UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2018/028
Judgment No.: UNDT/2020/189
Date: 6 November 2020
Original: English

Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

CONTEH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Joseph Amisi

Counsel for Respondent:
Elizabeth Brown, UNHCR
Francisco Navarro, UNHCR

Introduction

1. The Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision to separate him from service with compensation in lieu of notice and without termination indemnity.

Procedural background

2. On 28 March 2018, the Applicant filed his application and on 30 April 2018, the Respondent filed his reply.

3. On 13 March 2020, pursuant to Order No. 30 (GVA/2020) of 10 March 2020, the parties filed a list of their potential witnesses.

4. On 15 April 2020, pursuant to Order No. 35 (GVA/2020) of 17 March 2020, the Applicant filed his written statement, the record of his interview with the Inspector General's Office ("IGO"), his response to the findings of the IGO investigation and his UNHCR fact sheet. The same day, the Respondent filed the written statements of all the witnesses indicated in his 13 March 2020 submission.

5. By Order No. 86 (GVA/2020) of 14 August 2020, the Tribunal determined *inter alia* that the case was briefed enough and that the matter could be decided without holding a hearing, and parties were to file their closing submission by 11 September 2020.

6. On 11 September 2020, the Applicant filed a request for an extension of time of two weeks to file his closing submission.

7. The Respondent filed his closing submission on an *ex parte* basis, as per the deadline, and requested that it only be disclosed to the Applicant after he had filed his own closing submission. The request was granted by Order No. 97 (GVA/2020) of 14 September 2020, which also allowed the Applicant to file his closing submission by 28 September 2020.

8. On 28 September 2020, the Applicant filed his closing submission and the Respondent's closing submission was made accessible to him.

Facts

9. The Applicant joined UNHCR on 1 October 2000 in Freetown. He served in various positions in the field, mostly in hardship duty stations, including as Acting Senior Protection Officer at the P-4 level in Kakuma, Kenya, where he supervised the Resettlement Unit between 16 August 2014 and 1 May 2015. In December 2015, he was reassigned to New Delhi.

10. On 18 August 2015, UNHCR's Inspector General's Office ("IGO") received a complaint of sexual harassment and abuse of authority against the Applicant.

11. In November 2015, the IGO opened an investigation into the allegations and assigned the case to an investigator in January 2016.The IGO interviewed 17 witnesses, including the Applicant.

12. On 9 May 2017, the IGO shared their draft investigation findings with the Applicant inviting him to provide his comments, which he did on 22 May 2017. The Applicant denied all allegations of wrongdoing.

13. On 15 June 2017, the IGO finalized the investigation report. It found that the Applicant's "behaviour towards [Ms. M] (inappropriate touching of her breasts on two occasions), [Ms. C] (inappropriate touching of her bottom) and [Ms. F] (inappropriate touching of her back) constitute misconduct and that there is sufficient evidence to support the allegations of sexual harassment".

14. At the same time, the IGO found that there was insufficient evidence to support the allegations that the Applicant had engaged in sexual relationships with his subordinates.

15. The same day, the IGO transmitted the final version of the investigation report to UNHCR's Division of Human Resources Management ("DHRM"). The Director, DHRM, reviewed the investigation report and decided to institute disciplinary proceedings for sexual harassment in relation to the allegations referred to in para. 13.

16. On 10 August 2017, the Applicant received a letter dated 3 August 2017 from the Director, DHRM, notifying him of the allegations of misconduct brought against him and, by the same letter, he was given the opportunity to provide his comments.

17. On 7 September 2017, the Applicant sent his response to the allegations of misconduct. In his response he admitted to not remembering having treated the three women in the way they described as the alleged incidents occurred at social events when he "most likely would have been inebriated". He admitted to having been a heavy drinker at the time and he indicated that he could "not entirely exclude that [he] acted in the way the women describe it".

18. The IGO investigation report and evidence gathered by the IGO, as well as the submissions made by the Applicant, were provided to the High Commissioner of UNHCR for review and decision on the allegations of misconduct.

19. By letter dated 27 December 2017, the Director, DHRM, conveyed to the Applicant the High Commissioner's decision to separate him from service, with compensation in lieu of notice, and without termination indemnity, pursuant to staff rule 10.2(a)(viii). The High Commissioner concluded that it had been established based on clear and convincing evidence that the Applicant had committed sexual harassment against the three female UNHCR employees recalled under para. 13. He determined that the Applicant's actions amounted to misconduct and warranted the imposition of said disciplinary measure.

20. Effective 9 January 2018, the Applicant was separated from service.

Parties' submissions

21. The Applicant's principal contentions are:

a. There have been inconsistencies and gaps in the testimonies of various witnesses including Ms. M., Ms. C and Ms. F;

b. The weak evidence adduced does not support a finding that the Applicant violated his obligations under the Staff Regulations and Rules; and

c. The disciplinary measure imposed is unreasonable in light of the circumstances of the case. Mitigating circumstances were overlooked such as the Applicant's struggle with alcohol use and his cultural inclinations, which broadly accept "hugging, touching and similar contact" without sexual or other negative connotations.

22. The Respondent's principal contentions are:

a. The evidence was correctly assessed, and the facts related to each of the allegations were established to the level of clear and convincing evidence;

b. The High Commissioner correctly determined that the Applicant's conduct in relation to all four incidents fell under the definition of sexual harassment. The present case is particularly serious because it interfered with work and created an intimidating, hostile or offensive environment;

c. It was correctly determined that the abovementioned facts constitute sexual harassment and misconduct; and

d. The disciplinary measure imposed was proportionate to the offence committed. The Applicant's submission that mitigating circumstances were overlooked is without merit as they are explicitly referred to in the notification of the disciplinary measure.

Consideration

23. The general standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain: (a) whether the facts on which the disciplinary measure was based have been established; (b) whether the established facts legally amount to misconduct; (c) whether the disciplinary measure applied was proportionate to the offence; and (d) whether the accused staff member was awarded due process in the disciplinary proceedings (see, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT-523, *Wishah* 2015-UNAT-537). The Tribunal will consequently follow this standard in the review of the present case.

Have the facts on which the disciplinary measure was based been established?

24. The Appeals Tribunal has consistently held that when the disciplinary sanction results in the staff member's separation from service, the alleged facts must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable (see *Molari* 2011-UNAT-164).

25. According to the evidence on file, the Applicant committed four acts of sexual harassment by:

a. Placing his face into Ms. M.'s cleavage while he was inebriated during a party at the World Food Programme ("WFP") compound in Kakuma in September 2014;

b. Approaching Ms. M. from behind, putting his arm around her and lifting her breasts with his arm and hands, and whispering in her ear "it's me, your boyfriend, your one true love". This incident occurred during a party at the UNHCR cafeteria in Kakuma on 25 December 2014 when the Applicant was inebriated;

c. Putting his hand up Ms. F.'s back, underneath her shirt and touching her skin as they walked back with a group of colleagues to the UNHCR compound shortly after Ms. F.'s arrival in Kakuma in August 2014; and

d. Grabbing Ms. C's bottom on one occasion in Kakuma.

26. The Tribunal reviewed the evidence on record, including the investigation report and its annexes, the Applicant's response to the allegations of misconduct dated 6 September 2017, as well as the witness statements submitted to the Tribunal by Ms. M., Ms. F., Ms. C. (the "complainants"), the Applicant, Ms. R. (friend of the complainants), Mr. H.(Ms. F.'s boyfriend) and Mr. C (an UNHCR staff member).

27. The Tribunal considers that the testimonies of the complainants are reliable and credible. All of them confirmed their testimonies as provided to the IGO, in separate written statements to the Tribunal.

28. Furthermore, these testimonies are corroborated by the other testimonies collected, which relayed the version of the above-mentioned incidents with a conspicuous consistency that added to their credibility; as such, these corroborating testimonies are admissible even when they could be deemed hearsay evidence.

29. According to these witnesses' statements, some of the complainants reported that the incidents made them feel "extremely uncomfortable", "annoyed" and even "violated" and "intimidated".

30. Contrary to the Applicant's argument in his application, the Tribunal does not find inconsistencies or gaps in the above-mentioned testimonies. Furthermore, the Applicant has not submitted any evidence to support his claim that "some witnesses including [Ms. M, Ms. C, Ms. R and Mr. H]" colluded against him or that their testimonies were tainted by bias or any other improper motive. Similarly, his allegations of racial discrimination as a "black African man" are unsubstantiated.

31. The Tribunal notes that, while the Applicant denied any wrongdoing in his written statement before the Tribunal, he explicitly admitted, in his 27 September 2017 response to the allegations of misconduct, that he was a "heavy drinker at the time" and that he "[could] unfortunately not entirely exclude that [he] acted in the way the women describe it". He further requested permission to contact the complainants to apologize for his behaviour, which they perceived as inappropriate. The Applicant therefore cannot credibly deny the acts before the Tribunal that he did not exclude at the time of his response to the allegations of misconduct.

32. The evidence on record, including the investigation report, the coherent hearsay evidence pointing to a pattern of behaviour, the consistency of the witness statements, the Applicant's contradictory statements and the inherent probabilities of the situation in the working and living conditions in Kakuma, cumulatively constitute a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the acts of sexual harassment indicated in para. 25 above in fact occurred.

Do the established facts legally amount to misconduct?

33. The sanction letter states that the established facts amount to misconduct as the Applicant failed to comply with his obligations under Staff Regulation 1.2(a) and (b), Staff Rule 1.2(f) and UNCHR's HCP/2014/4 (Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority).

34. Staff regulation 1.2(b) provides that "staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but it is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status".

35. Under staff rule 10.1, a staff member commits misconduct when he or she fails to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil

servant, and such failure may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

36. Staff regulation 1.2(a) and staff rule 1.2(f) provide that every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination or harassment, including sexual harassment.

37. Sexual harassment is defined in para. 5.3 of UNHCR/HCP/2014/4, as follows:

> Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be excepted or be perceived to cause offence or humiliation to another. Sexual harassment is particularly serious when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. Sexual harassment may be unintentional and may occur outside the workplace and/or outside working hours. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between or amongst persons of the opposite or same sex.

38. In the present case, the Tribunal finds that the High Commissioner properly qualified the Applicant's conduct towards the complainants as sexual harassment. Indeed, the Applicant's actions as indicated in para.25 above constitute physical conduct of a sexual nature that might reasonably be excepted or be perceived to cause offence or humiliation to the complaints. In the present case, there is no doubt that the Applicant's conduct in relation to the complainants was unwelcome (see para. 29).

39. The four incidents mentioned in para. 25 above occurred in particular during private parties in the Applicant's house or its proximity and, in general, outside working hours and working premises.

40. As a general principle of the work relationship, facts of private life of the worker are purely their own concern and are not relevant for the imposition of a disciplinary measure.

41. An application of this principle is in ST/SGB/2008/5, where the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority requires that for the conduct to be disciplinary relevant, it must interfere with work or affect the work environment.

42. For UNHCR, however, the definition of sexual harassment in UNHCR/HCP/2014/4 explicitly provides that sexual harassment "may occur outside the workplace and/or outside working hours". While sexual harassment is particularly serious when it has consequences on work activities or the work environment, the existence of such consequences is not a constituent element of UNHCR's definition of sexual harassment. In this respect, the definition of sexual harassment is broader than that contained in ST/SGB/2008/5.Consequently, the Administration may impose disciplinary measures on staff members who sexually harass their colleagues in private life, in a social context and outside the work environment.

43. This is also due to UNHCR's specific working conditions, as in the present case, where staff members in Kakuma were required to live and work within a small compound next to the refugee camp, without a clear separation between private life and their work environment.

44. The Tribunal also notes that staff members' obligations under staff regulations 1.2(a), (b) and (f) are not limited to the work environment but also apply in a certain way to their private lives. Staff regulation 1.2(f) explicitly provides that staff members "shall conduct themselves at all times in a manner befitting their status as international civil servants". In turn, the Standards of Conduct for the International Civil Service state at para. 21 that "[h]arassment in any shape or form is an affront to human dignity and international civil servants must not engage in any form of harassment". The prohibition of harassment is therefore not limited to harassment in the workplace.

45. Indeed, in *Applicant* 2013-UNAT-302 (para. 54), the Appeals Tribunal referred to the prohibition of harassment in the Standards of Conduct and held that

> [t]his prohibition clearly applies to all kinds of harassment; thus, it encompasses sexual harassment. And this prohibition clearly is not limited to harassment in the workplace; thus, it includes harassment outside the workplace. The Applicant's conduct was in violation of paragraph 20 of the Standards of Conduct. Staff Regulation 1.2(b) requires staff members to uphold the "highest standards" of integrity. Sexual harassment prohibited by paragraph 20 of the Standards of Conduct is the antithesis of upholding the "highest standards" of integrity. Thus, the Applicant's violation of paragraph 20 of the Standards of Conduct constitutes misconduct, which may be subject to disciplinary action.

46. The Tribunal concludes that private life and activities of a staff member may be intruded in the context of imposition of disciplinary measures within the United Nations and the International Civil Service when the highest standards of efficiency, competence and integrity are not observed, or the behaviour may reflect on the image and reputation of the Organization or on its activities, or the activities are specifically prohibited by the Staff Regulations and Rules of the United Nations. With reference to sexual harassment, the above-mentioned aspects come into play all together.

47. The Respondent observes also that sexual harassment is particularly demoralizing when the perpetrator is a manager and supervisor who, moreover, has a specific obligation to act as a role model under para. 4.3(a) of UNHCR/HCP/2014/4.

48. On this point, it has to be considered that the Applicant was acting as Officer-in-Charge of the Protection Unit between 16 August 2014 and 1 May 2015 and that, in that capacity, he supervised the Resettlement Unit where two of the complainants worked when he sexually harassed them. Although the position of the Applicant was only formally related to said complainants, without a direct supervision on their activities, there was a certain grade (although minimal) of professional interaction that impedes to consider the relationship with the complainants purely private.

49. In light of the above, the Tribunal finds that by engaging in sexual harassment, the Applicant committed misconduct as he did not comply with his obligations under staff regulation 1.2(a) and (b), staff rule 1.2(f), para. 21 of the Standards of Conduct for the International Civil Service and paras. 4.2 and 4.3 of UNHCR/HCP/2014/4.

Is the disciplinary measure applied proportionate to the offence committed?

50. The principle of proportionality in a disciplinary matter is set forth in staff rule 10.3(b), which provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

51. The Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behaviour of the staff member involved. The Tribunal is not to interfere with administrative discretion unless "the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" (*George M'mbetsa Nyawa* 2020-UNAT-1024, para. 89 and *Portillo Moya* 2015-UNAT-523, paras. 19-21). The Appeals Tribunal has held that the Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose (*George M'mbetsa Nyawa* 2020-UNAT-1024, para. 89 and *Toukolon* 2014-UNAT-407, para. 31).

52. However, the discretion of the Administration is not unfettered since it is bound to exercise its discretionary authority in a manner consistent with the due process principles and the principle of proportionally. Said principles were described by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084 (paras. 39-40 and 42), as follows:

> In the present case, we are concerned with the application of the principle of proportionality by the Dispute Tribunal. In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering

> whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.
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> ….
>
> When 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.
>
> ….
>
> In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision.

53. Further in *Samandarov* 2018-UNAT-859 (paras. 24-25), the Appeals Tribunal stated that:

> due deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures,

> reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.
>
> The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

54. In the present case, the sanction imposed on the Applicant was separation from service, with compensation in lieu of notice, and without termination indemnity. According to the sanction letter, the Administration identified aggravating and mitigating circumstances and took them into consideration for the imposition of the disciplinary measure.

55. In order to properly determine the sanction, the Tribunal considers that not all misconduct must result in termination, and that a gradual assessment of the possible measures should be undertaken on a case by case basis. In accordance with staff rule 10.3(b), disciplinary measures imposed must be proportionate to the nature and the gravity of the misconduct involved. In determining the appropriate measure, each case is decided on its own merits, taking into account the particulars of the case, including aggravating and mitigating circumstances.

56. Aggravating factors may include repetition of the acts of misconduct, intent to derive financial or other personal benefit, misusing the name and logo of the Organization and any of its entities, and the degree of financial loss and harm to the reputation of the Organization (see *Yisma* UNDT/2011/061, para. 29).

57. Mitigating circumstances may include long and satisfactory service with the Organization, an unblemished disciplinary record, an employee's personal circumstances, sincere remorse, restitution of losses, voluntary disclosure of the misconduct committed, or coercion from third parties (see *Yisma* UNDT/2011/061, para. 29). This list of mitigating and aggravating circumstances is not exhaustive.

58. As to sexual harassment (not combined with other additional facts of misconduct), the Tribunal considers relevant factors such as whether the behaviour of the offender is objectively unlawful or harsh, fearful, repetitive, persistent, intolerable and incompatible with a direct and continuous supervision of the victim. These factors, especially if combined, deserve the maximal sanction, that is the offender's dismissal or separation.

59. However, absent globally those factors the sanction should be milder, especially when, like in the present case, none of them occurred.

60. The Applicant was sanctioned for a behaviour that was essentially episodic, was not threatening the victims or persistently annoying them, without specific consequences. Moreover, the Applicant immediately gave up the harassment when he understood that his "rude advances" were not accepted and were disturbing the complainants.

61. With reference to the case at hand, there is no evidence on record produced by the Respondent showing that those alleged facts concretely interfered with the work or created an intimidating, hostile or offensive environment; the conditions themselves of the harassment (perpetrated in non-working occasions and in private locations, in an atmosphere of conviviality), without any ill intent by the Applicant (see *Belkhabbaz* 2018-UNAT-873, para. 76) and the fact that the professional interaction of the Applicant with the complainants were rare, can lead to the conclusion that the facts had no impact (or at least a very limited impact) on the work environment.

62. Neither has the Respondent produced any evidence on record to show any specific manner in which the Applicant may, in the context of paragraph 44 of the investigation report, have negatively impacted the image and reputation of UNHCR.

63. In a graduation of sanctions, the heaviest disciplinary sanctions would perhaps have been appropriate if the IGO had found evidence—in addition to the sexual harassment examined in this case—on the allegations that the Applicant had engaged in sexual relationships with his subordinates. As it results from the records and from the conclusion of the investigation report, this behaviour, however, although investigated by the IGO was not demonstrated, so the object of the consequent disciplinary proceedings was narrower. The Tribunal finds that the only demonstrated facts, which objectively are less relevant than the facts originally envisaged, deserve a more lenient disciplinary sanction.

64. In the sanction letter, the Administration identified aggravating and mitigating circumstances. As aggravating factors, the Administration considered the Applicant's supervisory responsibility over the harassed women and the alleged negative impact of misconduct on UNHCR's image and reputation.

65. As mitigating factors, the Administration considered that the Applicant had expressed remorse and that he had a long and satisfactory service record as a UNHCR staff member, including service in numerous hardship duty stations.

66. In addition to the mitigating circumstances identified by the Administration, the Tribunal considers that the fact that the Applicant cooperated with the investigators, excused himself for his actions and requested permission to contact the complainants to apologize for his behaviour, should also be pondered as mitigating circumstances.

67. The fact that the Applicant was inebriated when two of the incidents occurred is not a mitigating factor *per se*, as the Applicant is responsible for his acts. However, it is relevant as it makes unlikely that such kind of incidents may occur again, particularly during working hours.

68. As to subjective elements to be considered, it results from the file that the Applicant was a long-serving UNHCR staff member with a positive performance record and no previous disciplinary problems. In this respect, it has to be recalled that in *Yisma* UNDT/2011/061 (para. 40) and *Koutang* UNDT-2012-158 (para. 73) the Tribunal held that "[a] disciplinary measure should not be a knee-jerk reaction and there is much to be said for the corrective nature of progressive discipline. Therefore, ordinarily, separation from service or dismissal is not an appropriate sanction for a first offence".

69. As to the proportionality test, the Tribunal believes that it must be based on objective criteria. Therefore, it is necessary to refer to the administrative practice in the disciplinary field and, moreover, to the evaluation of the proportionality made by the Courts in their case law.

70. The Tribunal is aware of the practice of the High Commissioner in disciplinary matters and cases of criminal behaviour over the last years. The Administration often applied the sanction of dismissal or separation from service with compensation in lieu and without termination indemnity for cases of sexual harassment that entailed touching intimate parts of a person's body, or for inappropriately touching colleagues in different occasions outside working hours, especially when the behaviour is repetitive or connected with other facts of misconduct (such as discriminatory or insulting comments, comments on physical appearance or abuse of authority).

71. If we examine instead the United Nations Secretariat Compendium on disciplinary measures, we note that the Administration applied only a censure for verbal and physical assault, a separation from service with compensation in lieu of notice for prolonged advances, and dismissal for harassment with threat or abuse of powers towards a subordinate or in case of receipt of sex and money for a job.

72. In *Ekofo* UNDT/2011/215 (very similar to the present case), the Administration imposed only a written censure for a sexual assault and the sanction was found lawful by the Tribunal (the Judgment was not appealed).

73. In *Aquel* 2010-UNAT-040, a sanction of termination was imposed for sexual harassment, but it was a case of sexual harassment against a minor and in a doctor-patient relationship of trust.

74. In *Khan* 2014-UNAT-486, the staff member was sanctioned with separation from service with compensation in lieu of notice and without termination indemnity, but it was a case of continuous sexual harassment, compounded by threats and abuse of power.

75. In another case similar to the present one, *Nadasan* 2019-UNAT-918, the offender was sanctioned with the same measure as the Applicant, but the Appeals Tribunal highlighted the relevance of the repetitive behaviour by the offender towards the victim, a feature that is absent in the present case as the act towards each complainant was episodic and the Applicant immediately gave it up once he realized his advance was unwelcome.

76. In light of the above considerations, the Tribunal finds that the disciplinary measure imposed in this case, namely separation from service with compensation in lieu of notice and without termination indemnity, is unfair and disproportionate to the established misconduct, which deserves a more clement disciplinary sanction. Accordingly, the Tribunal rescinds the disciplinary measure imposed on the Applicant.

77. The Appeals Tribunal recognises the jurisdiction of this Tribunal in replacing the disciplinary sanction (after an assessment of its unlawfulness) with a different one, more adequate to the real gravity of the offense (*Abu Hamda* 2010-UNAT-022; see also *Yisma* UNDT/2011/061).

78. The Tribunal finds that in the present case the sanction imposed must be replaced by the disciplinary measure of suspension without pay as per staff rule 10.2(iv), for a period of twelve months effective the date of the Applicant's separation from service, that is 9 January 2018.

79. Following such period, the Applicant should be placed on special leave with full pay and shall receive retroactive payment of his salary and related benefits.

80. In accordance with art. 10.5(a) of its Statute, the Tribunal shall also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission as the contested decision concerns termination.

81. It clearly results from art. 10.5(a) of the Dispute Tribunal's Statute, as consistently interpreted by the Appeals Tribunal , that compensation in lieu is not compensatory damages based on economic loss, but only the amount the administration may decide to pay as an alternative to rescinding the challenged decision or execution of the ordered performance (see, for instance, *Eissa* 2014-UNAT-469).

82. As to the amount of the compensation in lieu, the above recalled article of the Dispute Tribunal's Statute sets a general framework for its determination, stating that, apart from exceptional circumstances, it "shall normally not exceed the equivalent of two years' net base salary of the applicant" (see *Mushema* 2012-UNAT-247; *Liyanarachchige* 2010-UNAT-087; *Cohen* 2011-UNAT-131; *Harding* 2011-UNAT-188). The Appeals Tribunal found that the amount of in lieu compensation will essentially depend on the circumstances of the case (*Mwamsaku* 2012-UNAT-246) and that "due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach" (*Ashour* 2019-UNAT-899, para. 21).

83. Having in mind the above-mentioned criteria and applying them to the specific case at hand (and so having considered the seniority of the Applicant, the type of contract held, and the limited relevance of the facts), the Tribunal sets the amount of the compensation in lieu at two year's net-base salary based on the Applicant's salary on the date of his separation from service.

Due process

84. The Tribunal is satisfied that the key elements of the Applicant's due process rights were respected as per staff rule 10.3(a).

85. The evidence shows that the Applicant was informed of the allegations against him and of his right to seek legal assistance; he was given the opportunity to comment on the allegations against him, he provided comments on the allegations of misconduct, and he was informed of the reasons for a disciplinary measure imposed on him. The Tribunal also notes that the Applicant does not argue that his due process rights were violated.

Claim for costs

86. Concerning the Applicant's claim for compensation under art. 10.6 of its Statute, the Tribunal considers that there are no grounds to determine that the Respondent has "manifestly abused the proceedings" and, consequently, the Applicant's claim in this regard is rejected.

Conclusion

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

a. The contested decision is hereby rescinded and replaced by a suspension without pay for a period of twelve months effective the date of the Applicant's separation from service;

b. The Applicant should subsequently be placed on special leave with full pay and should receive retroactive payment of his salary and related benefits;

c. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, the Applicant shall be paid a sum equivalent to two-years net base salary, based on his salary at the time of his separation;

d. The aforementioned compensation in lieu of rescission shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and

e. All other claims are rejected.

(*Signed*)
Judge Francesco Buffa
Dated this 6th November 2020

Entered in the Register on this 6th day of November 2020
(*Signed*)
René M. Vargas M., Registrar, Geneva