UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/006
Judgment No.: UNDT/2021/082/Corr.1
Date: 14 July 2021
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

RAMOS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Marcos Zunino, OSLA
Jason Biafore, OSLA

Counsel for Respondent:
Lucienne Pierre, ALD/OHR, UN Secretariat
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Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant, a former Security Adviser in the Department of Safety and Security ("DSS") based in Kingston, Jamaica, contests "the Administration's finding of misconduct against him and the decision to impose the disciplinary measure of separation from service, with compensation in lieu of notice, and with termination indemnity". The disciplinary measure was imposed in response to the Applicant having been found to have committed misconduct by harassing and/or sexually harassing AA during a residential security inspection of her apartment.

2. The Respondent contends that the application is without merit.

3. A hearing was held via MS Teams (virtually) from 6 to 8 April 2021 at which the Applicant, AA (the alleged victim, who, at the relevant time, had just been promoted to the professional category as an international staff member), BB (a security officer from AA's workplace, who in addition to the Applicant and AA, was also present at the relevant residential security inspection), CC (AA's friend, who she contacted immediately after the inspection) and DD (AA's supervisor) gave witness testimonies. All names in this Judgment are redacted for privacy reasons.

4. In light of the reasons set out below, the application is rejected.

Facts

5. On 30 August 2018, the Applicant undertook the residential security inspection of AA's private home in Kingston in his capacity as the DSS Security Adviser at the duty station. The Applicant, AA and BB were all present at the inspection. The Applicant and AA were mostly talking to each other in Spanish, which BB did not understand. Immediately after the inspection was completed, BB stayed behind in the apartment at AA's request. AA told BB about her immediate

perception of the inspection, complaining about the alleged sexual character of some of the Applicant's comments and proposals.

6. On the same day as the residential security inspection (30 August 2018), the Applicant texted CC via WhatsApp about her concerns regarding the inspection and the Applicant's behavior during the inspection. In one of these texts, in response to AA's description of the incident, CC labeled the Applicant's comments and proposals as "sexual harassment".

7. By email of 31 August 2018 (the day after the residential security inspection), AA wrote EE (the Director of Administrative Affairs at AA's workplace), also copying BB. She stated that she wished to "put on record" that during the inspection, the Applicant "at times made [her] feel rather uncomfortable with his inappropriate sexualized comments and advances which were made in Spanish and outside of the hearing of [BB]".

8. On either 31 August 2018 or 1 September 2018, AA met with CC in person and further shared her thoughts and feelings about the residential security inspection.

9. On 31 August 2018, upon AA's return to her office, she met with DD and FF (a colleague of AA) and conveyed to them her impressions of the residential security inspection and the Applicant's comments and proposals.

10. By a report dated 4 December 2018, the incident was reported (unclear by whom) to the Office of Internal Oversight Services ("OIOS"). This report was based on a written statement by AA dated 26 October 2018.

11. In the investigation report dated 28 June 2019, OIOS found that "[b]ased on the evidence gathered":

a. "A security inspection was conducted at [AA's] house on 30 August 2018 for which [the Applicant, AA and BB] were present";

b. "During the inspection … [the Applicant] made an unwanted comment on AA's physical appearance, offered to cook for her and wanted to compete in a cooking contest with her boyfriend. He further [made] unwelcome remarks in AA's bedroom about fire and action occurring there and about her bed being small. [The Applicant] asked [AA] if her boyfriend would be jealous if she had friends and offered again at the end security inspection to return and cook for her. The comments and actions left [AA] feeling uncomfortable and unsafe in her home, as she feared that [the Applicant] might return to her residence when she was alone";

c. "Though [BB] could not understand the bulk of the conversation between [AA and the Applicant] as it was Spanish, [BB] determined from [AA's] facial expressions and body language that she was uncomfortable or not in agreement with what [the Applicant] was saying to her at times";

d. "At the end of the inspection, [AA] advised [BB] about [the Applicant's] unwelcome behaviour. [AA] also disclosed the matter contemporaneously to her friend [CC], her supervisor, [DD], and [EE];

e. "[T]he Applicant indicated that he may have made a bad joke about the action starting in [AA's] bedroom when he entered the bedroom alone, which [AA] may overheard. He also indicated that perhaps [AA] was upset with him as he had advised her that her residence was not recommended for occupancy";

f. "[AA's] early disclosures to [CC and FF] are supported by way of electronic evidence, specifically WhatsApp messages exchanged on 30 August 2018. An email dated 31 August 2018 supports [AA's] prompt reporting to [EE and BB]. In total, the four witnesses provided evidence that was fully consistent with [AA's] account. This corroborative evidence, alongside [the Applicant's] admission that he may have made a bad joke, leads OIOS to find that [AA's] account is credible";

g. "[The Applicant] denied making any unwanted sexual comments or unwelcome sexual advances towards [AA]. However, the evidence outlined above is not consistent with [the Applicant's statement], in particular [BB's observations] of [AA's] reactions and visible discomfort do not support his account. [The Applicant's] explanation of [AA's] motive being his denial of residential security clearance is not convincing in the light of the evidence and [AA's workplace] administration overrule[d] [the Applicant's assessment]. As a result, OIOS finds that [the Applicant's] account regarding the unwanted comments lacks credibility".

12. By interoffice memorandum dated 27 August 2019, the Director of the Administrative Law Division ("the Director") presented the Applicant with the "Allegations of Misconduct". Therein, the accounts of the Applicant, AA, BB, CC, DD and EE were highlighted, and pursuant to ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), it was stated that "it has been decided to issue formal allegations of misconduct against [the Applicant]". Specifically, it was noted that it "is alleged that [the Applicant], on 30 August 2018, made unwelcome comments and/or advances, including one or more of a sexual nature, to [AA] while acting in [his] official security capacity conducting a security assessment of her apartment". Further, the Director stated that "[i]f established, [the Applicant's]

conduct would constitute a violation of Staff Regulations 1.2(a) and l .2(f) and Staff Rule l .2(f)".

13. By interoffice memorandum dated 15 November 2019, the Assistant Secretary-General for Human Resources ("the ASG") conveyed the contested decision of the Under-Secretary-General for Management Strategy, Policy and Compliance ("the USG") to the Applicant.

14. The USG concluded that it was established, "by clear and convincing evidence, that on 30 August 2018, [the Applicant] made unwelcome comments and/or advances, including one or more of a sexual nature, to [AA] while acting in [his] official security capacity conducting a security assessment of her apartment". Based on "the entirety of the record, including the foregoing considerations", the USG further found that the Applicant's "actions violated Staff Regulations l.2(a) and 1.2(f), Staff Rule 1.2(f), and ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and amounted to misconduct".

15. As for the factual background, the ASG referred to the accounts of the Applicant, AA, BB, CC, DD and EE and made the following findings:

> a. "[AA] and [BB] provided largely consistent accounts of the incident. [AA] provided a very detailed account. [BB] was present during the exchange which occurred in the bedroom and he, despite language barriers, observed [the Applicant and AA]. Furthermore, [BB] witnessed [AA] appear[ing] to be in disbelief as to things [the Applicant] were saying before she signaled for [BB] not to leave as the inspection was concluding. After [the Applicant] had gone, [AA] discussed with [BB] the conduct [the Applicant] exhibited during the inspection including [his] comments about the bedroom being where

'she makes the fire' as well as comments about her boyfriend and that [the Applicant] could cook for her. [AA's] contemporaneous report of [the Applicant's] conduct to [BB] and others lends credibility to [AA's] account that [the Applicant] made these comments and that these comments were upsetting to [AA], so much so that she feared what [the Applicant] might do were [he] to have an opportunity alone with her";

b. "During the investigation [the Applicant] stated that [he] had not said 'oh, this is where the fire starts' but rather, may have said something such as 'oh, this is where the action takes place' and [he] acknowledged that [he] at times make jokes in poor taste. However, in [his] response to the allegations of misconduct, [he] stated that [he] did make reference to a fire in the bedroom but claimed that [he] were only referring to fire hazards in the room";

c. "During the investigation, [the Applicant] claimed that [he] could not recall suggesting a competition with [AA's] boyfriend but in [his] response to the allegations of misconduct, [he] acknowledged that [he] had done so but claimed that [he] had meant that [he] would cook for [AA] and her boyfriend";

d. "[The Applicant] have suggested motivation to lie on the parts of [AA, BB and CC] but in the case of the latter two have offered no evidence of motivation which would suggest that either would provide false information to the Organization. [The Applicant's] contention that [AA] made a complaint because of [his] assessment is belied by the fact that she raised a complaint with [BB] at the time of the incident and with others upon returning to the office";

> e. "Based on the foregoing, [the Applicant's] account of the incident is not credible. [His] explanations of [his] lack[s] consistency. Furthermore, [he has] acknowledged that [he] ma[d]e jokes as a result of [his] poor judgment at times. However, in this case, [his] words were not amusing to [AA] to whom the conduct was directed; the conduct was threatening and offensive to [her] and it was reasonable for her to perceive [his] conduct as such. [The Applicant was] charged with inspecting the private residence of a staff member with an organization related to the UN system but [he] used this opportunity to repeatedly make sexual innuendos toward the staff member. Following [the Applicant's] comments, [AA] described feeling threatened by [him] because of [his] words, [his] persistence, and [his] position".

16. When determining the sanction, among possible mitigating or aggravating factors, the USG found that "the fact that [the Applicant was] acting in [his] official security capacity undertaking an inspection of [AA's] private residence at the time of the conduct at issue" was an aggravating factor. At the same time, the USG considered that the Applicant's "length of service to the Organization, some of which has included work in difficult duty stations, constitute[d] a mitigating factor". In light thereof, the USG decided "to impose on [the Applicant] the disciplinary measure of separation from service, with compensation in lieu of notice, and with termination indemnity, in accordance with Staff Rule 10.2(a)(viii)".

Consideration

The Tribunal's limited scope of review in disciplinary cases

17. The Appeals Tribunal has consistently held the "[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the

Administration". In this context, the Dispute Tribunal is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". In this regard, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred", and when "termination is a possible outcome, misconduct must be established by clear and convincing evidence". Clear and convincing 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". See, for instance, para 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT-1024.

18. The Appeals Tribunal has generally held that the Administration enjoys a "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

19. The Appeals Tribunal, however, underlined that "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" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40). In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a

judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

20. Among the circumstances to consider when assessing the Administration's exercise of it discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

Whether the facts on which the sanction is based have been established?

The credibility of AA, BB, CC and DD

21. In the Applicant's closing statement, he is challenging the credibility of AA, BB and DD in their witness testimonies to the Tribunal and statements during the OIOS interviews. The Respondent has made no submissions in response to these allegations.

22. The allegations against AA. The Applicant's submissions may be summarized as follows:

> a. It "has been established that [AA] had a motive to complain about [the Applicant] and, at the very least, exaggerate what had transpired, as he had told her that her apartment would not be approved". AA "was upset over [the Applicant's] expert security assessment and confusion about her status which would have affected her objectivity and credibility", and her "main concern, as relayed to her friend, was that [the Applicant] had deemed the residence

unsafe". AA "was also admittedly influenced by prior incidents of harassment for which [the Applicant] should not be held responsible";

b. Contrary to the assertion of the sanction letter, AA's account is "riddled with contradictions". For instance, she wrote "in her complaint that she had called [CC] after [BB] had left but told the investigators that she could not get more information from [CC] about the alleged complaints against [the Applicant] because 'at that point in time [BB] hadn't left yet, so [AA] wasn't about to be on the phone for half an hour talking to her while he's still there'". The evidence on the record prove that AA contacted CC by "WhatsApp and not by phone". This contradiction "conveniently served [AA] to avoid having to justify her unfounded hearsay allegations about [the Applicant]";

c. AA "also perjured herself during her testimony before this Tribunal". AA "first said that she went with [BB] to the apartment she 'was looking to let'". Subsequently, AA said that "she signed the lease for the property before having it inspected for security". When AA "was questioned, under oath, about this contradiction, she repeatedly denied having said that she went to the apartment she was looking to let";

d. AA also told "investigators that [CC] had encouraged her to report [the Applicant's] behaviour and told her that the 'should think about reporting it' and that [BB] had told her that "he would put it on record". CC, however, testified that "she could not recall saying that and that [AA] was already determined to file a complaint against [the Applicant]; while [DD] testified that he had not said the words that [AA] ascribed to him". Furthermore, AA's "more serious allegations (e.g. comments about the bed, [air conditioner, "AC"] and her physical appearance) have not been corroborated";

e. These "contradictions", namely AA's "motive to complain against [the Applicant]; the fact that during the inspection she did not raise any issues or told [the Applicant] to speak English; that [BB] did not notice anything warranting an intervention; and the hyperbolic language used in her complaint indicate that her version of events lacks all credibility, is not reasonable and should be disregarded".

23. The Tribunal notes that it is undisputed that AA knew that the Applicant's role was solely to advise her workplace about his recommendation of the suitability of her apartment from a security and safety perspective and that he did therefore not have the decision-making power. Eventually, the Applicant's workplace indeed went against his recommendation and approved the apartment for her residence. The Tribunal is therefore unconvinced that AA should have had any ulterior motive related to the Applicant's disapproval of her apartment when filing a written complaint against him several months (on 26 October 2018) after the inspection took place on 30 August 2018. For the same reason, the Tribunal is unconvinced that AA's possible prior experiences with sexual harassment should have clouded her mind when filing the written complaint, as by then, she had had ample time to reflect on and digest the events that occurred at the inspection.

24. Similarly, the possible inconsistencies in the accounts of AA, BB and CC are all insignificant details and easily explained by the passage of time between the occurrence of the relevant events at the residential security inspection and the time of the OIOS interviews. The fact that BB did not intervene during the inspection is only logical as he did not understand the majority of the conversation between the Applicant and AA since it was in Spanish. The Tribunal also rejects the Applicant's contention regarding the "hyperbolic language" used in AA's "complaint" as irrelevant.

25. The allegations against BB. The Applicant submits that he lacked credibility because "[n]ot only did [BB] fail to corroborate [AA's] account—despite being present during the inspection—but he also displayed animus against [the Applicant]". It has been established that the Applicant "had repeatedly brought [BB's] dereliction of duties to the attention of his superiors", and that [BB] resented the fact that [the Applicant], at the initiative of [BB], was using Spanish during the inspection and made derogatory comments against people from Spanish-speaking countries, thereby evincing further animus against [the Applicant]. BB went "so far in his lack of objectivity in this matter that he prepared a report which went against the mandatory security policy that undermined [the Applicant's] assessment and benefitted [AA]".

26. The Tribunal is unconvinced by the Applicant's contentions regarding BB. Professional disagreement regarding the Applicant's residential security assessment of AA's apartment does not, by itself, amount to BB reporting in bad faith regarding the events that transpired there. Also, BB's different accounts were mostly him affirming—as hearsay—the Applicant's explanations as he did not understand the Spanish part of the conversation between the Applicant and AA. Any personal dislikes between the Applicant and BB have also not been convincingly shown to have tainted the motives of BB, who has worked for many years in the same position at AA's workplace, despite the possibility that the Applicant might have reported him to his superiors for under performance.

27. The allegation against CC. The Applicant submits that it has been established that CC "is a close friend of [AA] committed to support her with her complaint". CC also "volunteered unfounded allegations against [the Applicant] concerning other women in the office allegations that were disregarded by the investigators and that [CC] could not substantiate". While CC stated that "she allegedly felt uncomfortable with [the Applicant], she never complained about it, and her "close friendship with

[AA] and her spread of unsubstantiated rumours against [the Applicant], demonstrate her lack of credibility in this matter".

28. The Tribunal notes that CC's different statements were mostly hearsay in which she recounted what the Applicant told her about the inspection. For all intents and purposes, the two accounts are concurrent with only few discrepancies that all constitute unimportant details. The relationship between the Applicant and CC is therefore also insignificant.

29. The allegations against DD. The Applicant submits that he "has requested the exclusion of his testimony", and at all events, DD "displayed animus against the Applicant and his testimony hence lacks credibility".

30. The Tribunal notes that the reference in the sanction letter to DD's OIOS statement primarily concerns the content of BB's report to him at the relevant time about the incident between the Applicant and AA. While DD refused to give testimony to the Tribunal, and not being a United Nations staff member is not obliged to do so, this does not by itself render his interview statement inadmissible or otherwise invalid (in line herewith, see the Dispute Tribunal in *Applicant* UNDT/2021/007, paras. 20 to 24, in which reference was made to the Appeals Tribunal in *Applicant* 2013-UNAT-30, *Mbaigolmem* 2018-UNAT-819, *Sall* 2018-UNAT-889, *Nadasan* 2019-UNAT-918 and *Osba* 2020-UNAT-1061). For the limited purpose of corroborating the contemporary account of events of AA and BB, the Tribunal therefore accepts DD's OIOS statement as evidence.

31. Consequently, the Tribunal rejects all the Applicant's submissions regarding the credibility of AA, BB, CC and EE.

The Applicant's objections to the factual findings of sanction letter

32. The Tribunal notes that the crux of the present case is whether the comments and proposals of the Applicant were of inappropriate sexual nature, or if instead, they simply concerned the security and safety of the premises or otherwise were nothing but jokes and lighthearted remarks.

33. In the Applicant's closing statement, he challenges the USG's findings of facts on a number of different specific points, contending that the Respondent has failed to prove them by the required evidentiary standard of clear and convincing evidence. The following review will therefore focus on these points using the Applicant's headings and order of presentation.

"Usage of Spanish"

34. The Applicant submits that it "has been conclusively established that [the Applicant] spoke in Spanish during the inspection at the initiative of [AA]" and that he would have otherwise "conducted the inspection in English". AA "admitted that she never told [the Applicant] to conduct, or continue, the inspection in English", and it was also "established that [AA] was not fluent in Spanish and that she had no experience of Bolivian Spanish". The Respondent has made no submissions in this regard.

35. At the outset, the Tribunal notes that the USG made no factual findings regarding AA's language skills in Spanish in the sanction letter. The Tribunal, nevertheless, believes that this is a relevant circumstance in accordance with *Sanwidi*, which should also have been considered by the USG, when assessing facts in the sanction letter. The reason is that the disciplinary sanction was essentially based on what the Applicant said to AA in Spanish and the reasonableness of her emotional reaction thereto.

36. The Tribunal agrees with the Applicant that it follows from the evidence that, at least part, if not the majority, of the inspection was conducted in Spanish, at least the part when he and AA spoke to each other. In the Applicant's witness testimony, he described it as a "mix", since whenever he addressed BB or the local security guard, he would instead speak in English, knowing that none of them spoke Spanish. Also, The Tribunal agrees with the Applicant that it has not been established that it was he who took initiative to conduct the conversation with AA in Spanish.

37. The Tribunal, however, finds that by AA's own testimony, it has been established that AA spoke Spanish fluently as she studied the language at a university level and lived for a year in Colombia. This is corroborated by the Applicant's own testimony before the Tribunal in which he stated that he was surprised to hear her speak Spanish as not many people in Jamaica do so. Also, in the Applicant's OIOS interview, he described AA's Spanish as "kind of fluent and, you know, she appeared comfortable speaking Spanish" and that "it was a fluent conversation".

38. Accordingly, the Tribunal finds that it is clearly and convincingly established that AA's Spanish skills were adequate for her and the Applicant to have a detailed conversation during the residential security inspection and that she appropriately understood everything he said to her. Also, nothing indicates that the Applicant used any particular words or terms particular to Bolivian Spanish that AA would not understand.

"Alleged comments on [AA's] physical appearance"

39. The Applicant contends the he "has consistently denied these comments and has provided a credible explanation", because the "word allegedly used by [the Applicant] ('bonita') does not translate as 'beautiful' and is not used to compliment someone's physical appearance, especially in a romantic way". Although AA stated that "she told other people [the Applicant] had allegedly commented on her physical

appearance and living alone, no witness has corroborated this". AA did "not mention it to CC "in their WhatsApp conversation" and the latter could "not corroborate that [AA] had made such comments even when directly asked". DD "only assented when investigators led him to recall whether there were comments about [AA] being beautiful without providing any details". BB, who according to AA "was not present when this alleged comment took place, contradictorily stated that he overheard them talking about [AA] being pretty".

40. The Respondent has made no submissions in response to the Applicant's contentions.

41. To begin with, the Tribunal notes that, as with AA's Spanish skills, the USG made no factual findings in the sanction letter on the Applicant making comments regarding AA's physical appearance during the residential security inspection. The Tribunal, nevertheless, accepts the Applicant's submissions thereon, because they give a fuller picture of the key allegation that some of the Applicant's comments and proposals during the inspection had an inappropriate sexual undertone. The comment is therefore also a relevant circumstance as per *Sanwidi*, which the decisionmaker should have taken into consideration, also because it was made part of the factual findings of the investigation.

42. Pursuant to the online Spanish-English version of the Cambridge Dictionary, the adjective "bonito" (or the female form, "bonita") in Spanish translates into "beautiful", "lovely", "good-looking", "handsome", "nice", "pretty", "pleasing" and "attractive" in English.

43. While the parties agree that the Applicant had said "bonito" or "bonita" to AA, they disagree on the context. The Applicant's explanation to the Tribunal was that by saying "bonito" to AA, he referred to her Spanish skills and her having lived in Colombia. In the Applicant's OIOS interview, however, his explanation was

different as he said that AA's "house" was "nice". In the Applicant's witness testimony to the Tribunal, he also underlined that he did not call AA "hermosa", which unlike "bonito", would have referred to her physical appearance.

44. In contrast, in AA's testimony, she explained that the Applicant had told her that "eres [you are] bonita". This was a response to her inquiry as to why he had asked her whether she lived alone and describing her dependent status as "solita, solita" (meaning "alone, alone").

45. Even though not corroborated by other evidence, the Tribunal finds that AA's testimony is most credible. AA's testimony was both detailed and very believable in the circumstances. The Applicant's accounts of the events, on the other hand, differ between his witness testimony before the Tribunal and the OIOS interview. Also, the different explanations are self-contradictory—albeit in a different context during the OIOS interview, he also described AA's neighborhood as "a very bad location" and also said that "the apartment was very humble". Finally, the statements made little sense, because in Spanish, "bonito/a" can indeed be used to describe certain distinctive qualities in a person (see the above quotes from the Cambridge Dictionary).

46. Accordingly, the Tribunal finds that it is clearly and convincingly established that the Applicant was indeed referring to AA's physical appearance when describing her as "bonita" at the beginning of the inspection.

"Cooking"

47. The Applicant submits that it has been "established that asking security-related questions about cooking habits and non-dependents is standard in residential security inspections" and "proven [that the Applicant] made a passing comment on his cooking skills and a hypothetical cooking competition in a light-hearted manner".

This comment "sought to dispel the embarrassment that [the Applicant] thought [AA] could be feeling when she mentioned her boyfriend as she had not mentioned him when [the Applicant] asked about non-dependents earlier". The Applicant "is the only person with the knowledge to testify as to the intention of his comment", which was "light-hearted" and not a serious offer as [the Applicant] never contacted [AA] following the inspection". Also, AA "was not offended or humiliated by the comment at the time".

48. The Respondent, in essence, submits that the relevant comments and proposals of the Applicant in kitchen had an inappropriate sexual undertone.

49. The Tribunal notes when the Applicant inspected the kitchen, according to his own witness testimony, he admitted to having praised his own cooking skills as better than those of AA's boyfriend and to have proposed a cooking competition with him. Also, he does not deny that, as contended by the Respondent, he made the comment "bromeando mientras trabajando", which can be translated into "joking while working".

50. From this, the Tribunal gathers that the topic of the Applicant's cooking skills, rather than a passing comment, formed a substantial part of the conversation in kitchen. Also, in the Applicant's witness testimony to the Tribunal, he stated that he sensed that AA might have felt embarrassed by revealing private information about having a boyfriend. This demonstrates that the Applicant was aware of the sensitivity of the subject and of AA's possible discomfort with discussing her boyfriend with him.

51. At the same time, AA evidently did not take the Applicant's comment as a joke, but as the Respondent submits, she "believed that if she had told the Applicant that he could cook for her, he would have indeed shown up to her apartment to cook for her". In the Applicant's testimony, she explained that the reason that she brought

her boyfriend up in the conversation was to politely reject the Applicant's offer to cook for her. By mentioning the boyfriend, also in light of his previous comments about her being beautiful, she further hoped to signal to the Applicant that she was not interested in him. The Tribunal therefore also accepts the Respondent's contention that given the Applicant's comments and his knowledge of the location, layout and security aspects of her residence, AA "was afraid that, even without her consent, he would have shown up at her apartment in furtherance of his inappropriate sexual innuendo".

52. Accordingly, also referring to the Applicant's comments regarding the bedroom, which are reviewed in the following, the Tribunal finds that the Respondent has clearly and convincingly established that the comments and proposals, which the Applicant made in the kitchen, had an improper sexual innuendo.

"Bedroom"

53. The Applicant's submissions may be summarized as follows:

a. It has been established that the Applicant's comments "related exclusively to the fire risk in the bedroom". Also, the "evidence shows that there was copious flammable clothing in the bedroom; that [the Applicant] consequently recommended the installation of a fire extinguisher and a smoke detector in that room; that [BB] understood the comments as relating to the fire hazard and that even [AA] responded to [the Applicant's] comments understanding that he referred to a fire hazard". The words and their context "undoubtedly indicate that [the Applicant] was referring to a fire risk", although AA "could have misunderstood the situation, influenced by her limited Spanish skills, her misunderstanding of previous comments by [the Applicant] and her history of sexual harassment". If AA "had genuinely understood the comments to be inappropriate, she would have told [the

Applicant], expressed her concerns to [BB] or ask for the inspection to continue in English", which is "supported by [AA's] testimony that she was experienced in diffusing unwanted advances";

b. AA's "narrative of what transpired in the bedroom has not been corroborated by any witnesses". Concerning the allegations about the bed, [CC] "could not corroborate her friend's account, even when directly asked", and AA "did not mention anything about the bed in their WhatsApp conversation". BB, who was present, DD and EE could "not corroborate her allegations about the bed", and AA's "uncorroborated statement is not of a sexual nature as any sexual connotations originated exclusively in her imagination";

c. AA's "allegations concerning comments about the nature of the fire and an AC have not been corroborated in any way". BB was "unable, even when led by the investigators, to corroborate [AA's] account that [the Applicant] had allegedly told [BB], in English, that he was talking about the type of fire which 'the AC can be used to cool down'". This comment, "if indeed uttered, would have given a clear indication that [the Applicant] was not referring to a fire hazard", but "even the person to whom it was allegedly addressed, in a language he could understand, did not corroborate that it had been said". Moreover, "none of the people to whom [AA] recounted what allegedly happened were able to corroborate these allegations and [she] did not mention it in her WhatsApp conversation with [CC];

d. The allegation that the Applicant "made clear to [BB] in English that he was not referring to a fire risk, contradicts [AA's] allegation that [the Applicant] purposefully used Spanish 'as a language barrier to his advantage and advances'". If the Applicant "would have made the AC comment to [BB],

the latter, as a security professional aware of his duties, would have intervened or recalled the comment";

e. It "defies all logic that precisely those allegations which would have made clear that [the Applicant's] comments did not refer to a fire risk remain uncorroborated and not mentioned in [AA's] WhatsApp conversation". Surely, AA "would have mentioned, and the witnesses would have remembered, those comments which were more serious and more indicative of inappropriate conduct".

54. The Respondent essentially submits that the Applicant's relevant comments and proposals in the bedroom were of an inappropriate sexual nature.

55. From the outset, the Tribunal notes that the Applicant's witness testimony before the Tribunal does not concur with the explanations that he gave to OIOS during the interview.

56. To the Tribunal, the Applicant stated that the conversation between him and AA in the bedroom only concerned the issue of whether there was a fire hazard in the room. When the Applicant entered the room and with reference to the alleged disorder of clothes and shoes scattered all over, he explained that he said out loud "aqui es donde empieaza el fuego". By this, the Applicant stated that he meant that "this is where the fire starts"—and nothing more. The Applicant further explained that since power cuts are frequent in area, a fire hazard would occur if, in case the electricity went off, AA would light a candle in the room.

57. In contrast, in the Applicant's OIOS interview, he adamantly denied having used the word "fire", noting this is "not a word [he] would use in [his] vocabulary". Rather, he had said that he could have said "something like, oh, this is where the action takes place", because he saw "there [were] lots of underwear all on the bed". When asked what he meant thereby, the Applicant explained that, "I don't know. She

has a boyfriend. I'm sure, you know, they have sex there or something like that. I mean, was clearly (inaudible) for the [*sic*], for the underwear or something like that".

58. In the Applicant's final observations, he explains any discrepancies in his explanations with that "[a]ll the alleged 'changes' in the Applicant's account took place in the course of his OIOS interview", because he was "understandably nervous, was 'pounded by the investigators' while trying to recall details about a routine inspection from eight months prior". The Applicant therefore never "meant to say that his 'fire' or 'action' comment referred to sex" and "[i]n fact, he denied making any sexual comments" to AA. Also, the OIOS investigator did "not ask him what he meant by the comment and any answer that the Applicant may have given in a state of pressure was purely hypothetical".

59. The Tribunal is unconvinced by this explanation of the Applicant. The investigators did not "pound" the Applicant, but asked him simple and open-ended questions to which he provided his answers. Also, the Tribunal believes that the Applicant spoke his true mind when stating to OIOS that the sight of AA's bed and underwear made him think of her having sex with her boyfriend. While the word "fire" could have a double-meaning in that it could also refer to fire hazard, the manner in which he described to OIOS what went through his mind when using the word "action" leaves no doubt that he was actually talking about sex.

60. The understanding of the Applicant's use of the words "action" and "fire" having a sexual innuendo is corroborated by AA's witness testimony before the Tribunal and her statements during the OIOS interview. After the incident, AA recounted the bedroom conversation to BB, CC and DD, who, in their witness testimonies and OIOS interviews, all confirmed AA's perception that the Applicant's statements were of a sexual nature.

61. During the bedroom conversation, in accordance with AA in her OIOS interview and testimony before the Tribunal, the Applicant further told AA that her bed was small but that it would do. By this, AA believed that the Applicant was implying that the bed was of an adequate size for them to have sex, explaining that the Applicant is a very largely built man, to which he also admitted himself. Also, AA explained that the Applicant made another sexual comment when subsequently telling BB that the fire to which the Applicant referred was not the type that an AC could cool down. The Applicant has denied both.

62. Whereas AA's statements are not corroborated by other witnesses, including BB, this does not automatically mean that they have not been established. Rather, considering the general sexual undertone of some of the Applicant's other comments during the inspection and the Applicant's inconsistent and contradictory statements to the Tribunal and OIOS regarding the conversation in the bedroom, the Tribunal finds AA's account of the events is more credible than that of the Applicant.

63. Accordingly, the Tribunal finds that the Respondent has established that the comments and proposals made in the bedroom by the Applicant had an improper sexual innuendo.

"Security Assessment"

64. The Applicant's submission may be summarized as follows:

a. It has been "conclusively established" that the Applicant "informed [AA] during the course of the inspection that her apartment would not be approved for occupancy". As AA "had moved into the apartment before having it assessed, in disregard of applicable rules of which she was aware, the failure to approve it would mean that she would have had to move out of the apartment". It has "been proven that [AA] was clearly upset about [the

Applicant's] initial belief that she was not entitled to security allowances and about his security assessment of the property that she vehemently disputed";

b. It has been "established" that the Applicant "had an obligation not to approve the apartment as it did not comply with the mandatory minimum standards". Following AA's complaints against the Applicant, BB "issued a 'report' with comments on [the Applicant's] recommendations in which he stated, against the rules, that the security deficiencies identified by [the Applicant] were recommended and not mandatory". Based on "this unlawful 'report', [DD] requested for the official report to be amended and [AA] was allowed to stay in the property and benefit from the security allowances".

65. The Respondent has made no contentions in response to these submissions.

66. The Tribunal notes that it is an undisputed fact that the ultimate decision regarding the approval of AA's apartment rested with AA's workplace, which, albeit the Applicant's negative appraisal, eventually also approved the apartment for her residence. It follows therefrom that the Applicant's role in the residential security inspection was only advisory and that his recommendation was overruled. Considering the fact that the decision-making power rested with someone other than the Applicant and the apartment was approved at the end, also referring to the Tribunal's findings above regarding the credibility of AA, the Applicant's arguments that AA's complaint against him was motivated by his negative appraisal and that the apartment was not suitable as AA's residence are therefore not convincing.

67. Consequently, the Tribunal rejects the Applicant's submissions regarding the security assessment of AA's apartment.

"End of Inspection"

68. The Applicant submits that it has been "established that it was appropriate for [the Applicant] to ensure that [AA] saved his official phone number". It has "not been established that the end of the inspection happened as recounted by [AA] as the Applicant "did not insist that he would come and cook for her" and "[n]one of the witnesses could corroborate the details of [AA's] account. This account is "implausible as it involves [the Applicant] telling her that the apartment was not safe and that as a professional staff she could afford to live elsewhere, comments that [AA] did not like, and immediately insist to come and cook for her". If the Applicant "would have wanted to make romantic advances to [AA], he would not have prefaced them by reprimanding her".

69. The Tribunal notes that, as already stated above, the circumstance that the Applicant's oral evidence are not supported, at least entirely, by corroborating evidence does not, by itself, mean that it is without evidentiary value. Instead, its plausibility must be appraised in light of the circumstances and context of the situation, which was described as follows in the sanction letter:

> a. In [AA]'s OIOS interview statement, she indicated "that as the inspection was concluding, [the Applicant] insisted that she save[d] [his] phone number to her phone and asked when [he] could cook for her. AA responded that "she told [the Applicant] that her schedule would not allow for [him] to visit her and cook for her";
>
> b. AA further stated to OIOS that the Applicant "asked her if it was because of her boyfriend and inquired as to whether she was permitted to have 'friends'". AA stated that "she told [the Applicant] that she was able to have friends to which [he] replied 'Oh entonces no te dejara aun si ...' [translated in the sanction letter to "Oh then [he] won't leave you even if …"]". AA stated

that "she understood this to mean that [the Applicant was] questioning whether her boyfriend would leave her if she cheated";

c. "As the inspection was concluding, [BB] observed [the Applicant] giving [his] phone number to [AA], and "[s]hortly thereafter, [he] left but [AA] asked [BB] not to leave" as she "told [BB] she needed to speak with him". After the Applicant left, AA "discussed [his] conduct during the inspection with [BB], who in particular noted that AA "looked very frightened and told him what [the Applicant] had said to her in Spanish regarding her bedroom and that being where "she makes the fire" and also about the comments [he] had made about her boyfriend and that [he] could cook for her".

70. The situation as described in the sanction letter is supported by the OIOS interview statements and the testimonies of AA and BB before the Tribunal. The Applicant, on the other hand, has categorically denied that any of these events took place. Considering the sexual innuendo of the Applicant's other comments during the residential security inspection, the inconsistency of the Applicant's other explanations to OIOS and the Tribunal, and the lack of an ulterior motive for AA in pursuing her sexual harassment claim, the Tribunal finds that the Applicant's account is not credible and that the facts as stated above have been appropriately established.

Conclusion

71. As the Tribunal has rejected all the Applicant's submissions regarding the facts not having been established, it finds that the factual findings set out in the sanction letter (as quoted above in para. 15) has been proved by clear and convincing evidence.

Whether the established facts qualify as misconduct and whether the sanction is proportionate to the offence

72. The Applicant's submissions might be summarized as follows:

a. "The facts, as established by the evidence, do not amount to harassment". Whereas "whether conduct is unwelcome is subjective, determining whether it is improper or whether it might reasonably be expected or perceived to cause offence or humiliation involves an objective test";

b. CC, who is "a reasonable person, on being presented with [AA's] version of what had transpired during the inspection, thought that she was overreacting. This was "in line with [CC's] assessment of [AA] as a 'scaredy cat'". Equally, BB, who is "a seasoned security professional, did not think that his intervention was warranted". Therefore, the Applicant's "comments could not reasonably have been expected or be perceived to cause offence or humiliation";

c. The Applicant enquiring whether AA "lived alone and any persons with access to her residence was appropriate in the context of a residential security inspection", and it "was not of a sexual nature and did not interfere with work, create an intimidating, hostile or offensive work environment";

d. The Applicant asking AA about her "cooking habits was appropriate", and "the comment about a cooking competition cannot reasonably be expected or perceived to cause humiliation or offence". It was "not of a sexual nature; did not interfere with work; or create an intimidating, hostile or offensive work environment";

e. The Applicant's "comments about 'fire' and 'action' were appropriate as they referred to a fire hazard". They were "not of a sexual nature and did not interfere with work, create an intimidating, hostile or offensive work environment". The allegations concerning "the bed and AC have not been established";

f. The Applicant's comments at the end of the inspection "were not of a sexual nature and did not interfere with work, create an intimidating, hostile or offensive work environment".

73. The Tribunal observes that under staff rule 10.1 regarding misconduct "[f]ailure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct" (see sec. 10.1(a)).

74. The Tribunal further notes that the USG concluded in the sanction letter that the Applicant's actions had violated staff regulations 1.2(a) and 1.2(f), staff rule 1.2(f) and ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and amounted to misconduct.

75. Staff regulations 1.2(a) and 1.2(f) and staff rule 1.2(f) set out a number of normative behavioral rules according to which, as relevant to the present case, staff members shall (a) not abuse the power and authority vested in them, (b) conduct themselves at all times in a manner befitting their status as international civil servants, and (c) not commit sexually harassment or other abuse in any form at the workplace or in connection with work.

76. ST/SGB/2008/5 prohibits four different types of conduct that are specifically defined in this Bulletin. In the present case, the USG fails to explicitly state which category of misconduct offence it is that the Applicant is found to have committed under ST/SGB/2008/5 in connection with the finding of misconduct. It follows, however, from another place in the sanction letter that the conclusion is that the Applicant has committed "harassment, including sexual harassment". It is unclear whether this refers to "harassment", "sexual harassment" or both types of "prohibited conduct" as per the statutory definitions in sec. 1.3 of ST/SGB/2008/5. This is evidently a procedural error.

77. With reference to the factual findings and the legal provisions set out in the sanction letter, as well as the Appeals Tribunal's seminal judgment in *Sanwidi*, the Tribunal, nevertheless, finds that the USG acted within the scope of her discretion when concluding that the Applicant had committed misconduct during the residential security inspection in the form of sexual harassment.

78. As follows from the factual findings in the sanction letter and with reference to the statutory definition of sexual harassment in sec. 1.3 of ST/SGB/2008/5, the comments and proposals of the Applicant can reasonably be categorized as a "pattern of behaviour", which in their totality amounted to "*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" (emphasis added). Also, the comments and proposals could "reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work … or [create] an intimidating, hostile or offensive work environment".

79. In accordance with staff regulations 1.2(a) and 1.2(f) and staff rule 1.2(f), the Tribunal further finds, since the Applicant acted in his official capacity as the DSS Security Adviser when conducting the residential security inspection, he was vested with a particular power and authority towards AA in the situation. Considering the

Applicant's long and distinguished United Nations career, he should also have known better than to act in the way that he did and not sexually harass AA as per the statutory definition in sec. 1.3 of ST/SGB/2008/5. Such behavior is evidently unbefitting of an international civil servant.

Whether the sanction is proportionate to the offence

80. The Applicant's submissions might be summarized as follows:

a. The sanction was "excessive as it bore no suitable relationship to the evidence of misconduct". The Applicant "was simply doing his job; even if it was found that some of his comments were inappropriate, they did not warrant separation". Further, "the sanction bore no suitable relationship to the purpose of corrective discipline as by separating [the Applicant], the Respondent cut short a lengthy and distinguished career without explaining why a less onerous sanction would not have achieved the desired goals, particularly in light of the mitigating factors which the Respondent failed to consider";

b. The sanction "was disproportionate when compared with similar cases", referring to *Sow* 2011-UNDT-086, and no staff member has been "separated in situations similar" to that of the Applicant. Even "when compared with cases where staff had clearly committed harassment, [the Applicant's] sanction stands out as an outlier for its unwarranted severity". There are "several cases in which staff members were given a less serious for offenses of a similar nature". Moreover, "those cases where the same sanction was imposed can be clearly distinguished from the present case", because in these instances, "the staff member had either sexually harassed a supervisee over the course of months", "continued to attempt to contact the individual", "offered money to an individual who rejected the unwanted advances",

> "inappropriately touched women", "sexually harassed several women", or "committed additional misconduct". These cases involve "conduct significantly more serious than that ascribed to [the Applicant]".

81. The Tribunal observes that the Appeals Tribunal has consistently held that the sanction should not "be more excessive than is necessary for obtaining the desired result" (see *Sanwidi* 2010-UNAT-084, para. 39, and in line herewith, for instance, *Samandarov* 2018-UNAT-859, *Turkey* 2019-UNAT-955, *Nyawa* 2020-UNAT-1024 and *Haidar* 2021-UNAT-1076). The Appeals Tribunal has, at the same time, also held that "in assessing the seriousness of misconduct and deciding on the proportionality of a disciplinary sanction" it has "consistently granted large discretion to the Secretary-General" (see *Nadasan* 2019-UNAT-918, para. 52). In the case of *Sow*, to which the Applicant refers, the Dispute Tribunal pronounced an equality principle whereby staff members who commit similar offences should be given similar sanctions (the case otherwise concerned a staff member's failure to disclose a financial document and not sexual harassment, and since the judgment was rendered by the Dispute Tribunal, it is only of persuasive value to the Tribunal in the present case).

82. In the sanction letter, as background for the disciplinary measure of separation from service with compensation in lieu of notice and termination indemnity, the USG took into account the Secretary-General's "past practice in relevant cases including those in which staff members engaged in harassment, including sexual harassment of another staff member". The USG further noted that "such cases have been met with sanctions at the strictest end of the spectrum" as they strike "at the heart of the core values of the Organization". As an aggravating factor, the USG mentioned that the Applicant was "acting in [his] official security capacity undertaking an inspection of [AA's] private residence". The USG also indicated that the Applicant's "length of

service to the Organization, some of which has included work in difficult duty stations" constituted a mitigating factor.

83. The Tribunal notes that staff rule 10.2(a) lists an exhaustive number of disciplinary measures of which the imposed sanction, namely separation from service with compensation in lieu of notice, constitutes the second most strict measure (the strictest sanction is dismissal). In addition, the Applicant was granted a termination indemnity, which the USG could also have decided to deny him in accordance with staff rule 201.2(a)(viii).

84. In the application, to which the Applicant refers in this closing statement, he makes reference to a number of cases listed in the "Compendium of disciplinary measures" in which the "[p]ractice of the Secretary-General in disciplinary matters from 1 July 2009 to 31 December 2017" is listed. The Tribunal notes that since then, this compendium has been extended to 31 December 2019.

85. When reviewing this compendium, the general trend is that in sexual harassment cases, the perpetrator has either been dismissed or separated with compensation in lieu of notice. In the latter situation, in some instances, unlike in the present case, the staff member was not given a termination indemnity. The various summarized cases included both single instances and repetitive cases of sexual harassment and also different degrees of severity. From the scant descriptions in the compendium, the present case would best fit in the category of less severe cases.

86. The Tribunal therefore concludes that the imposed sanction against the Applicant was in line with the general practice of the Secretary-General in cases of sexual harassment. This, however, does not mean that the imposed sanction is necessarily lawful, because the Tribunal is not bound by this practice if the Secretary-General is thereby viewed as having overstepped the scope of his discretion. In this regard, the Tribunal notes that the degree of severity is a factor that must be taken

into account, and no statutory or other provisions state that all cases of sexual harassment *per se* must result in either dismissal or separation with compensation in lieu of notice.

87. Considering the objective of the imposed sanction—separation with compensation in lieu of notice—the evident purpose is to remove the Applicant from the role as a Security Adviser with DSS. The Respondent has established that the Applicant, in this capacity, undertook an official residential security inspection of a staff member's private home, where he made different comments and proposals with a sexual undertone. Also, the Tribunal notes that during the entire process, the Applicant has maintained that none of his comments and proposals had a sexual meaning and instead said they concerned the safety and security of the premises or labeled them as jokes or otherwise lighthearted statements, if admitting to them at all.

88. The Tribunal thereby finds that the Applicant has demonstrated no understanding of how his comments and proposals could have had sexual connotation, or how these comments and proposals could negatively impact AA. Such minimum level of comprehension would appear to be fundamental for a DSS Security Officer, who as part of his tasks undertake residential security assessments of staff members' private homes. No staff member should inappropriately be put in an uncomfortable and/or harmful place in such a private and sensitive situation by the very official, whose responsibility is to secure her/his safety and security.

89. Consequently, the Tribunal finds that the imposed sanction did not fall outside scope of the USG's discretion.

Conclusion

90. The application is rejected.

(Signed)
Judge Joelle Adda
Dated this 14th day of July 2021

Entered in the Register on this 14th day of July 2021
(Signed)

Nerea Suero Fontecha, Registrar, New York