hearing was not required in determining this case<sup>1</sup> and subsequently filed their closing submissions on 19 June 2020.

## **Summary of the relevant facts**

5. The Applicant began her career with UNHCR in 1998 and has worked in different UNHCR operations, from Kenya, Pakistan, Uganda, Tanzania, Sierra Leone and the Islamic Republic of Iran where she served as UNHCR Deputy Representative from 2010 to 2013.<sup>2</sup>
6. 16 December 2013, she was appointed as the Deputy Regional Representative (Protection) (P-5) at UNHCR’s Regional Office in Pretoria. On 1 January 2017 her position was upgraded to the D-1 level. On 1 September 2017, she was promoted to the D-1 grade.<sup>3</sup>
7. On 3 October 2017, the UNHCR Inspector General’s Office (“IGO”) received allegations of misconduct implicating the Applicant. Specifically, it was reported that she abused her authority by instructing Mr. BK, Associate Protection Officer, and Mr.

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<sup>1</sup> Parties’ joint motion dated 28 May 2020.

<sup>2</sup> Application, annex 3 and reply, annex 1.

<sup>3</sup> Reply, para. 7.

GB, Associate Protection Officer, to help with her private academic work and to complete a homework assignment for her child. On 4 December 2017, the IGO opened an investigation into the matter. The scope of the investigation was subsequently expanded to encompass new allegations of abuse of authority and office, breach of oath of office, creation, maintenance and failure to disclose conflicts of interest, engaging in unauthorized outside activities, continuously abusing UNHCR human and other resources to further her private interest, and making discriminatory and harassing comments towards several staff members.<sup>4</sup>

8. During the scope of its investigations, the IGO interviewed the Applicant and the following UNHCR staff members:<sup>5</sup>

- a. Mr. GB;
- b. Mr. BK;
- c. Ms. ZS, Senior Regional Human Resources (“HR”) Officer, UNHC/RO Pretoria;
- d. Mr. GM, Associate Regional Resettlement Officer, UNHCR/RO Pretoria;
- e. Mr. GK, Senior Regional Protection Officer, UNHCR/RO Pretoria;
- f. Dr. MR, Senior Regional Protection Officer (Statelessness), UNHCR/RO Pretoria;
- g. Ms. ON former UNHCR staff member at the UNHCR/RO Pretoria;
- h. Ms. DC, Programme Officer, UNHCR Country Office (“CO”) South Africa;

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<sup>4</sup> Application, annex 4, IGO Investigation Report, paras. 1-4.

<sup>5</sup> Ibid., para. 10.

- i. Ms. ES, Assistant Programme Officer, UNHCR/CO South Africa;
- j. Ms. SS, Chief Programme Section of the Central Emergency Relief Fund (“CERF”);
- k. Ms. CR, Assistant Representative Protection, UNHCR Branch Office (“BO”) Addis Ababa;
- l. Ms. BD, Deputy Representative, UNHCR, Kigali, Rwanda;
- m. Mr. AT, Senior Regional Registration Officer;
- n. Ms. SG, Associate Protection Officer, UNHCR Mbarara Sub-Office (“SO”), Rwanda; and
- o. Ms. NL, Senior Secretary, UNHCR/RO Pretoria.

9. The IGO finalized its Investigation Report on 3 August 2018 and transmitted it to the Division of Human Resources (“DHR”). The Report concluded that the evidence available supported a finding that the Applicant harassed staff members and abused her authority, office and resources by:

- a. instructing staff members to follow up on her personal TV channel preferences with hotels during working hours;
- b. instructing a staff member to prepare a poster for her child’s school assignment;
- c. instructing staff members to do her personal errands and prioritizing private matters over UNHCR work;
- d. instructing a staff member to decorate for her child’s birthday;
- e. borrowing money from staff members;

- f. instructing staff members to write motivation letters to further her applications to positions;
- g. instructing staff members to write the Manager's comments on her behalf in the electronic appraisal system ("ePAD");
- h. instructing staff members to obtain police clearance letters for her private United States of America (USA) Green Card application;
- i. requesting staff members to write and review her private academic work;
- j. requesting staff members to prioritize her private academic work over UNHCR work;
- k. abusing the UNHCR resources at her disposal to further her private interests;
- l. her comments towards Ms. DC;
- m. her comments towards Dr. MR;
- n. her comments towards Ms. CR;
- o. her attempt to rescind Ms. CR's appointment;
- p. her comments towards Mr. AT;
- q. breaching her Oath of Office;
- r. failing to notify UNHCR of her intention to acquire permanent residency in a country other than her nationality;
- s. breaching confidentiality in several instances;
- t. engaging in unauthorized outside activities;

u. creating and maintaining a conflict of interest by involving Mr. GK in the follow-up regarding Ms. CR's appointment; and

v. creating and maintaining a conflict of interest by rewarding Mr. BK and Mr. GM for their contributions to her private academic work.<sup>6</sup>

10. The Director of DHR reviewed the report and decided to institute disciplinary proceedings against the Applicant for misconduct.

11. By letter dated 17 September 2018 from DHR, the Applicant was informed of the allegations of misconduct against her and was invited to provide her comments and observations within two weeks.<sup>7</sup>

12. The Applicant responded to the allegations of misconduct on 11 October 2018.<sup>8</sup>

13. By letter dated 5 December 2018, the Applicant was notified of the contested decision.

### **Considerations**

14. As is well established in the United Nations Appeals Tribunal ("UNAT") jurisprudence<sup>9</sup>, judicial review of a disciplinary case requires the Dispute Tribunal to examine:

- a. whether the facts on which the sanction is based have been established;
- b. whether the established facts qualify as misconduct under the Staff Regulations and Rules; and
- c. whether there was a substantive or procedural irregularity, and

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<sup>6</sup> Ibid, paras. 215 to 514.

<sup>7</sup> Reply, annex 3.

<sup>8</sup> Reply, annex 4.

<sup>9</sup> *Majut* 2018-UNAT-862, para. 48; *Ibrahim*, 2017-UNAT-776, para. 234; *Mizyed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; *Molari* 2011-UNAT-164, paras. 29 and 30; and *Mahdi* 2010-UNAT-018 ;.

d. whether the sanction is proportionate to the offence.

Part of the test in reviewing decisions imposing sanctions is whether due process rights were observed.<sup>10</sup>

(A) Whether the facts on which the disciplinary measure was based have been established.

15. In resolving this issue the Tribunal will be guided by established legal principles such as that the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.<sup>11</sup> The second relevant legal principle is that when termination is a possible sanction, the “misconduct must be established by clear and convincing evidence,” which “means that the truth of the facts asserted is highly probable”.<sup>12</sup> This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. It means that the truth of the facts asserted is highly probable.

16. The impugned decision related to 16 complaints against the Applicant for harassment, discrimination, abuse of authority, misuse of office, attempting to influence a Member State to have a decision by the High Commissioner reversed, breaching the duty of neutrality, independence and impartiality required of an international civil servant, abuse of privileges and immunities, breaching the confidentiality of UNHCR information and unauthorized outside activities by the Applicant. The Tribunal will review the evidence which formed the basis for the Respondent’s decision in the order the complaints appear in the application.

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<sup>10</sup> *Applicant* 2012-UNAT-209, para. 36.

<sup>11</sup> *Nyambuza* 2013-UNAT-364.

<sup>12</sup> *Molari* 2011-UNAT-164.

*(1) Allegation that the Applicant harassed Ms. DC.*

17. The Applicant denied the above charge pointing out that there is no record of the meeting at which it is alleged that she harassed Ms. DC, let alone a record of what was said. She maintained that Ms. DC had “motive and malice” due to the Applicant having refused to recruit Ms. DC’s husband to a position in the Resettlement Unit.<sup>13</sup>

18. The Applicant’s statements are contradictory in that while on the one hand she outrightly denied the allegations, asserting that there was no such meeting, during her subject interview she admitted that as the Officer-in-Charge, she had welcomed Ms. DC upon her arrival and told her that the number one candidate (HM) had withdrawn her application and that Ms. DC was the number two preference.<sup>14</sup> The Tribunal notes that the above admission corroborates all aspects of the allegation.

19. Ms. DC’s testimony<sup>15</sup> was moreover fully corroborated by the testimonies of Ms. ES who was present at the meeting in issue<sup>16</sup> and of Ms. ZS in whom Ms. DC confided soon after incident<sup>17</sup>. The Appeals Tribunal in *Siddiqi* 2019-UNAT-913, found that statements of three witnesses who were present during the meeting in issue were found to be of corroborative value to the issues at trial.

20. Considering that Ms. DC and Ms. ES quoted the Applicant’s words, located the incident in time and space and described how the comments made Ms. DC feel, the Applicant’s assertion that Ms. DC’s complaint was motivated by personal interest and racial discrimination against her stands discredited.

21. The Tribunal finds that the facts relating to the complaint that the Applicant introduced Ms. [DC], “Okay, this is [DC]. She is the new staff, she will be doing Programme. We did not really want [DC], she was not our first choice. We wanted

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<sup>13</sup> Reply, annex 2(A) -- Record of the Applicant’s interview dated 25 May 2018, pages 78/48- 78/50.

<sup>14</sup> Ibid., pages 78/47 -78/48).

<sup>15</sup> Reply, annex 2(B), page 628.

<sup>16</sup> Ibid., page 25.

<sup>17</sup> Reply, annex 2(A), page 135.



[HM]” and that the comments made Ms. [DC] feel humiliated and embarrassed were established to the level of clear and convincing evidence.

*(2) Allegations that the Applicant harassed and discriminated against Dr. MR.*

22. Dr. MR informed the investigators that he had been subjected to “bullying and harassment” when during a meeting and in front of the other colleagues present, the Applicant told him that “she had done everything in her power to prevent his appointment” and that UNHCR Headquarters had imposed Dr. MR on her as a staff member despite her objections, that she did not need a Statelessness Officer, that Dr. MR was an academic whom she found unfit and unqualified for the position”. Also that, “everyone knew the Germans were the Boers and responsible for the Apartheid regime and it was insensitive to have a German working in South Africa”. The Applicant denied that she made those statements and asserted that she is a victim of collusion and racial discrimination between the IGO and Dr. MR.

23. The Tribunal notes that Dr. MR detailed and coherent testimony is corroborated by the direct independent evidence of Ms. SG who testified that she heard the Applicant tell Dr. MR that he was not her choice and she did not want him there. And, that the Applicant made reference to Dr. MR’s nationality, saying that the Boers were his people, which Dr. MR rebutted by informing the Applicant that he was German and not Dutch.<sup>18</sup>

24. Dr. MR moreover documented the incident in writing at the time it occurred.<sup>19</sup> The document contains a description of the incident that is entirely consistent with Dr. MR’s account of events. In *Sall* 2018-UNAT-889, a report to the UNAMID Special Investigations Unit describing in detail the preceding assault by the applicant in that case in the “immediate aftermath of the event was found to have been a previous consistent statement and of considerable evidentiary weight”. That Dr. MR

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<sup>18</sup> Ibid., page 48.

<sup>19</sup> Reply, annex 2(B), page 9.

documented the incident in writing at the time the incident occurred is of considerable evidentiary weight.

25. In *Choi* UNDT/2011/181, the fact that the complainant reported the facts in a consistent manner to five different people, as was confirmed by their statements or other written documents was relevant in determining the veracity of the complaint. The fact that Dr. MR confided in Mr. AT, Ms. ZS and Ms. SS about what the Applicant had said to him, telling them that he had been humiliated by the Applicant, which narrative they confirmed in their testimonies, is evidence of consistency of complaint by Dr. MR. The Applicant's assertion that she is a victim of a racial and discriminatory divide fails for lack of evidence. The Tribunal finds that the facts relating to the allegations that the Applicant harassed and discriminated against Dr. MR were established to the level of clear and convincing evidence.

*(3) Allegation that the Applicant harassed and discriminated against Ms. CR.*

26. Ms. CR informed the investigators<sup>20</sup> that on 4 July 2016, her first day at work, the Applicant received her in her office and, in the presence of Mr. AT, said that the South African authorities did not like white people, that she was a late applicant and that the office had preferred another candidate. Ms. CR felt unwelcome. The Applicant denied having made those comments to Ms. CR and again pointed to the fact that the majority of the international staff in the UNHCR/RO Pretoria were "whites".

27. The Tribunal notes the contradiction in Ms. CR's account of events in that while she testified that the encounter with the Applicant took place in the Applicant's office, Ms. ZS's testimony is that Ms. CR had told her that the Applicant made the comments in issue over the phone.<sup>21</sup> In addition, Mr. AT, who Ms. CR said was present at the meeting, could not recall any specific comments made towards Ms. CR. The other witnesses, Ms. SS<sup>22</sup>, and Ms. BD<sup>23</sup> informed the investigators that they were only

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<sup>20</sup> Application, annex 10.

<sup>21</sup> Reply, annex 2(A), at page 139.

<sup>22</sup> Ibid., at page 210.

<sup>23</sup> Reply, annex 2(B), page 604.

informed that the Applicant had made those comments.

28. The Tribunal finds the above facts insufficient to ground an adverse finding given the contradiction between Ms. CR's account of events and Ms. ZS's testimony. The Respondent also sought to rely on the fact that the allegations are fully consistent with the Applicant's attempt to have Ms. CR's appointment rescinded, (which is the next allegation). The fact however that the Applicant attempted to have Ms. CR's appointment rescinded (even if it were proved) does not confirm that she made the comments attributed to her by Ms. CR, given the major contradiction in Ms. CR and Ms. ZS's interview statements, which creates doubt as to whether the comments were made at all.

29. The Tribunal finds that the facts relating to the allegation that the Applicant harassed and discriminated against Ms. CR were not established to the level of clear and convincing evidence.

*(4) Allegation that the Applicant influenced South African authorities in order to have Ms. CR's appointment rescinded.*

30. It was alleged that the Applicant used her position as a senior UNHCR staff member to try and obtain a representation from the South African authorities that they were displeased with the High Commissioner's decision in order to prompt the rescission of Ms. CR's appointment. Her main motives were to have Mr. GK, whom she favoured, appointed instead of Ms. CR, and to put up a fight with DHR for not selecting Mr. GK despite the Regional Office's recommendation.

31. The Applicant contends that she was not the only one involved in seeking to rescind Ms. CR's appointment. The evidence on which the Respondent based the impugned decision included documentary evidence emails (Annex 44 of the Investigation Report) which show that the Applicant together with, Mr. GK, Ms. SC and Ms. BD were dissatisfied with Ms. CR's appointment and discussed ways to have

the decision rescinded.<sup>24</sup>

32. The Respondent agrees with the Applicant's assertion but maintains that while other officers such as Ms. SC were initially involved in the scheme, the Applicant was the only one who actively continued to lobby and seek audiences with the pertinent ministries of the South African Government. In this regard, the Respondent cites the Applicant's comment that "the [South Africa] Office can still fight as we cannot give up now!"<sup>25</sup>

33. In the Tribunal's view, any attempt to determine this issue on the basis of the degree of culpability of the Applicant will invariably result in a miscarriage of justice. This is because each of the protagonists played a significant role in advancing the scheme. The evidence shows that the concerned staff members decided on a specific course of action based on the advice of Ms. ZS and in light of the DHR's justification of Ms. CR's appointment in accordance with the applicable rules, Ms. ZS stated that her "advice [was] for the [Regional] Bureau to raise it with the HC [the High Commissioner] requesting to rescind the decision based on preferences of the Government of South Africa".<sup>26</sup> All the concerned staff members, including the Applicant, subsequently discussed the follow-up and, specifically, the content of the message that would be sent to Mr. Valentin Tapsoba, Director of the Regional Bureau for Africa, raising the matter.<sup>27</sup>

34. In their discussions the staff members emphasized that "the GOSA's [Government of South Africa] preference for African candidates is the crux of the situation".<sup>28</sup> On 6 April 2016, Ms. SC finally wrote to Mr. Tapsoba stating that "we have had discussions with the Government of South Africa and they have reiterated, as in the case of the Regional Representative, their preference for an African with proven

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<sup>24</sup> Reply, annex 2(F), pages 41-47.

<sup>25</sup> Ibid., page 43.

<sup>26</sup> Ibid., page 41.

<sup>27</sup> Ibid., at pages 41 and 109.

<sup>28</sup> Ibid., page 26.

experience working in Africa, to head UNHCR offices in South Africa”.<sup>29</sup>

35. At some stage Mr. Tapsoba reached out to Mr. George Okoth-Obbo, Assistant High Commissioner-Operations, who advised him on the content of the memorandum that should be sent to him requesting the rescission of Ms. CR’s appointment, so that he could take it up with the High Commissioner.<sup>30</sup>

36. Mr. Tapsoba relayed this advice to the Applicant, who prepared the memorandum together with Mr. GK.<sup>31</sup> Mr. Tapsoba submitted the memorandum to Mr. Okoth-Obbo on 15 April 2016<sup>32</sup>. Mr. Okoth-Obbo forwarded the memorandum to Ms. Karen Farkas (then Director of DHR) and expressed his support for the Bureau’s request to rescind Ms. CR’s appointment and have Mr. GK appointed instead.<sup>33</sup>

37. While the Tribunal agrees that the Applicant was deeply emotionally invested in the conspiracy and exhibited overzealousness in the pursuit of the desired result, (she for example responded to Ms. ZS who advised that the issue be raised with the High Commissioner, that, “Thank you [ZS], the needful will be done”)<sup>34</sup> and she called the Deputy Minister of Home Affairs and committed to seek a written note from Mr. PM, Chief, Director of Human Rights and Humanitarian Affairs at the Department of International Relations and Cooperation during a lunch-time appointment two days later, the other officers’ roles as demonstrated above were not of any lesser significance.

38. Since the conspiracy complained about was orchestrated by a number of people at different levels of the Organization, apportioning blame for the whole scheme on the Applicant on the basis of her role does not serve the ends of justice. The facts and circumstances surrounding this particular complaint do not persuade the Tribunal that the facts relating to the allegations were established to the level of clear and convincing

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<sup>29</sup> Ibid., page 28.

<sup>30</sup> Ibid., page 71..

<sup>31</sup> Ibid., pages 77 and 119.

<sup>32</sup> Ibid., page 10.

<sup>33</sup> Application, annex 9, page 77.

<sup>34</sup> Reply, annex 2(F), page 168.

evidence.

(5) *Allegations that the Applicant abused her authority by instructing Mr. GB to do her eight-year-old child's homework.*

39. Mr. GB informed the investigators that, on one Friday afternoon, the Applicant asked him to make a colourful poster with pictures and talking points on the life cycle of dogs, which request made him feel belittled. He told the Applicant that he had to leave the office but she told him that he had to stay and finish the assignment. He prepared the poster but refused to draft any talking points.<sup>35</sup>

40. The Applicant maintained that this allegation is false and that she did not ask Mr. GB to draft talking points for her child's school presentation. She only requested that he assist her to google a poster of a dog and this was in the morning not at 1500hours. Her request to him was a collegial request with no coercion or pressure exerted on him and there was no urgency for him to avail that help. Had Mr. GB felt offended or belittled, he would have reported this matter immediately to the Respectful Workplace Advisors in the Office or to her Supervisor, Ms. SC, or brought it to the Applicant's attention. She would have apologized to him immediately. She questioned the fact that Mr. GB took long (until October 2017) to complain to the IGO.

41. Mr. GB's testimony is corroborated by that of Ms. NL who confirmed that the Applicant had requested her and Mr. GB to complete a school assignment for her child but that it was Mr. GB who did the assignment. She did not find it appropriate.<sup>36</sup>

42. Additional corroboration is supplied by the fact that Mr. GB informed Dr. MR<sup>37</sup> and Mr. AT<sup>38</sup> about the incident long before it was formally raised. Copies of Mr. GB's email to the Applicant containing the poster with the dogs and of the Applicant's response to Mr. GB that "Super! Thanks a million [GB], this is a very useful and a big

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<sup>35</sup> Reply, annex 2(A), at page 130.

<sup>36</sup> Reply, annex 2(G), at page 10.

<sup>37</sup> Reply, annex 2(B), at page 14.

<sup>38</sup> Reply, annex 2(A), at page 219.

assistance. We will develop the rest, together with little Veronica!”<sup>39</sup> whose authenticity the Applicant does not challenge, go to support the credibility of the complaint.

43. The Tribunal rejects the Applicant’s explanation that she simply asked Mr. GB to provide technical assistance in accessing an image on the computer, since it is contradicted by the available documentary evidence which confirms that Mr. GB sent the Applicant a full document containing a picture and different text boxes. The Applicant even acknowledged his assistance and noted that she would do the rest together with her daughter.

44. The Tribunal finds that the available testimonial and documentary evidence sufficiently established the facts relating to the allegation that the Applicant abused her authority by instructing Mr. GB to do her eight-year-old child’s homework, to the required standard of proof.

*(6) Allegation that the Applicant abused her authority by instructing Mr. GB and Mr. MK to accompany her during grocery shopping, to push her shopping cart, to carry her groceries to the car and to carry her groceries inside her house.*

45. It is alleged that in June 2017, the Applicant went on official mission travel to Swaziland with Mr. GB and Mr. MK, Senior Driver. Mr. GB<sup>40</sup> and Mr. MK<sup>41</sup> informed the investigators that, upon their return to Pretoria on a Sunday afternoon, the Applicant instructed Mr. MK to drive her to a shopping centre, bringing Mr. GB along. At the shopping centre, the Applicant had Mr. GB push her shopping cart, carry her groceries to the car, carry her groceries inside her house together with Mr. MK and blow up balloons for her children’s birthday party. Mr. GB felt compelled to do as the Applicant said in order to keep the peace. The Applicant maintains that they passed by the “Pick n Pay” to buy an electricity token. She did not buy groceries and that Mr. GB did not

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<sup>39</sup> Annexes 12, 51 and 52 of the Investigation Report.

<sup>40</sup> Reply, annex 2(A), at page 131.

<sup>41</sup> Reply, annex 6, pages 6 and 7.

leave the car to go to the shop and even when they reached her house.

46. Mr. GB and Mr. MK did not have any reasons to collude to falsely incriminate the Applicant. Their interview statements were coherent and consistent. Each of them provided detailed and specific accounts of how the Applicant requested that they go to a supermarket to buy groceries, how they helped her push the trolley and carry the groceries to the car, and how they helped her carry the groceries inside her house. The Tribunal finds their interview statements fully credible and concludes that the allegations that the Applicant abused her authority by instructing Mr. GB and Mr. MK to accompany her during grocery shopping, to push her shopping cart, to carry her groceries to the car and to carry her groceries inside her house, were established on the basis of clear and convincing evidence.

*(7) Allegation that the Applicant abused her authority by requesting Ms. ON to fix her shoes, bring her child shopping, take her child to the doctor and pay her utility bills.*

47. The Applicant denies that she requested her Senior Secretary, Ms. ON to fix her shoes and to take her child shopping. She testified that her daughter was Ms ON's friend. If they ever went shopping together, the Applicant was not involved. She however admits that she once requested Ms. ON to take her child to the doctor and to pay the sum of Rands150 for her water bill, a fact corroborated by emails which show that Ms. ON had paid Rands150, for the Applicant's utilities in December 2015, and that as of 22 February 2016 the Applicant had not reimbursed Ms. ON.<sup>42</sup>

48. The Applicant maintains that Ms. ON was sympathetic to her and was very willing to assist her. Had she refused to assist her, the Applicant would have sought help elsewhere. She denied that she borrowed money from Ms. ON. She refunded to her the Rands150 immediately upon her return.

49. The Tribunal finds that the Applicant's admission that Ms. ON cleared her

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<sup>42</sup> Annexes 27, 28 and 29 of the Investigation Report.



electricity bill and took her daughter to see a doctor sufficiently proves the facts relating to those allegations. With respect to the allegations that the Applicant requested Ms. ON to fix her shoes and to take her daughter shopping, Ms. ON explained that she did not feel in a position to decline the Applicant's requests since the Applicant did not like it when Ms. ON turned down her requests. Ms. ON's interview statement account was coherent and detailed. She moreover had nothing to gain from fabricating allegations against the Applicant and, she stated she had already left UNHCR and could not have been pressured or coerced into giving false testimony against the Applicant.

50. The Tribunal believes her evidence and finds that the facts relating to the allegations that the Applicant abused her authority by requesting Ms. ON to fix her shoes, take her child shopping, take her child to the doctor and pay her utility bills were established on the basis of clear and convincing evidence.

*(8) Allegation that the Applicant abused her authority by instructing Mr. GK, Mr. SD and Ms. MA to prepare motivation letters for UNHCR vacant positions for which she intended to apply.*

51. The Applicant asserts that Mr. GK, Mr. SD and Ms. MA only assisted her to review her original motivation/letter of interest. The motivation letters were her original drafts which her colleagues only reviewed. The allegation was premised on nine emails which were retrieved from the Applicant's UNHCR email account<sup>43</sup>. The emails show that the Applicant instructed different staff members to draft, review or amend letters of motivation for her job applications at UNHCR as follows:

- a. Mr. SD, then Senior Regional Resettlement Officer, wrote a draft motivation letter for an unspecified vacancy.<sup>44</sup>
- b. Mr. GK drafted the Applicant's motivation letters for the positions of Deputy Director (D-1) in New York, Deputy Representative (D-1) in Beirut,

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<sup>43</sup> Annex 31 of the investigation report.

<sup>44</sup> Reply, annex 2(D), at page 3.

Representative (D-1) in Ottawa and Director of the Ethics Office (D-1).<sup>45</sup>

c. Ms. MA, Protection Officer, drafted the Applicant's motivation letter for the position of Representative (D-1) in Tehran.<sup>46</sup>

52. The emails show that the motivation letters were in fact prepared by the officers in issue, contrary to the Applicant's assertion that she drafted the letters herself and only asked them to review and format them as a professional courtesy. Mr. SD for example wrote to the Applicant in the following terms "Dear Veronica, Please find attached the draft motivational letter for your review and required amendments. I've highlighted in green, the sections that require your inputs".<sup>47</sup>

53. According to Mr. GK's interview statement, he had done several applications for the Applicant.<sup>48</sup> Electronic copies of some of the motivation letters which were retrieved bear information in the Word file format showing that the Applicant neither created the documents nor made the last modifications.<sup>49</sup> Mr GK's interview statement, as corroborated by the nine emails included in Annex 31 to the investigation report and information from electronic copies of some of the motivation letters leaves no doubt that the facts relating to the allegation that the Applicant abused her authority by instructing Mr. GK, Mr. SD and Ms. MA to prepare motivation letters for UNHCR vacant positions or positions for which she intended to apply were established to the level of clear and convincing evidence. It is so found.

(9) *Allegation that the Applicant breached the rules governing performance appraisals at UNHCR by instructing Mr. GK and Dr. MR to write the Manager's comments for their own performance appraisals.*

54. The Applicant denied the allegation and explained that Mr. GK and Dr. MR put her under unbearable pressure to finalize their ePad in a short time. She requested for

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<sup>45</sup> Ibid., at pages 7-30.

<sup>46</sup> Ibid., pages 37-42.

<sup>47</sup> Reply, annex 2(D), at page 3.

<sup>48</sup> Reply, annex 2(A), at page 45.

<sup>49</sup> Annex 31 of the investigation report.

drafts of their self-assessment and achievements on the agreed objectives vis-à-vis what they did during that period for her review. She requested them to provide inputs on their concrete achievements during the period to facilitate the completion of their ePADs which had been delayed due to the many roles she was playing simultaneously in the ROSA, but they did not write the manager's comments as alleged.

55. This allegation was, inter alia, grounded on Dr. MR's testimony that the Applicant had instructed him on three occasions to draft the manager's comments for his own ePAD from 2016 to 2017. He informed the investigators that he ignored her request twice but he proceeded to draft something and sent it to her by email after the third time.<sup>50</sup> He found her behaviour improper and not in accordance with the rules.

56. There is credible documentary evidence that Mr. GK, at the Applicant's request, prepared the manager's comments for his own ePAD and submitted them to her. He, for example, wrote:

Mr. [GK] is a very hard working Staff Member who has a professional approach toward his work. Since his deployment in July 2015 to head the South Africa Unit, he has fulfilled all his objectives and in particular was instrumental in assisting with the removal of refugees and other persons of concern who had camped outside the UN building for close to 2 years. He is an accomplished Manager with good managerial skills and has exercised prudent use of office resources. He is willing to take on additional tasks at short notice and has excellent drafting skills. This being a P 5 post, Mr. [GK] has shown without doubt that he is capable of executing tasks at a higher level.

These comments are not mere inputs on his achievements as suggested by the Applicant. They constitute an appraisal of Mr. GK's performance. It is clear that the Applicant simply copied and pasted those comments into Mr. GK's ePAD for 2015.<sup>51</sup>

57. The Applicant's suggestion that she merely asked Mr. GK and Dr. MR to draft their self-assessment and achievements runs counter to the abundant documentary

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<sup>50</sup> Reply, annex 2(A), at page 13.

<sup>51</sup> Record of interview with the Applicant; Annex 4 of the investigation report at pages 25 and 26; and Annex 57 of the investigation report. A copy of Mr. GK's ePAD for the relevant period was attached to the Reply as Annex R-7.

evidence. The documentary evidence renders the Applicant's account of events unreliable.

*(10) Allegation that the Applicant misused her office by instructing Mr. BK and Mr. GM to review, revise and contribute to her private academic work, and by instructing Mr. BK to prioritise her academic work over UNHCR work.*

58. The Applicant denied this allegation. She maintained that Mr. BK's contribution in terms of study materials, reviewing, critiquing, providing legal reasoning or position were done after UNHCRs working hours and mostly during the weekends and at night. Their role was limited to peer review of what she had done pertaining to only one module out of six modules.

59. She sought to rely on the interview transcripts of Mr. BK and Mr. GM in which they maintain that she did not instruct them to review, revise and contribute to her private academic work. The Applicant's assertion (and indeed Mr. BK's and Mr. GM's denials) are however squarely contradicted by email records which show that she in fact instructed them to carry out substantive work on the preparation of her Doctor of Laws ("LL.D") proposal.<sup>52</sup>

60. Information in the emails reveals that when the Applicant received feedback on her academic work from Professor KVM of the University of Pretoria, she forwarded that feedback to Mr. BK and/or to Mr. GM and pressed them to work on it. They did so and reverted to her. She then sent the reworked document to her professor. One email to Mr. BK, reads as follows;<sup>53</sup>

Thanks dear [BK]. Hope you are doing well.

We had a meeting with our brother [Mr. GM] yesterday and I gave him a print-out of both documents and e-mails from KVM [Professor [KVM] of the University of Pretoria].

He had not been able to look at it as he said, he had no internet access

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<sup>52</sup> The email exchanges, dating from 16 May 2017 to 17 January 2018 are included chronologically in Annex 16 of the investigation report.

<sup>53</sup> Reply, annex 2 (B), at page 420

while in the village in Meru.

He promised to discuss with you so you could divide the work between you. He said he will re-work some portions like the Methodology, timelines and address some of the questions of kvm but that you will do the literature review with the authors and information as each links with the chapters and sources since you were they [sic] one that read/did the annotations of the sources that we will be using and which of the authors/sources speaks to what chapters.

I am surprised that both of you have not yet spoken and time is of the essence now since the absolute deadline as given by **kvm is the 31st of October just some 6 days from today** (emphasis in original).

Our brother suggested that you could take one day and dedicate it to this re-working and it is doable!

Kindly write to him and find out what it is and what portion he wants you to work on.

I know you will be having the visit of the President at your location tomorrow Thursday and after that, Pls find some quality time and dedicate to the project so that the re-submitted/re-worked product will go through to allow the OD [oral defence of the LL.D proposal] to take place this year.

You will also be getting an additional hand in the North – [SC] will be going to your location as from Sunday for some Two weeks mission, to assist as coordinator and that should help with the emergency a lot. Kindly treat this issue above with utmost importance as we both know what this means to us.

Mr. BK obliged and responded the following day that he would take two days off to work on the Applicant's LL.D proposal<sup>54</sup>

61. The Applicant followed up and asked Mr. BK: "Were you able to take off time off work a bit, and focus as you had promised?"<sup>55</sup> Mr. GM had told Mr. BK to "please look at the areas identified by the supervisor, especially in green highlight".<sup>56</sup> Mr. BK worked on the LL.D proposal and reverted with a revised version on 3 November 2017.<sup>57</sup> The Applicant submitted her LL.D proposal to Professor KVM the following

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<sup>54</sup> Ibid., at pages 419-420.

<sup>55</sup> Ibid., at page 531.

<sup>56</sup> Ibid., at page 31.

<sup>57</sup> Ibid., at page 385.

day.<sup>58</sup>

62. A cursory perusal of the last versions of the Applicant's LL.D proposal<sup>59</sup> reveals that the Applicant in fact submitted the document prepared by Mr. BK with only very minor editorial modifications.

63. The available documentary evidence supports a finding that the facts relating to the allegation that the Applicant misused her office by instructing Mr. BK and Mr. GM to review, revise and contribute to her private academic work, and by instructing Mr. BK to prioritise her academic work over UNHCR work, were established to the level of clear and convincing evidence.

*(11) Allegation that the Applicant rewarded Mr. BK and Mr. GM for their contributions to her academic work by supporting Mr. GM's applications for UNHCR vacancies and requesting a salary increase for Mr. BK.*

64. The Applicant denies the allegation and asserts that her email recommending Mr. GM for a P-2 position in Uganda was not in any way linked to any imagined or real contribution to her academic work. The recommendation was simply in recognition of his being competent and hardworking without any further expectation beyond that. Mr. GM sought her recommendation and informed her that his temporary appointment ("TA") at ROSA was ending in March and he was leaving the Organization for good after 12 years of service. She would have done so for any other staff when/if approached. She did not play any other role beyond sending the recommendation and Mr. GM was not even recruited for the position she recommended him for in Uganda, so this cannot be taken to be a reward.

65. While the Applicant concedes that she approached the Human Resources Unit to request to have Mr. BK's salary increased, she asserts that this was due to his long experience in UNHCR over other UNOPS staff at the same level. Contrary to the Applicant's assertion, it is abundantly evident that the relationship between her and Mr.

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<sup>58</sup> Ibid., at page 555.

<sup>59</sup> Reply, annexes 8-10.

BK and Mr. GM went far beyond the appropriate and normal level of supervisor/supervisee relationship. The only logical explanation, given the timing of the courtesies they extended to each other is the mutual benefit accruing from either side, them by way of assistance with her private work and her by advancing their employment and career prospects. One of Mr. BK's emails to the Applicant leaves no doubt that the Applicant acted to reward Mr. BK for his contributions to her academic work.

I just wanted to alert you to please be on the look-out for a request to offer me a TA to Nchelenge. While attractive, my loyalty to you and to our project beyond 2017 (which I cannot renege on) need to be a priority. I therefore cannot take it up at this time. I wanted to re assure you of this.

Hence I would be agreeable to return to Nchelenge after O.D. [the Applicant's oral defence of her LL.D proposal] for three weeks till they find someone - I will gain the invaluable experience before they declare it a L2 emergency and soften the blow of declining the offer.<sup>60</sup>

66. Additional evidence of their unusual relationship is the undisputed fact that she invited Mr. BK and Mr. GM to lunch with one of her professors and supported Mr. BK's deployment to Zambia, his mission extension in Zambia and his possible TA to Nchelenge in Zambia.<sup>61</sup>

67. The Applicant also supported Mr. GM in his endeavours to continue working in the UNHCR/RO Pretoria after a mandatory break in service. She supported him as he looked for positions in UNHCR and sent an email to Mr. K (then Representative in Uganda) recommending Mr. GM for the position of Associate Reporting Officer in Kampala.<sup>62</sup>

68. Mr. GM drafted an email for the Applicant to send to Mr. AB, Deputy Director of the Regional Bureau for Africa, concerning staffing needs at the Regional Resettlement Unit and stated that, if only one of two P-2 temporary positions could be

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<sup>60</sup> Reply, annex 2(H) , page 56.

<sup>61</sup> Ibid., pages 53-58.

<sup>62</sup> Ibid., pages 4-532 generally.

kept, it should be the one encumbered by Mr. GM.<sup>63</sup> That the Applicant forwarded her correspondence with Mr. K, Ms. ZS and Mr. IT, Senior Regional Resettlement Officer, to Mr. GM.<sup>64</sup> lends credence to the Respondent's contention that she wanted Mr. GM to know what she was doing for him. This is why when Mr. GM did not acknowledge the fact that she had forwarded him Mr. K's response to her email recommending him, the Applicant asked him whether he had seen the response to her email.<sup>65</sup> In addition, the Applicant instructed Ms. ZS and Mr. IT to explore any avenue that could enable the office to have Mr. GM's services extended beyond December 2017.<sup>66</sup>

69. The proximity in timing between the Applicant's favours to Mr. BK and Mr. GM and their contribution to her academic work supports the Respondent's assertion that the parties operated a *quid pro quo* scheme and a finding that the facts relating to the allegation that the Applicant rewarded Mr. BK and Mr. GM for their contributions to her academic work by supporting Mr. GM's applications for UNHCR vacancies and requesting a salary increase for Mr. BK were established to the level of clear and convincing evidence.

*(12) Allegations that the Applicant requested staff members in the UNHCR offices in Uganda, Iran, Tanzania, Kenya, Pakistan and Sierra Leone to obtain police clearance letters on her behalf through diplomatic channels for the purposes of her application for a United States Green Card, and to submit them via the UNHCR pouch.*

70. The Applicant denied that she "instructed" staff members of UNHCR Offices in Uganda, Iran, Tanzania, Kenya, Pakistan and Sierra Leone to use diplomatic channels in obtaining her Police clearance letters. She maintains that the allegation is mischaracterized as an instruction and none of the recipients of the requests suggested it was. It was couched as a request for assistance and it is not clear on how this violated

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<sup>63</sup> Ibid., page 4.

<sup>64</sup> Ibid., pages 32, 35 and 42.

<sup>65</sup> Ibid., page 35.

<sup>66</sup> Ibid., page 43.



any UNHCR instructions.

71. The Applicant's explanation that she sent e-mails to relevant staff members to assist in obtaining or following up on her applications for Police clearance because their assistance would not be different from the official letters issued to staff members when applying for administrative documents for opening of bank account, medical hospitalization, bills and visas however contradicts her assertion that she did not instruct, but requested the recipients for assistance. This is because once she viewed the assignment as an official piece of work (which her explanation suggests), it was no longer a request but an instruction.

72. That she reminded the Sierra Leone office that United Nations staff members were not supposed to pay any fee and requested them to submit an official application via *Note Verbale* when they advised her that the fee for the Police clearance letter was approximately USD80, supports the position that she viewed the assignment as an official piece of work. This was why she requested them to send her the originals by the UNHCR official pouch. She used the official pouch to send the documents required for the issuance of the letter in Uganda<sup>67</sup> and once the clearance letters from Sierra Leone and Kenya were obtained, she requested them to send her the originals by the UNHCR official pouch.<sup>68</sup> The email exchanges included in Annex 31 to the investigation report show that the Applicant followed up multiple times while casting the matter as being urgent and a priority.

73. The Applicant also requested Mr. BK to prepare the curriculum vitae ("CV") that she included in her application for a United States of America green card. Specifically, the Applicant wrote:

Dear [BK], Pls (sic) use this information to prepare for me a good CV to be use/or application (sic) for a Green Card un the USA, draft a nice and modern CV for me as the Immigration Lawyer handling my case has requested for my CV. I prepared a CV last in I997 when I was job

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<sup>67</sup> Reply, annex 2(D) , page 292.

<sup>68</sup> Ibid., at page s 180 and 272.

hunting! Talk you later. Best regards.<sup>69</sup>

74. The evidence supports a finding that the facts relating to the allegation that the Applicant requested staff members in the UNHCR offices in Uganda, Iran, Tanzania, Kenya, Pakistan and Sierra Leone to obtain Police clearance letters on her behalf through diplomatic channels for the purposes of her application for a United States green card, and to submit them via the UNHCR pouch, were established to the level of clear and convincing evidence.

*(13) Allegation that the Applicant breached the duties of neutrality, independence and impartiality of an international civil servant and the Oath of Office in her application for permanent residence in South Africa.*

75. In the process of applying for permanent residence in South Africa, the Applicant included a letter of motivation in which she stated, inter alia, that;

... I will be willing to invest more of my resources, expertise as a refugees/migration specialist and Geo-Political Analyst in South Africa. I will use my position and resource for the good the Country, willing and available to serve the Country international and in whatever way possible.

[...]

Given my extensive experience and technical abilities, I have no doubt that I can make a critical and substantial contribution to South Africa national interests if my application is granted.

I believe that I can use my experience as frontline humanitarian worker and thought-leader to deliver lectures and seminars at South Africa universities and think-tanks on the growing asylum-migration nexus.

I currently had an indefinite contract with UNHCR, and will continue to serve the organization in different countries and location in the world and will always stand ready to work in close collaboration with the South Africa Missions abroad if need be.

I also intend to continue making my expertise available to South Africa local NGOs working in the humanitarian sector and consider any worthwhile opportunity to work with them directly now and in the

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<sup>69</sup> Reply, para. 126.

future.<sup>70</sup>

The Applicant signed the letter as “Veronica Irima Modey-Ebi, Deputy Regional Representative (Protection), United Nations High Commissioner for Refugees (UNHCR)”, and attached her CV which lists the address of the UNHCR Regional Office in Pretoria as her address, her UNHCR email address as her email address, and her official UNHCR phone number as her phone number.

76. The Applicant did not dispute the contents of the letter or the fact that it was part of the application she submitted for permanent residence in South Africa. The fact that she sought to use her position at UNHCR to promote her personal interest is clearly reflected in the letter and it supports a finding that the facts relating to the allegation that the Applicant breached the duties of neutrality, independence and impartiality of an international civil servant and the Oath of Office in her application for permanent residence in South Africa, were established to the level of clear and convincing evidence.

*(14) Allegation that the Applicant forwarded to her husband an email that she had addressed to the Director and Deputy Director of the Regional Bureau for Africa, including two UNHCR official mission reports.*

77. The Applicant does not dispute the fact that on 15 April 2016 she wrote an email to then Director and Deputy Director of the UNHCR Regional Bureau for Africa in order to inform them of her conversations with the Deputy Minister of Home Affairs of South Africa concerning the situation of a group of refugees in the KwaZulu-Natal Province. The Applicant also requested their feedback and advice for an impending mission to the area. One hour later the Applicant forwarded that email to her husband. To her message the Applicant attached two UNHCR documents titled “Mission to KwaZulu Natal” and “Mission Report- Durban”.<sup>71</sup>

78. The Applicant explained that she was stressed, overburdened and overstretched

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<sup>70</sup> Reply, annex 2(E).

<sup>71</sup> Reply Annex 2(C), page 82.

and so she shared that e-mail with her spouse for his support, advice and guidance as regards the security and displacement situation in Cato-Ridge, Isipingo and Phoenix temporal displaced Camps for persons of concern in Durban, KwaZulu-Natal province.

79. As she does not contest the allegation but only gives explanations of why she acted in the way she did, which does not negate the factual aspects of the allegation, the Tribunal finds that the facts relating to the allegation that Applicant forwarded to her husband an email that she had addressed to the Director and Deputy Director of the Regional Bureau for Africa, including two UNHCR official mission reports were established to the level of clear and convincing evidence.

*(15) Allegations that the Applicant disclosed confidential IGO information to UNHCR staff who had no need to know that information, including sharing information with a complaint of sexual misconduct with the subject of the complaint.*

80. The Applicant explained that she shared with Mr. PK an e-mail dated 25 May 2016. Mr. PK was the Head of the Cape Town Office when certain allegations of misconduct were brought against a local partner. In her message to Mr. PK, she stated that she would also “share the IGO findings”<sup>72</sup>. She also forwarded to him correspondence relating to the manner in which a UNHCR implementing partner in South Africa had handled allegations of misconduct, including the original message by the Head of the Investigations Service of the IGO dated 13 May 2016 as well as a note for the file prepared for the IGO entitled “Confidential NFF\_13.05.16\_1P ARESTA”.

81. The nature of information sent to Mr. PK does not support the Applicant’s explanation that she was just informing him about what was going on. Moreover, while she explains that her e-mail response of 18 December 2017 to “NA”, a staff member accused of sexual harassment was a response to NA’s apologies for the disappointment and breach of trust caused by his behaviour, there is no reason for her disclosure of information about the sexual misconduct complaint to other staff members like Dr.

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<sup>72</sup> Ibid., page 84.

MR<sup>73</sup>, Mr. GK<sup>74</sup> and to Mr. OO, UNHCR Senior Administrative/Finance Officer in Yangon, Myanmar, whom she told that NA had been referred to the IGO for investigation “for breast grabbing, forced kissing and indecent touching of [M] by [NA] and [NA]’s counter claim of a sexual consensual relationship that turned sour”.<sup>75</sup> She also told NA that the non-renewal of his contract in Botswana was his own doing, for starting a “despicable relationship” despite being a married man and informed him that the issue and all the various emails between him and the other staff member involved had been forwarded to the IGO by Ms. ZS and that an investigation was still ongoing.<sup>76</sup>

82. The Applicant maintains that her e-mails to NA and to Mr. OO carried no potential to jeopardize the IGO investigation since she was just expressing her disappointment with NA’s behaviour. Her explanations however do not negate the established fact that she disclosed the confidential information in issue.

83. The Tribunal finds that the facts relating to the allegation that the Applicant disclosed confidential IGO information to UNHCR staff who had no need to know that information, including sharing information with a complaint of sexual misconduct with the subject of the complaint were established to the level of clear and convincing evidence.

*(16) Allegation that the Applicant did not seek authorization to have her master’s dissertation published online, although the dissertation was relevant to UNHCR work.*

84. While it is not disputed that the Applicant’s master’s dissertation was published, that it is freely accessible on the website of the University of Pretoria, and that the Applicant neither sought nor obtained authorization from UNHCR to have it published or made available online, the Applicant denied that she published it or consented to its publication. She explained that it is a requirement of the Faculty of

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<sup>73</sup> Reply, annex 2(B), Record of interview with Dr. MR, page 13.

<sup>74</sup> Reply, annex 2(A), Record of interview with Mr. GK, page 45.

<sup>75</sup> Reply, annex 2(C), page 100.

<sup>76</sup> Ibid., at page 99.

Law at the University of Pretoria that all dissertations presented for exams are posted on the University's online repository without the permission of the student and that this is the University's rule promulgated to prevent plagiarism. This assertion was not controverted. Her explanation is reasonable, since it is not farfetched that a University would have such a rule in place. Since there is no evidence to rebut her assertion that she was not responsible for the online publication of her dissertation, the possibility that she did not publish it cannot be ruled out. The doubt created by the lack of evidence must be resolved in the Applicant's favour. The Tribunal finds that the facts relating to the allegation that the Applicant did not seek authorization to have her master's dissertation published online were not established to the level of clear and convincing evidence.

85. In conclusion, the Tribunal finds that the Administration discharged the burden of establishing that misconduct has occurred with regard to the allegations in parts 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 and found no evidence to support the assertion that the Applicant is a victim of "mobbing".

*(B) Whether the established facts legally amount to misconduct under the regulations and rules.*

86. In respect to the following:

- a. the allegation that the Applicant harassed Ms. DC;
- b. the Applicant's conduct in relation to Dr. MR;
- c. her instruction to Mr. GB to do her eight-year-old child's homework;
- d. her instructions to Mr. GB and Mr. MK to accompany her during grocery shopping to push her shopping cart, to carry her groceries to the car and to carry her groceries inside her house; and
- e. her conduct in requesting Ms. ON to fix her shoes, to bring her child shopping, to take her child to the doctor and pay at least one of her utility bills;

as detailed in complaint numbers 1, 2, 5, 6 and 7 above, qualify as harassment under paragraph 5.3 of the UNHCR/HCP/2014/4 Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (“the Policy”) which provides at that:

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 or cause personal humiliation or embarrassment to another; or that cause an intimidating, hostile or offensive work environment. While typically involving a pattern of behavior it can take the form of a single incident. Harassment may be unintentional and may occur both at the workplace and outside working hours. 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’.

87. In order to establish harassment, the test is whether the impugned conduct would be expected or be perceived to cause offence or humiliation to a reasonable person, taking into account the overall circumstances in which the conduct occurred.

88. The comments made to Ms. DC that she was not the first choice and that a different candidate had been preferred for her position and to Dr. MR (allegation 2), that the Applicant had done everything she could to prevent his appointment, that Headquarters had imposed him upon her despite all her objections, that she did not need a Statelessness Officer, that he was an academic unqualified and unfit for the profession, that everyone knew that the Germans were Boers and responsible for the Apartheid regime and that it was insensitive to have a German working in South Africa, would make a reasonable person feel offended and humiliated.

89. In respect to her instructions to Mr. GB (allegation 5) to do her eight-year-old child’s homework, the Applicant’s submission that she was not aware of any subjective feeling of embarrassment is inconsequential. The Applicant’s argument that her conduct could not be considered harassment because it was not identified as unwelcome has no merit. Under paragraph 4.4.1 of the Policy, the aggrieved individuals were under no obligation to confront her over her comments. Paragraph

4.4.1 provides that, “the aggrieved individual may opt for an informal or a formal process as detailed in sections 4.5 and 4.6 of the present policy”. This position was clarified in *Mapuranga*<sup>77</sup> where it was held that “the reference to “unwelcome” conduct does not require that the alleged offender be put on notice that his or her conduct is unwelcome”. There can be no doubt that the Applicant’s instruction to Mr. GB qualifies as abuse of authority under paragraph 5.4 of the Policy which stipulates that,

Abuse of Authority is any improper use of a position of influence, power or authority by an individual against another person. This is particularly serious when an individual misuses his/her influence, power or authority to negatively influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. It can include a one-off incident or a series of incidents. 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.

90. The Applicant’s argument at paragraphs 12 and 41 of her application that the consideration of her conduct as harassment, in this and the other instances, is the result of a culturally and racially biased perception of her management practices is disingenuous and lacks merit given the nature of comments she made. The comments in issue have nothing to do with the recipient’s race, since they would embarrass/humiliate any human being. The Appeals Tribunal’s guidance on the applicable test in such a context in the case of *Applicant*<sup>78</sup>, where the Appellant was a senior staff member and supervisor within the United Nations, that “[t]he test is not if his actions and behaviour can be explained but the perception of his behaviour by a reasonable person within a multicultural environment”, answers to the Applicant’s arguments.

91. With respect to Dr. MR, the Applicant’s comments distinguished him

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<sup>77</sup> UNDT/2018/132, at paragraph 122. The case involved a similar legislative provision from the International Trade Centre, ITC/EDB/2015/7 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority).

<sup>78</sup> 2012-UNAT-209, at para. 54,



arbitrarily and treated him unfairly on the basis of his German nationality, associating him with the Apartheid regime and noting that it was insensitive to have him in South Africa. This was contrary to paragraph 5.1 of the Policy which provides that:

Discrimination is any unfair treatment or arbitrary distinction based on a person's race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, or social origin. Discrimination may be an isolated event affecting one person or a group of persons similarly situated, or may manifest itself through harassment or abuse of authority.

92. With regard to the Applicant having Mr. GB, Mr. MK and Ms. ON do her private chores, the Tribunal is in agreement with the Respondent that it is highly unlikely that they would have simply complied with her requests had it not been for the disparity of power in their professional relationship. The Applicant therefore improperly used her position of authority to have them perform duties which were entirely unrelated to UNHCR work or their official functions, and, in the cases of Mr. GB and Mr. MK, after returning from mission on a Sunday afternoon. The Tribunal agrees with the Respondent that since Ms. ON had to pay the Applicant's utility bill in December 2015 and was not reimbursed until February 2016, the Applicant effectively borrowed money from her in contravention of the Standards of Conduct for the International Civil Service, published in 2013 by the International Civil Service Commission ("the Standards of Conduct"), which provide at paragraph 17 state:

Managers and supervisors serve as role models and they have therefore a special obligation to uphold the highest standards of conduct. It is quite improper for them to solicit favours, gifts or loans from their staff; they must act impartially, without favouritism and intimidation. In matters relating to the appointment or career of others, international civil servants should not try to influence colleagues for personal reasons.

93. By falling short of the Standards of Conduct expected of an international civil servant, the Applicant also breached her obligations under staff regulation 1.2(t). By committing harassment (allegations 1, 2, 5, 6 and 7) the Applicant violated her basic obligations under staff regulation 1.2(a) and (b), and staff rule 1.2(t). In addition, the Applicant's conduct was in breach of her obligations under paragraph 4.2(a) of the

Policy, which provides that:

UNHCR Personnel, including Staff Members and Affiliate Workforce, are expected to maintain a harmonious working environment for other colleagues by behaving in a manner which is free of disrespect, intimidation, hostility, offence and any form of discrimination, harassment, sexual harassment or abuse of authority.

94. Moreover, as the UNHCR Deputy Regional Representative (Protection) the Applicant was a senior manager and had additional obligations under the Policy, which she also violated. In particular, pursuant to paragraph 4.3 of the Policy:

Managers and supervisors are also expected to:

a) act as role models by upholding the highest standards of conduct in order to achieve an environment free from discrimination, harassment, sexual harassment and abuse of authority, in which hurtful and destructive behaviour have no place;

b) facilitate, inspire and help to create a harmonious working environment free of disrespect, intimidation, hostility, offence and any form of discrimination, harassment, sexual harassment and abuse of authority.

95. The Tribunal finds that the established facts in allegations 1, 2, 5, 6 and 7 legally amount to misconduct under the cited Rules and Regulations.

96. In respect to the allegations that the Applicant abused her authority by instructing Mr. GK, Mr. SD and Ms. MA to prepare motivation letters for UNHCR vacant positions for which she intended to apply, the Tribunal is in agreement with the Respondent that the Applicant's conduct in this regard qualifies as abuse of authority. It is in breach of the standards of conduct expected of an international civil servant since she used her senior position to have junior colleagues execute functions which are not UNHCR related and which are not related to their official functions. They only accepted to draft the Applicant's motivation letters because she was their superior. The Applicant's conduct was not consistent with her duty to uphold the highest standards and act as a role model. It therefore contravenes her obligations under staff regulation 1.2 (a), (b) and (t) as well as paragraphs 4.2 and 4.3 of the Policy and constitutes misconduct.

97. UNHCR/HCP/2014/12/Rev.1 (Revised Policy on Performance Management) provides at paragraphs 4.1.4 and 4.4.5 that:

4.1.4 A supervisor is responsible/or participating in all phases of the performance appraisal process in a timely manner, giving regular, candid and timely performance feedback to the supervisee on and providing accurate appraisals.

4. 4. 5 Phase three - Final Evaluation: The supervisee is responsible for initiating the phase three by completing the self-assessment. Multi-raters, where selected, provide comment on relevant competencies. The supervisor prepares tire draft evaluation taking into account the self-assessment and multi-raters' comments, and discuss it with the reviewing officer where necessary. Then the supervisor discusses the evaluation with the supervisee and finalizes it. Supervisees have the opportunity to provide comments, which will be reflected in their Fact Sheet.

By requesting Mr. GK and Dr. MR to write the manager's comments in their own performance appraisal, the Applicant did not conform to her role and responsibilities as a manager and therefore neglected a crucial part of her responsibilities as a supervisor. Secondly she undermined UNHCR's interest in having an adequate assessment of staff members' performance.

98. She moreover placed the staff members in a clear situation of conflict of interest. The Tribunal fully agrees with the Respondent that the Applicant's conduct was not consistent with her obligation under staff regulation 1.2(b) to uphold the highest standards of competence and also constitutes misconduct.

99. With respect to the allegations that the Applicant misused her office by instructing Mr. BK and Mr. GM to review, revise and contribute to her private academic work and by instructing Mr. BK to prioritise her academic work over UNHCR work, staff regulation 1.2(g) provides that "staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise". The Applicant breached the above-cited regulation when she used her office as Deputy Regional Representative (Protection) (D-1) to have two junior colleagues at the P-2 level carry out her academic work and other tasks not related to

UNHCR work.

100. Her conduct also qualifies as abuse of authority under paragraph 5.3 of UNHCR/HCP/2014/4 which provides that:

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 or cause personal humiliation or embarrassment to another; or that cause an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour it can take the form of a single incident. Harassment may be unintentional and may occur both at the workplace and outside working hours. 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”.

101. The Applicant also breached paragraph 4 of the Standards of Conduct which provides that:

International civil servants should share the vision of their organizations. It is loyalty to this vision that ensures the integrity and international outlook of international civil servants; a shared vision guarantees that they will place the interests of their organization above their own and use its resources in a responsible manner.

The Applicant urged Mr. BK who was working in an emergency situation in Zambia at a time when his contractual arrangement was being converted, to prioritise her own interests over UNHCR work. Her actions constitute misconduct since they contravened her obligations under staff regulations 1.2 (a), (f) and (g), paragraphs 4 and 17 of the Standards of Conduct, and paragraphs 4.2 and 4.3 of the Policy.

102. With respect to the allegations that the Applicant rewarded Mr. BK and Mr. GM for their contributions to her academic work by supporting Mr. GM’s applications for UNHCR vacancies and requesting a salary increase for Mr. BK, the Tribunal has found that the Applicant had personal reasons for recommending Mr. GM and Mr. BK for job placements and for seeking a salary increase for Mr. BK. This conduct is in breach of paragraph 17 of the Standards of Conduct which provides that:

Managers and supervisors serve as role models and they have therefore a special obligation to uphold the highest standards of conduct. It is quite improper for them to solicit favours, gifts or loans from their staff; they must act impartially, without favouritism and intimidation. In matters relating to the appointment or career of others, international civil servants should not try to influence colleagues for personal reasons.

103. She placed herself in a situation of conflict of interest because her personal interests, that is, the continued employment and advancement of the two junior staff members who carried out her academic work and other tasks, interfered with her actions as a UNHCR senior manager, which violated her obligations under staff regulation 1.2(m) and staff rule 1.2(q). She misused her position as a senior UNHCR staff member for the private gain of those she favoured, thereby breaching her obligations under staff regulation 1.2(g). The Applicant's conduct therefore qualifies as misconduct.

104. The Applicant's request that UNHCR make an official intervention through diplomatic channels to enable her obtain the clearance letters she needed for personal/private purposes constituted an abuse of UNHCR's privileges and immunities. When she was advised to pay the official USD80 to obtain the letter in Freetown, she requested that the office make an official request via *note verbale* so that she could avoid payment. She therefore used UNHCR resources for private purposes by virtue of her senior position in the Organization, which contravened paragraph 43 of the Standards of Conduct, which provides that:

The privileges and immunities that international civil servants enjoy are conferred upon them solely in the interests of the organizations. They do not exempt international civil servants from observing local laws, nor do they provide an excuse for ignoring private legal or financial obligations. It should be remembered that only the executive head is competent to waive the immunity accorded to international civil servants or to determine its scope.

105. The Applicant's conduct with respect to the allegations that she requested staff members in the UNHCR offices in Uganda, Iran, Tanzania, Kenya, Pakistan and Sierra Leone to obtain police clearance letters on her behalf through diplomatic channels for

the purposes of her application for a United States green card, and to submit them via the UNHCR pouch also qualifies as misuse of office and is inconsistent with the standards of conduct expected of an international civil servant.

106. There is evidence that the Applicant used the UNHCR pouch to receive police clearance letters which were for personal use from Kenya, Sierra Leone and Uganda. This was inconsistent with paragraph 3(d) of ST/AI/368 (Instructions governing United Nations Diplomatic Pouch Service) which only allows for including personal letters in the following terms:

In exceptional circumstances, where mail service is unavailable or inadequate, a limited number of personal letters and periodicals will be accepted for pouching to or from staff in an office away from Headquarters. In such cases, request/or permission to include these items in the pouch shall be made by the head of the office away from Headquarters concerned to the Chief, Buildings Management Service. It is the responsibility of the field office to notify Headquarters when pouch service/or personal mail is no longer required.

Since Sierra Leone, Kenya and South Africa are all served by expedited mail services, the Applicant's did not need to use the official UNHCR pouch.

107. The Applicant's conduct was in breach of her obligations under staff regulations 1.2(t) and (g), paragraphs 4 and 43 of the Standards of Conduct, was inconsistent with the provisions of ST/AI/368 and qualifies as misconduct.

108. In respect to the allegations that she breached the duties of neutrality, independence and impartiality of an international civil servant and the Oath of Office in her application for permanent residence in South Africa, in the motivation letter in issue, the Applicant stated:

... I will be willing to invest more of my resources, expertise as a refugees/migration specialist and Geo-Political Analyst in South Africa. I will use my position and resource for the good the Country, willing and available to serve the Country international and in whatever way possible.

Given my extensive experience and technical abilities, I have no doubt

that I can make a critical and substantial contribution to South Africa national interests if my application is granted.

The Tribunal is in agreement with the submission that the Applicant's statement that she would serve South Africa in whatever possible way and her expressed willingness to make a substantial contribution to South Africa's national interest was in blatant breach of her basic obligations under the Charter of the United Nations and her Oath of Office.

109. Article 100.1 of the Charter provides that:

In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

The Applicant breached the Oath she took under staff regulation 1.1(b) which requires staff members to make the following written declaration witnessed by the Secretary-General or his or her authorized representative:

I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization.

I also solemnly declare and promise to respect the obligations incumbent upon me as set out in the Staff Regulations and Rules.

110. Her statement is also in breach of her obligations under staff regulation 1.2(e) and paragraph 8 of the Standards of Conduct, which provide that:

If the impartiality of the international civil service is to be maintained, international civil servants must remain independent of any authority outside their organization; their conduct must reflect that independence. In keeping with their oath of office, they should not seek nor should they accept instructions from any Government, person or entity external to the organization. It cannot be too strongly stressed that international civil servants are not, in any sense, representatives of Governments or other entities, nor are they proponents of their policies. This applies

equally to those on secondment from Governments and to those whose services have been made available from elsewhere. International civil servants should be constantly aware that, through their allegiance to the Charter and the corresponding instruments of each organization, member States and their representatives are committed to respect their independent status.

The Applicant's statement to the South African authorities was thus in contravention of her obligations under article 100.1 of the United Nations Charter, staff regulations 1.1(b) and 1.2(e) and (f), and paragraph 8 of the Standards of Conduct, and it amounted to misconduct.

111. The Tribunal agrees with the Respondent that by forwarding to her husband, a third party outside UNHCR, the email she addressed to the Director and the Deputy Director of the Regional Bureau for Africa dealing with operational matters and including the reports of two UNHCR missions, the Applicant's conduct was in breach of staff regulation 1.2(i). Her conduct also qualifies as prohibited activity under ST/SGB/2004/15 (Use of Information and Communication Technology Resources and Data) which provides at paragraph 5.1 (b) as follows:

5.1 Users of ICT resources and ICT data shall not engage in any of the following actions:

(a) Knowingly, or through gross negligence, creating false or misleading ICT data;

112. Staff regulation 1.2(i) and paragraph 5.1(b) of ST/SGB/2004/15 require staff members to exercise utmost discretion and prohibit the communication of any information to any person except as appropriate in the normal course of their duties or by authorization of the Secretary-General. The Tribunal finds that the Applicant's sharing of official information with her husband contravened her obligation under staff regulation 1.2(i) and ST/SGB/2004/15. Her actions constituted misconduct.

113. It has been established that the Applicant revealed confidential IGO information on a complaint of sexual misconduct and information which included an IGO note for the file explicitly classified as confidential in its title to UNHCR staff like Mr. OO who had no need of knowing it, including the subject of the complaint (NA)



which could have jeopardized the integrity of the investigation. There can be no doubt that she contravened her obligation to exercise utmost discretion under staff regulation 1.2 (i), and that her actions constituted misconduct.

*(C) Whether there were any due process violations in the investigation and in the disciplinary process leading up to the disciplinary sanction against the Applicant.*

114. The Tribunal is alive to the requirement that an internal disciplinary process must comply with the principles of fairness and natural justice and that before a view is formed that a staff member may have committed misconduct, there should be adequate evidential basis following a thorough investigation.<sup>79</sup>

115. The Applicant asserted that there was a fundamental breach of due process since the letter conveying the allegations of misconduct repeated the findings contained in the Investigation Report as if they were established facts with no further analysis or citation of the factual basis for its conclusions. Further, that the panel did not verify the accuracy of the statements they recorded. The fact, however, that there is credible evidence, as has been found by the Tribunal, establishing the factual basis of the allegations renders the Applicant's assertions baseless and unsustainable.

116. The assertion that there is no record of any formal complaint of harassment ever being filed until the present investigation actively solicited negative opinions of the Applicant's managerial style from a number of people going back several years is also rejected for lack of evidence.

117. The Applicant's argument that cultural and racial influences improperly influenced the investigation is not supported by evidence. The evidence which formed the basis for the impugned decision was a mix of documentary evidence and evidence from locally and internationally recruited staff members of diverse nationalities, ethnic backgrounds and seniority such as Ms. ES (South African, NOA), Mr. GK (Kenyan, P-4), Ms. ZS (Jordanian, P-4), Mr. MK (South African, G-4), Ms. ON (South African,

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<sup>79</sup> *Mmata* UNDT/2010/053.

G-5), Ms. NL (South African, G-5) and Ms. SG (Egyptian member of the affiliate workforce). It is clear that cultural and racial influences did not influence the investigation.

118. The complaint that the investigator did not interview the people whom the Applicant had proposed but only those who were put forward as critics was satisfactorily explained. The Tribunal accepted the Respondent's explanations; first that the Applicant did not explain the relevance of the testimonial evidence that those witnesses could provide. Secondly, that the Respondent had no authority to interview some of the witnesses who the Applicant named, Mr. Montwedi for example is a high-ranking official of the South African government, and Ms. SC retired from service on 1 April 2018. Her evidence was not even required given that there was sufficient documentary evidence. Mr. MK was interviewed and he fully corroborated the allegations.

119. There is no evidence proving that there was solicitation of evidence and a coordinated effort to tarnish the Applicant's reputation since the IGO investigator spent time in Pretoria interacting with staff and witnesses before she was informed about the charges. Most of the allegations against the Applicant were corroborated by uncontested email conversations between her and other persons.

120. Turning to the investigative process, the Respondent's contention that the IGO informed the Applicant in a timely manner and to an adequate extent of the allegations against her was not denied. Nor were the assertions that the IGO duly updated this information as new allegations came to light and the scope of the investigation expanded. That the Applicant was aware that she was the subject of an investigation prior to her interview, that the interviews were duly recorded and shared with her for her comments and signature, that the IGO gave her the opportunity to provide her comments on the draft investigation report, that she was fully notified of the charges levied against her in a detailed manner, including the rules that she was charged with breaching, and was informed of her right to be assisted by counsel as soon as this right legally arose were not challenged.

121. The investigation fully complied with the formal requirements set out in the applicable texts, particularly in UNHCR/OG/2016/4 (Operational Guidelines on Conducting Investigations and Preparing Investigation Reports). There were no due process violations in the investigation and in the disciplinary process leading up to the disciplinary sanction against the Applicant.

*(D) Whether the sanction disproportionate.*

122. The Applicant maintains that her unblemished disciplinary record and long and outstanding record of service and management competencies were not considered in determining the sanction imposed on her. Also, that the basis for finding aggravating circumstances was not clear and the penalty of dismissal appears to her to have been irrational and perverse in the face of what is arguably concern over perceptions of management practices that could have been addressed informally.

123. Firstly, the argument that the allegations in issue were mere concerns over perceptions of the Applicant's management practices is false given the proved fact that there was misconduct on her part.

124. Secondly, the letter which communicated the decision<sup>80</sup> shows that the High Commissioner in fact took into account the particular circumstances of the case, including aggravating and mitigating circumstances as well as the prior practice of the Secretary-General of the United Nations and the UNHCR in arriving at the decision. Contrary to the Applicants assertion, her long and satisfactory service record with very good performance appraisals, including of her management competencies by multiple supervisors and reviewing officers and her unblemished disciplinary record were considered. The fact that the punishment was nonetheless unpleasant to the Applicant is not proof that mitigating factors were not considered.

125. The High Commissioner also considered aggravating circumstances which

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<sup>80</sup> Application, annex 2.

were:

- a. the Applicant's position as a senior manager at the D-1 level carried a heightened responsibility to act as role model and uphold the highest standards of conduct in order to achieve an environment free from discrimination, harassment and abuse of authority;
- b. she committed a wide range of misconduct, breaching numerous obligations under the United Nations Charter, the Staff Regulations and Rules and other administrative issuances over a substantial period of time, aggrieving multiple staff members and members of the UNHCR affiliate workforce;
- c. she repeatedly placed her interests above UNHCR's interests; and
- d. she did not fully comply with her obligation to cooperate with the investigation and made untruthful submissions to the IGO.

126. The Tribunal looks at the totality of the circumstances, including mitigating factors in considering the question of proportionality.<sup>81</sup> Harassment and discrimination on the basis of a staff member's nationality and/or race are some of the worst forms of misconduct by a senior international civil servant. Similarly serious is the act of breach of her duties of independence, neutrality and impartiality, as well as the Oath of Office. Staff rule 10.3(b) lays down the principle that an administrative action should not be more excessive than is necessary for obtaining the desired result<sup>82</sup> and that the essential elements of proportionality are balance, necessity and suitability.<sup>83</sup> Considering that the Applicant engaged in harassment, abuse of authority and discrimination, breached her duties of independence, neutrality and impartiality of an international civil servant in addition to disclosing information on a complaint of sexual misconduct and also

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<sup>81</sup> *Yisma* UNDT/2011/061.

<sup>82</sup> *Applicant* 2013-UNAT-280.

<sup>83</sup> *Samandarov* 2018-UNAT-859; *Sanwidi* 2010-UNAT-084.

engaged in other instances of misconduct, the aggravation factors far out-weighted the mitigating factors.

127. In *Aqel* 2010-UNAT-040 the Appeals Tribunal could not review the level of sanction imposed since misconduct and the seriousness of the incident had been established. It was held that the decision, (which falls within the remit of the Commissioner-General) can only be reviewed in cases of obvious absurdity or flagrant arbitrariness. The facts and circumstances of this case don't suggest that there was absurdity or flagrant arbitrariness in arriving at the impugned decision. On the contrary, considering the nature and extent of the Applicant's misconduct, the High Commissioner correctly determined that dismissal was a proportionate disciplinary measure.

128. The Applicant failed to prove that the disciplinary measure was unfounded or disproportionate. She also failed to prove any violation of her due process rights that could justify the rescission of the disciplinary measure.

### **Conclusion**

129. The application has no merit and it is dismissed.

*(Signed)*

Judge Margaret Tibulya

Dated this 28<sup>th</sup> day of October 2020

Entered in the Register on this 28<sup>th</sup> day of October 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi