UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2020/031
Judgment No.:	UNDT/2021/065
Date:	7 June 2021
Original:	English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MDOE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Monika Ona Bileris

Counsel for the Respondent:
Matthias Schuster, UNICEF
Nicola Caon, UNICEF

Background

1. On 28 April 2020, the Applicant, Representative, South Sudan Country Office ("SSCO"), UNICEF, filed an application challenging the findings of a 31 January 2020 dismissal letter, the decision to summarily dismiss him from service and the decision to include his information in the United Nation's screening database.

2. The Respondent replied to the application on 2 June 2020.

3. The Tribunal held a case management discussion ("CMD") on 15 April 2021. During the CMD, the parties agreed that the Tribunal shall decide on the merits based on the parties' pleadings and supporting documentation without the need for an oral hearing.

Introduction and procedural history

4. The Applicant was serving at the D-1 level as of 15 June 2016 as Representative/SSCO.

5. On 13 April 2018, the UNICEF Office of Internal Audit and Investigations ("OIAI") received an anonymous complaint informing that the Applicant engaged in a pattern of sexual misconduct against UNICEF personnel and employees of non-governmental organizations. On 30 May 2018, OIAI closed the case because it was unable to obtain further information from the anonymous complainant.[1]

6. On 20 June 2018, the UNICEF Eastern and Southern Africa Regional Director issued the Applicant with a written reprimand for his failure to report a personal relationship with a staff member under his remit of responsibility during a period in 2016.[2]

7. On 9 November 2018, the Principal Adviser OIAI informed the Applicant that OIAI was conducting an investigation into allegations that he had sexually harassed

[1] Reply, para. 3
[2] Application, annex 11.

female colleagues who worked under his leadership as Representative/SSCO.[3]

8. The Applicant was placed on Administrative Leave with Full Pay ("ALWFP") on 13 November 2018. The ALWFP was extended on 20 December 2018 and on 25 February 2019.[4]

9. On 5 December 2019, the Applicant was informed by the Officer-in-Charge, Policy & Administrative Law, Division of Human Resources ("DHR"), that OIAI had submitted its investigation report No. 2018/148 to the Director/DHR.[5]

10. On 11 December 2019, the Applicant received a charge letter from the Officer-in-Charge, DHR, informing him that the Organization was charging him with misconduct, and inviting him to respond to the charges within 15 days. He also received a copy of the OIAI Report.[6]

11. The Applicant submitted his response to the charge letter on 10 January 2020.[7]

12. On 31 January 2020, UNICEF's Deputy Executive Director, Management ("DED/M"), *ad interim*, concluded that there was clear and convincing evidence that the Applicant engaged in sexual harassment, conflict of interest and inappropriate staff conduct. In view of the nature and seriousness of the misconduct, she determined that the appropriate sanction was dismissal from service in accordance with staff rule 10.2(a)(ix).[8]

13. On 8 and 11 June 2020, the Applicant filed motions seeking leave to file a rejoinder to the reply on the grounds that he has additional documentary evidence to refute the Respondent's negative portrayal of the facts and of his character, which are incorrectly portrayed in the reply.

[3] Application, annex 3.
[4] Application, annexes 4, 5 and 6.
[5] Application, annex 7.
[6] Application, annex 8 and reply, annex R/2.
[7] Application, annex 10 and reply, annex R/3.
[8] Application, annex 2 and reply, annex R/4.

14. The Respondent filed an objection to the Applicant's motion on 9 June 2020 asserting that no justification was provided for an additional filing, which is not foreseen in the UNDT Rules of Procedure.

15. On 5 August 2020, the Applicant filed another motion requesting for anonymity in the judgment on the merits of this case on the grounds that the nature of the alleged misconduct is very sensitive and, if revealed, could cause greater harm to his career, reputation, and emotional and mental health.

16. The parties filed their closing statements on 30 April 2021.

17. On the same date, the Respondent filed a motion to strike the Applicant's additional evidence from the record. The Applicant filed a response to the said motion on 4 May 2021.

Considerations

Preliminary motions

a. Applicant's request for anonymity

Legal framework

18. Article 11.6 of the Dispute Tribunal's Statute and art. 26 of its Rules of Procedure provide that the judgments of the Dispute Tribunal shall protect personal data and shall be made available by the Registry of the Dispute Tribunal.

19. It is understood that the need for transparency and accountability dictates that names of litigants are routinely included in judgments of the internal justice system of the United Nations[9] and as is well established, the principle of publicity can only be departed from where the applicant shows greater need than any other litigant for confidentiality.[10] It is for the party making the claim of confidentiality to establish the

[9] *Lee* 2014-UNAT-481.
[10] *Pirnea* 2014-UNAT-456.

grounds upon which the claim is based.[11]

20. The Applicant requests for anonymity in this judgment on the grounds that the nature of the alleged misconduct is very sensitive and, if his particulars are revealed, it could cause greater harm to his career, reputation, emotional and mental health.

21. The Tribunal determines that the degree of sensitivity of the alleged misconduct does not constitute an exceptional circumstance warranting departure from established Tribunal practice. On the other hand, in cases of alleged sexual harassment there is heightened need for transparency and accountability being that sexual harassment is a scourge in the work place and a message needs to be sent out clearly that staff members who sexually harass their colleagues should expect not only to lose their employment but also to suffer consequences such as the resultant publicity. The Applicant has failed to show exceptional circumstances warranting departure from established Tribunal practice. His application for anonymity is rejected.

22. The Tribunal however agrees with the Respondent that witnesses, especially the victims in this case should be only referred to by their initials being that while as staff members they are obliged to cooperate with investigations, publication of their names and titles might have a chilling effect on witnesses reporting misconduct or cooperating with investigations.

b. Respondent's motion to strike the Applicant's additional evidence from the record

Legal framework

23. The Tribunal has discretion to determine the admissibility of any evidence and may exclude evidence which it considers irrelevant, frivolous or lacking in probative value.[12] In the exercise of this discretion the primary consideration is

[11] *Bertucci* 2011-UNAT-121.
[12] Articles 18.1 and 18.5 of the UNDT Rules of Procedure.

whether or not the evidence lacks probative value and whether it is relevant to the facts in issue.

24. The proposed evidence (especially email messages) were not declared in time to allow the Investigators to probe, test and corroborate it (for example by putting it to relevant witnesses to explain, accept, contradict or deny it). The proposed evidence therefore remains as mere assertions which come as an afterthought by the Applicant. Worse still is the fact that it was not considered by the decision-maker in arriving at the impugned decision.

25. It was moreover not within the scope of the Tribunal's Order No. 082 (NBI/2020) for the Applicant to adduce additional evidence. The proposed evidence is irrelevant and not probative of the issues before the Tribunal concerning the lawfulness of the contested decision. The submission that it is common practice to allow the parties to submit evidence along with their pleadings is not backed by any legal authority. The application to allow the evidence is rejected.

The role of the UNDT in disciplinary cases

26. In keeping with UNAT jurisprudence[13] the Tribunal will 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 the sanction is proportionate to the offence.

27. Part of the test in reviewing decisions imposing sanctions is whether due process rights were observed.[14] The Tribunal will therefore, in addition examine the

[13] *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; and *Molari* 2011-UNAT-164, paras. 29 and 30.
[14] *Applicant* 2012-UNAT-209, para. 36.

issue of whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

a. Whether the facts on which the sanction is based have been established

28. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.[15]It is recalled that when termination is a possible outcome, the Administration must prove the facts underlying the alleged misconduct by "clear and convincing evidence", which requires more than a preponderance of evidence but less than proof beyond reasonable doubt, and "means that the truth of the facts asserted is highly probable".[16]

29. The impugned decision was premised on alleged evidence that the Applicant:

a. Sexually harassed Ms. EB;

b. Sexually harassed V01;

c. Failed to disclose a conflict of interest;

d. Inappropriately conducted himself when he interfered with the OIAI investigation; and

e. Inappropriately conducted himself when he accessed pornographic material on a UNICEF device.

Whether the facts relating to the allegation of sexual harassment of Ms. EB were established by clear and convincing evidence.

30. Ms. EB informed the investigators that the Applicant sexually harassed her on different dates in London, Central African Republic, Sierra Leone and New York. While pointing to what he refers to as a "disconnect between describing someone as

[15] *Nyambuza* 2013-UNAT-364.
[16] *Molari* 2011-UNAT-164.

"a good supervisor who was energetic and passionate and who [one] would look up to", and accusing them of professional misconduct", the Applicant denies the allegations.

31. Measured along the parameters of "goodness" stated by Ms. EB and all the witnesses who testified to the investigators about the Applicant's personality and conduct in the work place (for example, that Ms. EB had been shy but became confident on account of the Applicant's frequent public compliments to her, also that he offered vital assistance and re-assurance to her when she was preparing to join the institution, further that her first impression of him was that he was dynamic, he was saving the world and he was a paternal figure who she looked up to), the Applicant was **probably** a "good supervisor". This however doesn't in any way rule out the possibility that he committed the breaches which formed the basis for the impugned decision.

Incidents in London

32. Ms. EB's statement to the investigator's was that shortly after she was selected for a consultancy position at UNICEF's Central African Republic Country Office where the Applicant was the head of office, the Applicant **pressured** her to go to a nightclub with him in London which she declined "because [she] felt weird going clubbing with the head of UNICEF" (though she lied to him that she had a class the following morning).

33. The Applicant's assertion that he was only extending an invite to a new employee which was not meant as anything more than a **friendly** gesture must fail on the basis that Ms. EB was certainly not his **friend** at that point in time. Before their interaction in London, their last relationship had been that of interviewer/interviewee. If the Applicant is ascribing his one-sided **friendship** with Ms. EB to the fact that soon after he had interviewed her he offered her a job, then that points to an even more serious problem.

34. It is noteworthy that Ms. EB's impression of the Applicant at that point, that he was "**dynamic", "so cool" and he is "saving the world",** was obviously from a subordinate's standpoint. Indeed, the aspects of their conversation she recalls were about life and work in Bangui where she had been posted.

35. In these circumstances, the Applicant's assertion that as two adults, they were free to go their own ways, and that the Applicant did not threaten reprisal or anger if she had refused his invitation misses the point that Applicant was the head of the office to which Ms. EB had just been hired as a consultant. In her mind therefore, Ms. EB was interacting with her supervisor. He did not need to directly threaten reprisal or anger in order to exert pressure on her. It was reasonable for Ms. EB to feel pressured to go along with his request.

36. Since the Applicant has not denied that this incident took place[17] but merely disagreed with Ms. EB's characterization of his conduct as pressure, and since there obviously existed power imbalance between them by virtue of their relationship, the Tribunal accepts Ms. EB's evidence that the Applicant pressured her to go clubbing and that she felt weird going clubbing with the head of UNICEF, and finds that the facts supporting the allegation that the Applicant pressured Ms. EB to go clubbing in London were established by clear and convincing evidence.

Incidents in the Central African Republic ("CAR")

37. It was in evidence that around July 2007, at a restaurant called *Relais des Chasse* in Bangui, the Applicant pressured Ms. EB to drink alcohol, and after dinner at the same restaurant, he ignored her requests to take her home but instead took her to his home where he insisted to take a shower, and then returned to Ms. EB wearing only a small towel. He subsequently approached her with "weed" inside his mouth, tried to make her smoke the "weed" which she refused. He kissed her once on her lips before she pushed him away.[18] He then commented that she was so uptight.

[17] Application, section VIII, para. 2. See also page 17, paras. 80-82 of Annex R3 to the reply.
[18] Pages 2 and 3 of Annex R1.1 to the reply, paras. 7 – 10.

38. While the Applicant accepted that it was possible that he invited Ms. EB for a drink[19] he maintained that he did not remember any of the events Ms. EB alluded to.[20] The fact however, that the Applicant could not recall the incidents in issue is not proof that the events, especially his sexual advances towards Ms. EB at his residence did not take place or that Ms. EB's account of events is false.

39. The Applicant also asserts that no restaurant would have been opened around midnight, and so the evidence that he took Ms. EB to *Relais des Chasse* restaurant is unlikely to have happened.[21] Ms. EB's evidence that the Applicant knew the owner of the restaurant and that because of that the kitchen was opened and they were served, was not denied. The Applicant, in his interview with the OIAI moreover confirmed that he knew the owner of that restaurant[22] which supports the suggestion that the restaurant was specially opened for them.

40. The Applicant's question about the credibility and motivation for bringing these claims more than 10 years later was answered by Ms. EB in her statement to the investigators that many of her friends reported to her similar behavior from the Applicant, and that some of their lives turned upside down because of the toxic relationship and his behavior. She reported him because she is tired of seeing him do this to so many of her friends over the course of a decade in every duty station he works in.[23]

41. The Applicant's concern that Ms. EB's evidence in relation to his conduct does not measure up is not substantiated. Ms. EB indeed provided specific details of what happened. His assertion that he would never deliberately expose Ms. EB or any one of his team members to the risk of encountering bandits by going to a restaurant late at night does not rule out the fact that he did so in this instance.

[19] Annex 3 to the reply, page 19, para. 92 of.
[20] Ibid., pages 18 and 19, paras. 90-94. See also: Annex 1.1 to the reply, Transcript of interview with Applicant, 14 November 2018, page 195, lines 2650-2657.
[21] Application, Section VIII, para. 3. See also pages 18-21, paras. 83-101 of Annex 3 to the reply).
[22] Page 2 of Annex R1.1 to the reply, para. 7; Page 200 of Annex R1.1 to the reply, lines 2844-2853.
[23] Page 5 of Annex R1.1 of the reply, para. 20.

42. The Tribunal finds that the facts supporting the allegation that the Applicant sexually harassed Ms. EB in the Central African Republic have been established by clear and convincing evidence.

Incidents in Sierra Leone

43. It is in evidence that in 2008, the Applicant asked Ms. EB to visit his home and help babysit his daughter. While at his home, the Applicant asked Ms. EB if she wanted to "do some cocaine" which Ms. EB declined. The Applicant proceeded to snort cocaine in front her.[24]

44. The Applicant maintained that he had no recollection of such event.[25] Again, the fact that he could not recollect the occurrence of this event does not mean that it did not happen. He points to the impossibility of occurrence of the incident given that even to Ms. EB's admission, he had a full-time nanny and so he could not have asked Ms. EB to go and babysit his child.

45. That the Applicant had a nanny does not overcome Ms. EB's evidence that, for whatever reason, he asked her to go and babysit on this occasion.[26] Ms. EB moreover mentioned that she was embarrassed for having been "naïve" in believing that the Applicant actually needed her to go and babysit his child who spent the whole time in the kitchen with the nanny.[27] This means that she also realized that the issue of baby-sitting had only been fronted to lure her to go to the Applicant's home.

46. The Applicant further asserts that the Respondent does not account for the possibility that, if this story were true, Ms. EB could simply have exited his home upon the realization that her babysitting services were clearly not needed. There is however no evidence suggesting that Ms. EB remained at the Applicant's home after she realized that her services were not actually needed. Her evidence was that she left

[24] Page 5 of Annex R1.1 of the reply, para. 17.
[25] Annex R3 of the reply, Applicant's response to the Charge-Letter, page 21, para. 106; see also: Annex R1.1 of the reply, Transcript of interview with Applicant, 14 November 2018, page 195, lines 2650-2657.
[26] Application, Section VIII, para. 4.
[27] Annex R1.1 of the reply, Statement of Ms. EB, signed 16 October 2018, page 5, para. 17.

the home after being there for less than an hour.

47. The assertion that it was unlikely that Ms. EB would go to the Applicant's home given her evidence of a previous negative incident with him[28] is not only speculative but also false in view of Ms. EB's explanations that she had kept her distance from the Applicant in Sierra Leone and that when she went to his house, she had been "naïve" in believing she would babysit the Applicant's child. In any case, the assertion does not engage with the specific evidence from Ms. EB that her relationship with the Applicant had improved and that she went because, at the time, the Applicant had told her, and she had believed, that he required assistance babysitting his daughter.[29]

48. The Tribunal believes Ms. EB's account of events and finds that the facts supporting the allegation that the Applicant engaged in unwelcome behavior towards Ms. EB in Sierra Leone have been established by clear and convincing evidence.

Incidents in New York

49. The Applicant did not contest the evidence that in June 2011 Ms. EB met him in New York and he invited her for drinks and dinner. At the end of the evening he asked to spend the night at Ms. EB's apartment. When she explained that she shared her apartment with other roommates, and had no spare bed, he asked to share her bed with her and swore that he would not do anything. The Applicant argued with Ms. EB until she hailed a taxi to take him to his hotel. He argues that his conduct did not amount to sexual harassment.[30]

50. There can be no doubt that asking Ms. EB to allow him to share her bed with him even though he was staying at a hotel, constituted a sexual advance. The fact that the Applicant's advances were unwelcome was obvious given that Ms. EB even hailed a taxi to take him to his hotel. Ms. EB had repeatedly rejected the advances

[28] See pages 21-22, paras. 102-109 of Annex 3 to the reply.
[29] Annex R/1.1 of the reply, Statement of Ms. EB, signed 16 October 2018, pages 4-5, paras. 15-17.
[30] Application, Section VIII, para. 5; Annex R1.1 of the reply, Transcript of interview with the Applicant, 14 November 2018, page 195, lines 2650-2657.

and so he was aware or could have reasonably been aware that they were unwelcome, yet he continued urging Ms. EB to allow him to go with her to her room. The Tribunal finds that the Applicant's conduct amounted to sexual harassment.

51. He further argues that since he was no longer Ms. EB's co-worker, (by then Ms. EB was based at UNICEF New York), it is far-fetched to assert that his conduct interfered with Ms. EB's work simply because they worked for the same Organization that employs thousands of people and had little or no contact with one another.

52. The Tribunal determines however that it is irrelevant that he and Ms. EB were no longer co-workers at the same duty station. He was a senior UNICEF official and Ms. EB had just rejoined UNICEF. They were co-workers and there can be no doubt that his conduct interfered with her work experience.

53. On the whole, Ms. EB gave a comprehensive, consistent and detailed statement about her experiences with the Applicant to the investigators. She provided specific details, such as locations, times and the circumstances of the events. There are no indications that her evidence was coached or rehearsed. There is no reason to believe that Ms. EB fabricated her account of events or colluded with other witnesses given that she generally spoke highly of the Applicant, describing him as a good supervisor who was energetic and passionate and who she would look up to. Ms. EB was forthcoming about the reasons why she submitted her complaint at the time she did; namely, to ensure that what happened to her would not happen to other women, especially those who were vulnerable. She was clear that she did not act for other motives.

54. The Tribunal is satisfied, that the fact that the Applicant sexually harassed Ms. EB in London, Central African Republic, Sierra Leone and New York have been established by clear and convincing evidence.

Whether the facts relating to the allegation of sexual harassment of V01 have been established by clear and convincing evidence.

55. The impugned decision was based on V01's statements to the investigators, excerpts of which, for ease of reference, are reproduced below;

> **…** we had a very good working relationship. On a personal level we also had a good relationship. We developed an inappropriate relationship but I would not say it was coerced. From an ethical point of view, you are not supposed to have this kind of relationship…
>
> …yes, he did offer me drugs, marijuana and cocaine. He did not push it down my throat. But I felt I was in such a situation in which I could not get out, at some point I was so intoxicated. We would also have sexual intercourse. I took both drugs with him. He did also consume it in front of me. It happened multiple times. I don't know whether he used drugs to force me to have sex with him. I cannot speak to his intentions. I know that the set up in a way was wrong. When you have authority over someone you still have authority.
>
> …how I knew what he was giving me was drugs, is because he told me what it was. For me, it was the only time in my life I engage in the conduct, I have never tried drugs before in my life. Marijuana was like grass. I remember that after taking drugs I was not myself, these were mind altering substances. I would say that I felt helpless but it was my own fault I felt that way… I am not accusing him of sexual harassment, but I do feel it was inappropriate; it was abuse of authority… I want my statement to be redacted because I fear retaliation inside UNICEF…[31]

56. The above evidence does not support the Applicant's assertion that V01's evidence was that she was not coerced into any actions and was not accusing the Applicant of sexual harassment, and that she admitted to using drugs on her own.

57. It is also obvious that VO1's perception of her experience with the Applicant is blurred because of her past intimate involvement with him. Her statement that she was not accusing him of sexual harassment must be viewed in that light.

[31] Annex R1.1 of the reply, Statement of V01, signed 13 November 2018, pages 126-127, paras. 2-6.

58. It is noteworthy that even then, VO1 clearly came out to say that it was the only time in her life she engaged in the conduct, and that she had never tried drugs before in her life. She also said that she did not know whether the Applicant used drugs to force her to have sex with him, but she knows that the set up in a way was wrong, because he had authority. Also, that after taking drugs she was not herself, she felt helpless, and that these were mind altering substances. This shows that she was not completely blind to the fact that the Applicant abused authority, and to the possibility that he manipulated her and introduced her to drugs in order to have sexual intercourse with her.

59. Suffice it to say the facts she presents indeed disclose manipulation, sexual abuse and harassment and abuse of authority bordering on coercion, and justify the Respondent's portrayal of the Applicant as a sexual predator.

60. The Applicant did not provide a response to V01's allegations, arguing that it is hard to defend against a heavily redacted statement. The Tribunal however determines that the redactions in the statement to preserve V01's privacy do not detract from her account of what occurred between her and the Applicant, including their taking drugs and having sexual relations. Had the Applicant wished to rebut VO1's evidence he could have done so.

61. Since the Applicant has not denied that he invited VO1, his supervisee, to his home for drinks and had sex with her when she was intoxicated and "not herself",[32] and has not denied that he took drugs with her, the Tribunal finds that V01's statement constitutes clear and convincing evidence that the Applicant sexually harassed her when he engaged in behavior of a sexual nature that could reasonably be expected or perceived to cause her offence or humiliation.

62. The Tribunal finds that the facts relating to the allegation of sexual harassment of V01 have been established by clear and convincing evidence.

[32] Annex R1.1 of the reply, Statement of V01, signed 13 November 2018, page 126, para. 3.

Whether the facts relating to the allegation that the Applicant of failed to disclose a conflict of interest have been established by clear and convincing evidence.

63. It is in evidence that Ms. AG had an intimate relationship with the Applicant which began in September 2014 when she was working in Germany. That relationship ended six months before a consultancy role opened in the SSCO.[33] On 12 May 2016, the Applicant requested approval from his supervisor, the former Regional Director ESARO, to recruit Ms. AG, advising that he had worked with her before, but failed to disclose their earlier intimate relationship.[34]

64. The Applicant doesn't contest the above facts but argues that his recommendation of Ms. AG occurred after their relationship had ended, and that in any event he was sanctioned for the relationship and further punishment for it constitutes *res judicata*.

65. The Applicants argument that his recommendation of Ms. AG occurred after their relationship had ended makes no sense in view of the fact that the charge against him is premised on that **previous** intimate relationship with her. The argument that the Applicant was sanctioned for that relationship is incorrect. According to the reprimand letter,[35] the Applicant was reprimanded for a "personal relationship with Ms. AG at the time it occurred for a period in 2016". This clearly leaves out their 2014 relationship, which is the basis for this complaint.

66. The Tribunal finds that the facts relating to the allegation that the Applicant of failed to disclose a conflict of interest have been established by clear and convincing evidence.

Whether the facts relating to the allegation that the Applicant inappropriately conducted himself when he interfered with the OIAI investigation have been established by clear and convincing evidence.

[33] Annex R1.1 of the reply, Statement of Ms. AG, 7 November 2018, pages 20-21, paras. 6-7.
[34] Annex R1.1 of the reply, Email from Applicant to former Regional Director, ESARO, 12 May 2016, page 27.
[35] Annex R1.1 of the reply, page 125.

67. The charge against the Applicant was that after OIAI commenced investigations into the allegations against him but before he was notified, he discussed the investigation with Ms. AG. He informed her that he was reprimanded because of his "personal" relationship with her. Further, that he discussed dates when their relationship started and his visit to Cologne, Germany. In addition, before he was notified of the investigations by OIAI, he was in contact with at least four individuals with whom OIAI interacted.

68. The Tribunal notes that the Applicant admitted the above facts[36] and stated that Ms. AG contacted him via messages on WhatsApp stating that she had been asked to speak to investigators about him. He further stated that he had a phone call with Ms. AG and informed her that he had told UNICEF that they had been in a consensual relationship and that he had been reprimanded for it. The Applicant further admitted that he told Ms. AG that it was important for her to tell the investigators what had happened and not to say that they were not in a relationship.

69. The Tribunal finds that the facts relating to the allegation that the Applicant inappropriately conducted himself when he interfered with the OIAI investigation have been established by clear and convincing evidence.

Whether the facts relating to the allegation that the Applicant inappropriately conducted himself when he accessed pornographic material on a UNICEF device have been established by clear and convincing evidence.

70. It was alleged that the Applicant viewed pornographic material on one of the mobile telephones UNICEF had assigned to him, and that most of the videos he accessed were hosted in "youporn", "filmpertutti" and "ezsex.club". Further, that out of the 109 entries of the porn-related browsing history, 11 contained the word "teen".

71. The Applicant denied the allegation and maintained that the pornographic material was the result of malware, adware, backlinks and pop-ups. Further that the

[36] Annex R1.1 of the reply, Transcript of interview with Applicant, 14 November 2018, pages 161-166.

alleged activity took place during a very narrow window, indicating an anomaly in usage, and that the forensic team could not establish the identity of the user, also that the Applicant had had some difficulty with his phone.

72. He also asserts that the 18 November 2019 Supplemental Digital Forensic Report[37] found that there were hits and sites not attributed to him, and his own forensic analysis showed redirected searches through Kyrgyzstan.

73. The Applicant's assertions, however, must fail. That the phone which was used was his UNICEF-assigned phone was not contested, and there is nothing on the record to suggest that anyone other than him had access to it, nor did he claim this.

74. Secondly, the Supplemental Forensic Report states that the browsing of pornographic material occurred independent of any malware, adware, backlinks and pop-ups.[38] It indicates that the phone-user searched for specific terms, then viewed websites that were directly related to the search terms. There was no evidence in the phone's browsing history to suggest that the sites accessed were the result of anything other than normal use.

75. More crucial is the fact that in his interview the Applicant admitted that the pornographic sites were sites he would frequent[39] The allegation that he accessed pornographic material is therefore not without basis.

76. The Tribunal finds that the facts relating to the allegation that the Applicant inappropriately conducted himself when he accessed pornographic material on a UNICEF device have been established by clear and convincing evidence.

b. Whether the established facts qualify as misconduct.

77. The Applicant's sexual harassment of EB and V01 was misconduct. Sexual harassment offends the following Administrative laws:

[37] Reply, Annex R1.1, pages 345-351.
[38] Ibid., pages 345-351.
[39] Ibid., pages page 276, lines 330-331. Although he stated that he would not have searched for the term "teen" at lines 335-395.

a. Staff rule 101.2(d), in force in 2007 and 2008, which provides that any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited.

b. Staff rule 1.2(e), in force since 2009 (since 2016 as staff rule 1.2(f)) provides that any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

c. Since at least 1994, UNICEF has had policies in place specifically prohibiting sexual harassment. CF/AI/2005-017 (UNICEF's policy on preventing harassment, sexual harassment and abuse of authority), in force in 2007; CF/EXD/2008-044 (Prohibition of harassment, sexual harassment and abuse of authority), in force from 2008 to 2012; and CF/EXD/2012-007 (Prohibition of discrimination, harassment, sexual harassment and abuse of authority), in force between 2012 and 2018, all prohibit sexual harassment and contain nearly identical definitions of sexual harassment, such as: "an unwelcome sexual advance, request for sexual favor, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment, or creates an intimidating, hostile or offensive work environment.

d. Section 21 of the Standards of Conduct for the International Civil Service ("SCICS") stipulates that International civil servants must not abuse their authority or use their power or position in a manner that is offensive, humiliating, embarrassing or intimidating to another person.

78. The Applicant moreover failed to act in a manner befitting his status as a senior international civil servant, in violation of staff regulation 1.2(b) and section 17

of the SCICS. His conduct towards Ms. EB constituted unwelcome sexual advances or conduct of a sexual nature that would be reasonably expected or perceived to cause offence or humiliation to a person in her position. His sexual assault of Ms. EB at his residence in the CAR and his repeated requests to share Ms. EB's bed in New York would have been particularly shocking and offensive to a person in a junior role within UNICEF.

79. The Tribunal recalls Ms. EB's evidence that the Applicant's conduct created a hostile working environment for her. She was for example effectively excluded from communications by the Applicant in the CARCO after his assault and experienced unease at witnessing the Sierra Leone Country Office ("SLCO") Representative consuming recreational drugs.

80. The Applicant's conduct towards Ms. EB in New York interfered with work; Ms. EB was with UNICEF at the time and the Applicant was a senior UNICEF official. The Tribunal agrees with the Respondent that the Applicant's conduct interfered with Ms. EB's experience of the UNICEF workplace, and that any purported apology would not preclude it from constituting sexual harassment.

81. It is also recalled that V01 indicated that her relationship with the Applicant was consensual. She however indicated that it was "inappropriate", "setup in a way that is wrong" as a result of the power imbalance between them and that she felt "helpless". Given the above, the Applicant's conduct constituted unwelcome conduct of a sexual nature that would be reasonably expected or perceived to cause offence or humiliation to a person in V01's position, and it clearly interfered with work given that he was V01's supervisor.

82. V01 believed she had been taken advantage of due to the Applicant's authority, and so it is irrelevant that she didn't characterize the conduct as sexual harassment. The definition of sexual harassment is moreover objective in nature.

83. The Applicant's failure to disclose his previous intimate relationship with Ms. AG to UNICEF at the time he recommended her employment means that he was

conflicted. It was a violation of staff regulation 1.2(m), staff rule 1.2(q) and section 23 of the SCICS.

84. The Applicant's contention that his relationship with AG formed the basis of an earlier reprimand has already been found to be factually incorrect (paragraph 65 above).

85. The Applicant's interference with the OIAI investigation was in violation of staff rule 1.2(g), and by accessing pornographic material on the mobile phone issued to him by UNICEF, the Applicant failed to use UNICEF property for official purposes only, in violation of staff rule 1.2(g).

c. Whether the sanction is proportionate to the offence

86. The legal principle is that the proportionality principle limits discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.[40]

87. Other relevant principles are that; the Secretary-General has wide discretion in determining the appropriate disciplinary measure, due deference should be shown to the Secretary-General's disciplinary decisions, it is not the role of the Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him, and that the Tribunal is more concerned with how the decision-maker reached the impugned decision, not the merits of the decision.[41]

88. It is well established that only if the sanction imposed appears to be blatantly

[40] *Samandarov* 2018-UNAT-859.
[41] *Sanwidi* 2010-UNAT-084.

illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity that the judicial review would conclude in its unlawfulness and change the consequence.[42]

89. The Applicant's assertion that the sanction of removing him from service and placing his details in the Screening Database is disproportionate to the offence is, *inter-alia*, based on the erroneous argument that the misconduct for which he was summarily dismissed was not proven through clear and convincing evidence. Considering the Tribunal's finding that the facts relating to each allegation against the Applicant has been established by clear and convincing evidence, the Applicant's assertion must fail.

90. The Tribunal fully agrees with the Respondent that the Applicant's conduct warrants the sanction of dismissal from service with respect to the sexual harassment alone. The evidence that he might have introduced mind altering substances to VO1 with the aim of having sexual intercourse with her is particularly disturbing. There is evidence that some mitigating factors such as the Applicant's length of service with UNICEF and his good past performance were considered, but the several aggravating factors including that he engaged in sexual harassment of at least two individuals and that he was a senior UNICEF official whose actions undermined the trust and confidence placed in him, were such that the most severe sanction was warranted. The Tribunal finds that the disciplinary sanction was proportionate to the conduct.

d. Whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

91. The Tribunal is cognisant of the requirement that an internal disciplinary process complies with the principles of fairness and natural justice.[43]

92. The Applicant maintains that there were due process violations which resulted

[42] *Portillo Moya* UNAT-2015-523; *Aqel* UNAT-2010-040; *Konaté* UNAT-2013-334.
[43] *Mmata* UNDT/2010/053.

in a denial of his rights. In this regard he cites the OIAI Investigation Manual (December 2014), section 10.4, para. 92, in effect at the time of the subject investigation, which he maintains that it required that he be provided with OIAI's draft report and the opportunity to comment on same, but he was not.

93. The Tribunal determines that since the final report and supporting documentation were transmitted to the Applicant with the Charge-Letter, in accordance with section 30 of POLICY/DHR/2019/001 (UNICEF Policy on Disciplinary process and measures) and since he had sufficient opportunity to comment on the report, and considering that the contested decision was arrived at after a thorough review of all the evidence on the record, the Applicant did not suffer any prejudice.

94. The Applicant further complains that he was not informed of the investigation against him for two months after it was initiated and after OIAI had already interviewed other witnesses, which delay led to breaches of confidentiality. He alleges that witnesses BM and Ms. EB admittedly discussed their evidence with one another and could very well have altered their stories based on each other's version of events.[44]

95. In the Tribunal's view, any delays in informing the Applicant of the investigation did not prejudice him, especially given that there is no evidence that witnesses BM and Ms. EB ever discussed their evidence with one another, or that they altered their stories based on each other's version of events as the Applicant alleges.

96. That the Applicant's computer was seized in his absence and before he was informed that he was the subject of an investigation cannot amount to a due process violation in view of the fact that there was no requirement that he be present in the first place, or that he be informed of the investigation prior thereto.

[44] Application, para. 13.

97. In any event, the fact that the Investigators provided a detailed File Note of the circumstances in which the computer was seized, noting that they had tried several times to meet with the Applicant to inform him of the investigation earlier[45] is evidence that he suffered no prejudice at all.

98. The Respondent's explanation that the possibility of interference with evidence in the Applicant's possession meant the Investigators were unable to disclose the investigation before seizing the Applicant's computer is accepted as being reasonable. The fact that the search and seizure of items from the Applicant's office was in the presence of another United Nations staff member, and that necessary records of the seizure were generated further ensured that the Applicant's due process rights were protected.

99. Based on the above considerations and on the Appellate jurisprudence[46] that "only substantial procedural irregularities will render a disciplinary measure unlawful, and that even a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of grave misconduct...", the Tribunal finds that there are no due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant warranting interfering with the decision maker's discretion.

Whether there were m**ultiple procedural violations which require that the impugned decision be nullified**.

100. The alleged procedural violations cited by that Applicant; that OIAI relied on implausible, inconsistent, and faulty evidence, that OIAI failed or refused to interview key witnesses who could have testified to the Applicant's version of the facts, and that OIAI continued to interview witnesses after the case was closed thus denying the Applicant the chance to review and comment on all evidence put

[45] Annex R1.1 of the reply, OIAI Note for the Record, p.344.
[46] *Sall* 2018-UNAT-889 paras. 33and 39.

forward, have already been considered and found to be either without basis or with no consequence. The Applicant has for example not shown how any of the witnesses he claims OIAI failed or refused to interview could have provided exculpatory evidence related to the specific misconduct on which the disciplinary measure was based. The Tribunal finds no merit in the application.

Judgment

101. The application is dismissed.

(Signed)
Judge Margaret Tibulya
Dated this 7th day of June 2021

Entered in the Register on this 7th day of June 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi