UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/022
Judgment No.: UNDT/2022/026
Date: 18 March 2022
Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SZVETKO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Jason Biafore, OSLA

Counsel for the Respondent:
Louis Lapicerella, UNHCR
Marisa Maclennan, UNCHR

Introduction

1. The Applicant challenges the decision by the United Nations High Commissioner for Refugees ("UNHCR") to separate him from service for disciplinary reasons.

Procedural History

2. At the time of the application, the Applicant served as an Associate Supply Officer, at the P-2 level with the United Nations High Commissioner for Refugees ("UNHCR") in Tunisia.

3. On 18 March 2021, he filed the application mentioned in para. 1 before the United Nations Dispute Tribunal sitting in Nairobi to challenge the Respondent's finding of misconduct, following which he was separated from service of the Organisation with compensation *in lieu* of notice and without termination indemnity pursuant to staff rule 10.2(a)(viii).

4. It is the Applicant's case that the impugned decision was unlawful because: a) the facts on which the sanction is based have not been established for each charge; b) the established facts do not qualify as misconduct under the Staff Regulations and Rules; and, c) the sanction is not proportionate to the offence.

5. The Respondent filed his reply on 20 April 2021, stating that the impugned decision was lawful. The Respondent contends that the application is without merit; the facts are established to the required standard of proof; and they constitute misconduct. The sanction imposed on the Applicant was proportionate to the gravity of the Applicant's misconduct.

6. On 24 January 2022, the Tribunal issued Order No. 006 (NBI/2022) to inform the parties that this matter will be adjudicated on the papers, to which end the parties were invited to file their closing submissions.

7. Both parties filed their closing submissions, as directed, on 31 January 2022.

Factual background

8. Sometime towards the end of May 2018, around the 24th or 25th, the Applicant attended a UNHCR office retreat a hotel outside of Budapest, Hungary.

9. The incidents which led to the impugned decision mostly occurred during that retreat. The Applicant made an inappropriate comment (using the word mountains to refer to her breasts) to a fellow colleague, Ms. S, while at the swimming pool; he is also accused of having made another inappropriate comment to anther colleague, Ms. A (that the water jets in the pool/jacuzzi could be pleasurable between a woman's legs).

10. The Applicant admits only the first comment and denies the second one.

11. At some point during the same retreat, the Applicant received a meme on his mobile phone. He describes it as an advertisement for a wristwatch, "depicting a blurred out naked man in the background with a large gold watch prominent in the foreground". He showed the meme to several colleagues, including Ms. S. Most laughed it off as funny, but Ms. S took offense at having been showed the meme.

12. There was a staff party at the retreat on the evening of 24 May 2019. As the party was winding down, the Applicant joined a group of people, including his colleagues, as they went around the hotel knocking on doors to get others to join the party.

13. The Applicant cannot say for sure if the knock on Ms. S's door was by him or one of the other revellers; it could have been any of them, he says. Whereas she took offence at her door being knocked, several others testified that the knocking on their doors did not annoy, offend or harass them.

14. It is in the investigation report, that at an unspecified time the Applicant stopped Ms. A along the corridors of the UNHCR Office in Budapest and said that his friend was selling a watch and insisted that she look at the photo on his phone which was a picture of a watch with a penis underneath it.

15. The Applicant unequivocally denies this allegation, and queries why Ms. A did not report it given the offence that the Respondent now claims his action caused her.

16. On 20 June 2019, the Inspector General's Office ("IGO") received allegations of sexual harassment implicating the Applicant. An investigation into the allegations was opened on 28 June 2019.

17. The IGO interviewed 11 individuals. On 1 April 2020, the Applicant was interviewed as the subject of the investigation.

18. On 20 April 2020, the IGO shared the draft investigation findings with the Applicant. The Report states that the Applicant "engaged in prohibited conduct by: a) using inappropriate and offensive language; b) showing inappropriate pictures on his mobile phone; and, c) knocking on hotel room doors of female staff members late at night."

19. The Applicant was given the opportunity to respond to the draft investigation, which he did on 1 May 2020.

20. The Respondent submits that those comments "were taken into account for the finalization of the investigation report ("IR") dated 5 May 2020."

21. On 8 June 2020, the Applicant was notified of the allegations of misconduct.

22. The Applicant responded to the allegations on 24 August 2020 and submitted a supplemental response with the assistance of counsel on 18 September 2020.

23. The Respondent considered the Report and the Applicant's response to it, and found that there was clear and convincing evidence that he

> a) Made comments of a sexual nature to Ms. S (using the word mountains to refer to her breasts) during an UNHCR retreat in May 2018;
>
> b) Made comments of a sexual nature to Ms. A (suggesting that she direct the water jets in the pool/jacuzzi between her legs) during the same retreat;

c) Showed a "watch" photograph or "meme" which contained male genitalia to Ms. S and Ms. A, on separate occasions (at the May 2018 retreat and in the UNHCR office in Budapest, respectively); and

d) Knocked on Ms. S's hotel room twice, late at night (during the May 2018 retreat).

24. The Applicant was found to have violated staff rule 1.2 (f), paragraph 4.2 of UNHCR Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (UNHCR/HCP/2014/4) and Principles 2, 4 and 9 of UNHCR Code of Conduct.

25. On 18 December 2020, the Applicant was notified of the decision to separate him from service with compensation *in lieu* of notice and without termination indemnity pursuant to staff rule 10.2(a)(viii).

Submissions by the parties

26. The Applicant emphatically argues that charges (b), (c) and (d) have not been established to the requisite standard. He concedes to the facts alleged in the remaining charges.

27. He submits that the charges he concedes may constitute "inappropriate conduct" but *not* misconduct under the applicable rules.

28. The sanction was wholly disproportionate to the offence. The Respondent failed to properly consider mitigating circumstances and took irrelevant and aggravating factors into account.

29. It is the Respondent's case that the offences alleged were properly established; that the Applicant was afforded his due process right and that the sanction meted out to him was proportionate. The Respondent makes particular reference to the charges which the Applicant concedes to and submits that separation would have been justified relying solely on the facts admitted by the Applicant, "which minimally qualify as two instances of sexual harassment and one instance of harassment."

Considerations

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

31. The Tribunal will apply this standard in the review of the present case.

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

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

33. According to the evidence on file, the Applicant committed four acts which could be relevant for disciplinary measures: a) Made comments of a sexual nature to Ms. S (using the word mountains to refer to her breasts) during an UNHCR retreat in May 2018; b) Made comments of a sexual nature to Ms. A (suggesting that she direct the water jets in the pool/jacuzzi between her legs) during the same retreat; c) Showed a "watch" photograph or "meme" which contained male genitalia to Ms. S and Ms. A, on separate occasions (at the May 2018 retreat and, at an unspecified time, in the UNHCR office in Budapest, respectively); d) and knocked on Ms. S' hotel room twice, late at night (during the May 2018 retreat).

34. The Tribunal is of the view that facts are established by a clear and convincing evidence.

35. While the Applicant admitted the facts above at (a) and in substance the facts above at (c) and (d) too (see investigation report paras. 93, 70 and 99, and 74 respectively), facts under (b) result from the testimony to the investigators rendered by Ms. S. And Ms. A. Paragraphs 92 and 93 of the investigation report state as follows:

> The IGO also notes that Ms. A. stated that the Applicant made sexual comments about the water jets in the pool being pleasurable for women between their legs, and that she found his comments inappropriate. The IGO further notes that in his response to the draft investigation findings, the Applicant denied that he made such comments. The IGO considers that Ms. A's comments are commensurate to the same behaviour Ms. S reported of the Applicant […] The IGO is of the view that although the Applicant could not recall making any further sexual comments, it is very likely that he did so.

36. In *Mbaigolmem* 2018-UNAT-819, the Appeals Tribunal held that the undisputed facts, the evidence of a credible report, coherent hearsay evidence pointing to a pattern of behavior, the consistency of the witness statements and the inherent probabilities of the situation, taken cumulatively, constituted a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred.

37. The Tribunal is aware that the sentences at stake were not heard by anyone other than the alleged victims, but considers that the testimony by the Complainant (on the sentences heard and on the meme shown) is reliable and credible, and it is corroborated by the behaviour of the Applicant in the same situation towards other colleagues.

Do the established facts legally amount to misconduct?

38. The sanction letter states that the established facts amount to misconduct as the Applicant failed to comply with his obligations under the rules.

39. Staff regulation 1.2(b) provides that

> [S]taff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but it is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

40. Under staff rule 10.1, a staff member commits misconduct when he or she fails to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant, and such failure may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

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

42. Paragraph 5.3 of UNHCR/HCP/2014/4 prohibits sexual harassment, defined as follows:

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

43. In the present case, the Tribunal finds that the Administration properly qualified the Applicant's conduct towards the Complainants as sexual harassment.

44. Indeed, the Applicant's actions as in the first three allegations constitute conduct (verbal or gesture of showing) with sexual connotations for its content nature that might reasonably be excepted or be perceived to cause offence or humiliation to the complaints. There is no doubt that the Applicant's conduct in relation to the complainants was unwelcome.

45. The Applicant's conduct in the fourth allegation, although not sexual, was also unwelcome. The Tribunal is however of the view that it cannot be perceived - following an objective evaluation - to cause offense or humiliation to a reasonable person. Indeed, as to the knocking on doors, the reaction of the alleged victim (who allegedly was scared and later not able to sleep) seems not reasonable as nothing, given the circumstances, happened that could frighten her or impede sleep later on, given in particular that she with no dispute recognized the voice of the colleague in the corridor when the knocking at the door occurred.

46. The Applicant's conduct was, for the first three charges, in violation of the rules cited above.

47. The Applicant defends himself invoking the specific circumstances of the events, which happened mostly out of working hours and in any case did not interfere with the work environment, and as a joke frame between friends.

48. The Tribunal is of the view that the facts under the first three charges amount to misconduct; indeed, the behavior of an adult - although in a jovial atmosphere - must take into account the reactions by people who dislike jokes and do not want to be annoyed; no doubt that all those facts were unwelcome by the addressees and that they are within the scope of the rules against sexual harassment.

49. In light of the above, the Tribunal finds that the Applicant committed misconduct as charged, with the exception of the allegation that concerned the knocking on doors.

Is the disciplinary measure applied proportionate to the offence committed?

50. Staff rule 10.2(a) provides that disciplinary measures may take one or more of the following forms (more than one measure may be imposed in each case):

(a) Written censure;

(b) Loss of one or more steps in grade;

(c) Deferment, for a specified period, of eligibility for salary increment;

(d) Suspension without pay for a specified period;

(e) Fine;

(f) Deferment, for a specified period, of eligibility for consideration for promotion;

(g) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(h) Separation from service, with notice or compensation *in lieu* of notice, and with or without termination indemnity;

(i) Dismissal.

51. The principle of proportionality in a disciplinary matter is set forth in staff rule 10.3(b), which provides that

> [A]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct. In determining the appropriate measure, each case is decided on its own merits, taking into account the particulars of the case, including aggravating and mitigating circumstances.

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

53. The Appeals Tribunal has held that the Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose (*George M'mbetsa Nyawa* 2020-UNAT-1024, para. 89 and *Toukolon* 2014-UNAT-407, para. 31).

54. In the present case, the sanction imposed on the Applicant was separation from service, with compensation *in lieu* of notice, and without termination indemnity.

55. According to the sanction letter, the Administration identified aggravating and mitigating circumstances and took them into consideration for the imposition of the disciplinary measure.

56. The Tribunal is of the view that, while in the assessment of accusations of harassment the test focuses on the conduct itself - and requires an objective examination as to whether it could be expected or perceived to cause offence or humiliation to a reasonable person, being not necessary instead to establish that the alleged offender was ill-intended (see *Belkahbbaz* UNAT-2018-873, para. 76) -, the lack of ill-will by the offender could be relevant instead in the assessment of the proportionality of the sanction.

57. In the case at hand, the facts under scrutiny (as limited in para. 44 above) cannot be considered severe, as they were made in jest and without the aim of harming or harassing anyone.

58. As to facts (a) and (b), they were definitely inappropriate. They are of a sexual nature because they refer to an intimate part of a woman's body. Regardless of whether the Applicant had sexual intent or interest when he spoke, the comments nonetheless were sexually suggestive.

59. However, these acts are to be evaluated in the factual circumstances, where colleagues were having a rest in a pool during a retreat; it seems they were euphoric jokes and quips, "*boutades*" by an elated person (like a boy in a school trip) with no intention to harm or harass or humiliate (and it is significant that only one of the addressees of the sentences found the words offensive).

60. The Tribunal is cognizant that, while typically involving a pattern of behavior, harassment can take the form of a single incident; it does not require that the alleged harasser was aware of the offending character of his or her behavior, but the conduct must be reasonably perceived as offense or humiliation; in the case, the

sentences were inappropriate but the Applicant immediately stopped after having seen the cold reaction to his "*boutade*".

61. As to allegation/charge (c), admitted as mentioned by the Applicant, the Tribunal notes that there is no evidence of any shocking content of the meme (not seen by the investigators and by decision makers and not in the records) and that the meme undisputedly contained only a sexually explicit (but not pornographic or prurient) picture.

62. Showing it was certainly inappropriate, but it was in a framework of humour amongst colleagues in moments of relaxation in the office, without sexual advances and in no targeted way.

63. According to the testimonies collected by the investigators, the nature of the meme was silly and fun, with sexual connotations only in the background.

64. Coming to the aggravating and mitigating factors, it has to be noted that the Applicant was reproached also for having blamed the victims of his conduct, saying their reactions were exaggerated and unreasonable. The Tribunal is of the view that the Applicant's victim blaming was only a way to question the legitimacy of the reaction, found exaggerated given the context, in order to defend himself and to demonstrate that there was no aim to offend the victim at all. It was not an aggravating factor.

65. In order to properly determine the sanction, the Tribunal considers that not all misconduct must result in termination, and that a gradual assessment of the possible measures should be undertaken on a case-by-case basis.

66. In accordance with staff rule 10.3(b), disciplinary measures imposed must be proportionate to the nature and the gravity of the misconduct involved.

67. The Secretary-General has broad discretion in determining the most appropriate disciplinary measure. UNAT has found that the Administration is best suited to select an adequate sanction within the limits stated by the respective

norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance.

68. The Dispute Tribunal's intervention is warranted only "where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity". (*Ganbold* 2019-UNAT-976)

69. The principle of proportionality is however a limitation to the Administration's discretionary power.

70. As to the evaluation of proportionality in UNAT case law, in *Rajan* 2017-UNAT-781, the Appeals Tribunal stated that dismissal is justified only if the facts determined the loss of trust by the Administration in the staff member (and this is not the case here under scrutiny).

71. When the disciplinary measure involves termination,

> the question to be answered in the final analysis is whether the staff member's conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable.

72. Similarly, in *Conteh* 2021-UNAT-1171, para. 51, the Appeals Tribunal recalled that the facts must "render the continuation of the employment relationship intolerable".

73. In his closing submissions, the Respondent refers specifically to *Conteh* within the context of the "zero tolerance" policy within the Organisation:

> 39. UNHCR's Policy on Harassment, Sexual Harassment, and Abuse of Authority was issued under the commitment that all international organizations must have "zero tolerance" for harassment in the workplace and will not tolerate conduct that can be construed as harassment, sexual harassment or abuse of authority…
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> …
>
> 41. The "zero tolerance" policy is aimed at providing a safe environment for all United Nations employees, free from discrimination on any grounds and from harassment at work

> including sexual harassment. The interpretation of the policy allows the Appeals Tribunal to conclude that, as a general rule, it aims to tackle the issue of harassment in the workplace mainly by means of two methods. The first and more immediate one has the corrective purpose of addressing any possible inappropriate behaviour and applying the necessary measures according to the situation. The second and broader one has the preventative aim of promoting a positive work environment and preventing inappropriate behaviour in the workplace.
>
> 42. Because suitable deterrent sanctions are meant to be applied to ensure that incidents of sexual harassment are not treated as trivial as a result of the "zero tolerance" policy, it is fundamental that this policy is widely disseminated to all relevant persons, as it was the case at UNHCR, where the respective issuance UNHCR's HCP/2014/4 was published on its website".

74. This Tribunal of the view that, in a legal assessment of the case, the reference to the administrative "zero tolerance" policy refers to the attitude of the Organization to promptly and seriously react towards harassment. As a matter of law, however, proportionality remains a principle of parity which cannot be derogated from by the employer.

75. As the Tribunal stated in *Sow* UNDT/2011/086 at para 58:

> [T]he principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offence, the penalty, in general should be comparable. In exercising such judgment, it would be necessary to ensure that, amongst other matters, the principle of consistency is applied. This means that where staff members commit the same or broadly similar offences, in general, the penalty should be the same; not necessarily identical but within a very narrow range of appropriateness. " Indeed, in Respondent's own Reply, it is acknowledged that: "[i]n order to evaluate the proportionality of any disciplinary measure, the Administration should duly consider the parity principle, which requires equality and consistency in the treatment of employees. Therefore, the Applicant's case was compared to other cases in which staff members were previously involved in sexual harassment.

76. Indeed, the discretion of the Administration is not unfettered since it is bound to exercise its discretionary authority in a manner consistent with the due process principles and the principle of proportionally.

77. These principles were described by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084 (paras. 39-40 and 42), as follows:

> In the present case, we are concerned with the application of the principle of proportionality by the Dispute Tribunal. In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take. …. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General. …. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision.

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

> [D]ue deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application. The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

79. In its case law, in sum, UNAT consistently states that the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result, and that the most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee, and his past conduct, the context of the violation and employer consistency (*Applicant* 2013-UNAT-280, para. 120. See also, *Abu Hamda* 2010-UNAT-022. 925 *Sanwidi* 2010-UNAT-084, para. 39. This principle was also confirmed in *Applicant* 2013-UNAT-280, para. 120; *Abu Jarbou* 2013-UNAT-292, para. 41; *Akello* 2013-UNAT-336, para. 41; *Samandarov* 2018-UNAT-859, para. 23; *Turkey* 2019-UNAT-955, para. 38. *Aqel* 2010-UNAT-040, para. 35; *Konate* 2013-UNAT-334, para. 21; *Shahatit* 2012-UNAT-195, para. 25; *Portillo Moya* 2015-UNAT-523, para. 22. *Rajan* 2017-UNAT-781, para. 48; *Negussie* 2016-UNAT-700, para. 28; *Ogorodnikov* 2015-UNAT-549, paras. 30-35. 928 and *Rajan* 2017-UNAT-781, para. 48).

80. Applying these principles to the case at hand, the incidents in this case carried no substantial effect towards the victim apart for a very limited nuisance (and soon after promptly stopped), and completely different from those considered in the cases recalled by the Respondent in his reply at para. 54, footnote 62.

81. The framework of the main facts is a retreat in an hotel abroad, in an afterhours context; the incident that happened in the office is episodic and without impact on the work relationship.

82. Some mitigating factors must be taken into account, such as the Applicant's unblemished work record, his admission to certain allegations, the cooperation from the outset of investigation, his apology to one of the victims.

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

84. In its practice, the Administration often applied the sanction of dismissal or separation from service with compensation *in lieu* and without termination indemnity for cases of sexual harassment that entailed touching intimate parts of a person's body, or for inappropriately touching colleagues in different occasions outside working hours, especially when the behaviour was repetitive or connected with other facts of misconduct (such as discriminatory or insulting comments, comments on physical appearance or abuse of authority).

85. If we examine the United Nations Secretariat Compendium on disciplinary measures, we note that there have been cases where the Administration applied only a censure for verbal and physical assault.

86. As to sexual harassment (not combined with other additional facts of misconduct), in its case law the Tribunal considers relevant factors such as whether the behaviour of the offender is objectively unlawful or harsh, fearful, repetitive, persistent, intolerable and incompatible with a direct and continuous supervision of the victim. These factors, especially if combined, although of course not relevant

for the misconduct to occur but only for the proportionality test, deserve the maximal sanction, that is the offender's dismissal or separation. However, absent globally those factors the sanction should be milder, especially when, like in the present case, none of them occurred.

87. The present case is similar on some points to *Gelsei* UNDT/2021/007 where the staff member shared multiple Facebook messages with a colleague that had sexual content or a clear sexual innuendo, and links to images of genitals and to a website hosting a sex shop, overcoming the boundaries of a professional conduct with a supervisee and sharing a room with her during a mission.

88. Among the distinctions between the two cases, however, is the fact that the memes shared in *Gelsei* were targeted to the complainant and were even more sexual in nature; the accused staff member engaged in exchanges of a sexual nature with a supervisee, so the disparity of power between him and the victim aggravated his responsibility for a conduct which was abusive and protracted for some time.

89. Ultimately, the Tribunal in *Gelsei* determined that the sanction imposed in that case (loss of steps, deferment of promotion and managerial action) was proportionate to the misconduct found to have occurred therein.

90. In *Gelsei,* therefore, although the conduct was much more serious, the sanction applied was more lenient than the one applied to the Applicant in the present case.

91. The Applicant in this was sanctioned harshly for less serious behaviour, which was essentially isolated, was not threatening the victims or persistently annoying them. Moreover, the Applicant immediately gave it up once he realized his behaviour was unwelcome. With reference to the case at hand, there is no evidence at all on record produced by the Respondent showing that those alleged facts concretely interfered with the work or created an intimidating, hostile or offensive environment; the conditions themselves of the harassment (perpetrated on non-working occasions and mostly in private locations, in an atmosphere of conviviality), without any ill intent by the Applicant can lead to the conclusion that the facts had no impact (or at least a very limited impact) on the work environment.

92. It is also relevant to recall the judgment by UNAT in case *Michaud* 2017-UNAT-761, where a staff member was only sanctioned with a written reprimand for allegedly similar conduct (in the case, making sexually suggestive inappropriate comments to a supervisee).

93. In light of the above considerations, the Tribunal finds that the disciplinary measure imposed in this case – separation from service with compensation *in lieu* of notice and no termination indemnity - is unfair and disproportionate to the established misconduct, which deserves a more clement disciplinary sanction. It should properly have been more lenient than *Gelsei* and more similar to that applied in *Michaud*.

94. Accordingly, the Tribunal rescinds the disciplinary measure imposed on the Applicant.

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

96. The Tribunal finds that in the present case the sanction imposed should be replaced by the disciplinary measure of a written censure.

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

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

99. As to the amount of the compensation *in lieu*, the above recalled article of the Dispute Tribunal's Statute sets a general framework for its determination, stating

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

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

Due process

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

102. The Applicant alleges that his due process rights were breached because he was not specifically interviewed on the allegations of misconduct which arose from Ms. A's testimony. However, as the Respondent notes, the irregularity concerns only two of the five instances of misconduct and moreover the Applicant was presented an opportunity to see the facts surrounding this allegation in the draft investigative findings during the investigation, and to reply to these investigation findings. These constitute fair and reasonable opportunities to confront and respond to these allegations. As such, the Applicant's due process rights were not substantively breached.

103. The Applicant also complains about the fact that the impugned meme was not seen by the investigators. This however cannot be considered as a flaw of the proceedings because the content of the picture was described in detail to the investigators and properly acknowledged.

Conclusion

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

a. The contested decision is hereby rescinded and replaced with a written censure.

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

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

(Signed)
Judge Francesco Buffa
Dated this 18th day of March 2022

Entered in the Register on this 18th day of March 2022
(Signed)
Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi