UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2020/035
Judgment No.: UNDT/2022/048
Date: 23 May 2022
Original: English

**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

**Counsel for Applicant:**
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**Counsel for Respondent:**
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## Introduction

1. By application filed on 3 August 2020, the Applicant, a staff member of the United Nations Office on Drugs and Crime ("UNODC"), contests the decision to impose on him the disciplinary sanction of loss of five steps, and deferment for two years of eligibility for consideration for promotion, as well as the managerial action of requiring him to take training to improve his gender awareness and managerial sensitivity towards handling harassment issues.

2. The contested decision was imposed on the following two counts:

   a. Count One: between February and August 2018, the Applicant made inappropriate comments towards the complainant ("V01"), which made her feel offended and humiliated; and

   b. Count Two: the Applicant failed to properly address V01's complaint about Mr. N.'s unwelcome behaviour, including of a sexual nature, thereby making V01 feel offended and intimidated.

3. The Tribunal finds that the Administration failed to establish to the requisite standard the facts on which the disciplinary measure was based except for those in relation to the Applicant (i) asking V01 how old she was; (ii) repeatedly offering to bring medicine to her apartment; and (iii) commenting on V01's weight. The Tribunal concludes, however, that the Applicant's alleged conduct is not of sufficient gravity to rise to the level of misconduct, and that the disciplinary measures imposed on him are neither warranted nor proportionate to the alleged offence.

4. Therefore, for the reasons set forth below, the Tribunal rescinds the disciplinary sanction and restores the Applicant's entitlements.

**Facts**

5. The Regional Section for Latin America and the Caribbean ("RSLAC"), UNODC, consists of one Chief, at the P-5 level, one Programme Officer at the P-4 level, one Programme Officer at the P-3 level, and two General Service staff members. In September 2017, the Applicant became the Chief of RSLAC, and the direct supervisor of the P-4 Programme Officer (Mr. N.).

6. On 14 February 2018, V01 joined RSLAC as a P-3 Programme Officer on a fixed-term appointment. Mr. N. was entrusted with her mentoring and training and acted as her first reporting officer ("FRO") until the time when the Applicant decided to become V01's FRO in August 2018.

*Alleged unwelcome comments towards V01*

7. On 14 February 2018, namely V01's first day at RSLAC, the Applicant met her in person and asked her in front of Mr. N. and in Spanish: "Como tu es joven. Cuantos años tienes?" [English translation: "You look young. How old are you?"].

8. On 14 March 2018, the Applicant proposed to Mr. N. and V01 to have dinner together. On the way to the restaurant in Mr. N.'s car, the Applicant made remarks in front of V01 about Latin American women.

9. On 28 March 2018, while V01 was on sick leave, she missed two phone calls from the Applicant to her via WhatsApp. When V01 returned the call, the Applicant told her that he lived not far from her place and that he could come by and bring medicine. The Applicant made the offer more than twice and V01 declined it each time.

10. On 11 April 2018, when V01 returned to the office after sick leave, the Applicant said to two colleagues from the Justice Section, UNODC, Ms. M. J. and Mr. S. P.: "yeah, [V01] was sick at home and called me" and added that she had told the Applicant on the phone: "I'm sick".

11. On 12 April 2018, the Applicant attended a culinary reception at the Colombian Embassy with V01 and Mr. K. P., Administrative Assistant, RSLAC. During the reception, when conversation over the topic of the "Me Too" movement came up, the Applicant said to V01 "why are women talking now about something that happened 20 years ago?"

12. Between April and May 2018, on a few occasions, the Applicant addressed V01 in Spanish and said: "te veo muy mal. Estas perdiendo peso" [English translation: "You look unwell. You are losing weight"]. The Applicant said that he would need to call V01's mother to take care of her if her health did not improve.

*Handling of V01's request for assistance concerning Mr. N.'s behaviour*

13. According to the Respondent, since 19 March 2018, V01 was not talking to Mr. N. and avoiding him in the office.

14. On 27 April 2018, V01 submitted to the Applicant her draft performance evaluation workplan.

15. On 30 April 2018, the Applicant provided V01 with oral and written feedback and asked her to formally submit it through Mr. N., pointing out that he was always available to re-discuss it. V01 was horrified by this, as she believed the Applicant was her FRO, and asked him to "stay" as her FRO. The Applicant refused her request because it was "like this as per the hierarchy" and other Regional Sections had the same arrangement.

16. According to the Applicant, at the end of April 2018, Mr. N. told him that he had had a meeting with V01 during which she had voiced some concerns about working culture and personal space but that the matter had been solved.

17. Nevertheless, in response to the above concerns, from 6 May 2018 the Applicant conducted regular weekly meetings of the RSLAC team. Moreover, and considering his good relations with V01, the Applicant discretely inquired with her about how the situation evolved and closely monitored any developments.

18. On 18 May 2018, the Applicant took V01 by the office's parking area and asked her what was going on with Mr. N. In reply, V01 explained in general terms her familiarity with and preference for Scandinavian working culture and avoided mentioning the actual problems she had with Mr. N., a national from a Latin American country.

19. On 27 June 2018, V01 told the Applicant that in March 2018, Mr. N. had, in her view, acted inappropriately and that she had had a meeting with him to tell him that she had a broad sense of personal space because she came from a different working culture. V01 claimed that, since then, Mr. N. was distant, did not communicate well with her, and ignored her. The Applicant considered that V01's grievance concerned inter-personal workplace differences with Mr. N. and he proposed talking to both of them to try to find a solution. He also indicated that if there was anything more that she had not told him, she could contact Human Resources or the Ombudsman.

20. On 24 July 2018, the Applicant received an email from V01 complaining about the manner in which Mr. N. had introduced her during a meeting with German officials. In that meeting, Mr. N. introduced V01 by saying: "she did a very good exam, and we have high expectation on her [sic]". Although the Applicant was on leave, he responded immediately.

21. As the existing problem between V01 and Mr. N. appeared to relate to their working relationship, the Applicant sought to solve the problem by having them discuss the issues to try to reach common ground. When he returned from leave, on 1 August 2018, the Applicant asked Mr. N. and V01 to stay after the weekly meeting to discuss the issues between them.

22. On that occasion, and as reflected in V01's complaint, V01 primarily raised concerns she had with her performance evaluation and problems she had with how Mr. N. communicated with and supervised her. Towards the end of that meeting, V01 also mentioned specific instances dating months back when Mr. N. invaded her personal space and made inappropriate physical contact.

23. Although the Applicant's main focus was to try to build a professional working relationship between V01 and Mr. N. going forward, the Applicant told Mr. N. to respect V01's personal space. He also strongly censured Mr. N.'s behaviour and reiterated to V01 that she could report matters to the Ombudsman or Human Resources. V01 and Mr. N. agreed to discuss performance and evaluation together with Mr. K. P., in a work session with the Staff Development Unit.

24. On 2 August 2018, V01 informed the Chief, Human Resources Management Service ("HRMS"), UNODC, about the meeting of 1 August 2018 and asked to meet with her.

25. On 6 August 2018, V01 met with the Chief, HRMS, UNODC, and conveyed to her that she would feel safer by filing a formal complaint if she could be "in a different position, away from Mr. [N.] and [the Applicant]".

26. On 9 August 2018, Mr. N., V01 and Mr. K. P. held a work session conducted by the Staff Development Unit. During that meeting, Mr. K. P. was asked to leave, and the remaining participants discussed V01's performance evaluation. When discussing V01's communication with Mr. N., V01 started crying. Immediately after the meeting, V01 went on extended certified sick leave until 4 October 2018.

27. By e-mail dated 16 August 2018, the Applicant informed V01 that Mr. N. had told him about the meeting of 9 August 2018 and V01 being placed on sick leave. The Applicant further wrote: "it would be better if I act as your [FRO]. Please let me know if this is fine for you (sic)". By e-mail dated 23 August 2018, copied to Mr. N., the Applicant informed V01 that from thereon he would act as her FRO.

28. When V01 returned from sick leave in October 2018, she was transferred to the Field Operations Management Support Section ("FOMSS"), UNODC. Her new FRO and SRO for the 2018-2019 performance evaluation period was the Chief, FOMSS.

29. On 6 December 2018, V01 filed a formal complaint against the Applicant and Mr. N. with the Office of Internal Oversight Services ("OIOS").

30. OIOS investigated V01's complaint that resulted in an investigation report dated 28 June 2019.

31. On 16 December 2019, the Applicant received a letter charging him with making inappropriate comments towards V01 and failing to address V01's complaint about Mr. N.'s unwelcome behaviour, including of a sexual nature.

32. On 13 February 2020, the Applicant responded to the allegations of misconduct.

33. By letter dated 11 May 2020, the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/DMSPC") notified the Applicant of her decision to impose on him the disciplinary measures and the managerial action referred to in para. 1 above.

34. On 8 October 2020, V01 filed an application, registered under Case No. UNDT/GVA/2020/049, contesting several decisions or actions in relation to the Administration's handling of her complaint of sexual harassment by her former supervisors, namely the Applicant and Mr. N.

35. By Judgment No. UNDT/2021/165 of 29 December 2021, the Tribunal rejected the above-mentioned V01's application.

**Procedural history**

36. On 3 August 2020, the Applicant filed the application mentioned in para. 1 above.

37. On 2 September 2020, the Respondent filed his reply.

38. On 10 November 2021, the present case was assigned to the undersigned Judge.

39. By Order No. 171 (GVA/2021) of 18 November 2021, the Tribunal convoked the parties to a case management discussion ("CMD"), which took place on 6 December 2021.

40. By Order No. 176 (GVA/2021) of 7 December 2021, the Tribunal instructed the parties, *inter alia*, to file their respective list of witnesses and to attend a virtual hearing on the merits from 24 January 2022 to 27 January 2022, commencing each day at 2.30 pm (Geneva time).

41. On 16 December 2021, the Applicant informed the Tribunal that, in addition to himself, he would like to call two witnesses and indicated his intention to call the complainant and Ms. L. G. L. if they were not called by the Respondent.

42. On the same day, the Respondent informed the Tribunal that he would like to call V01 as his sole witness for the oral hearing and confirmed her availability.

43. By Order No. 1 (GVA/2022) of 6 January 2022, the Tribunal notified the parties of a tentative schedule of appearances at the hearing.

*Witness Ms. L. G. L.*

44. By Order No. 1 (GVA/2022), the Tribunal also instructed the Applicant, *inter alia*, to inform the Tribunal about the availability of Ms. L. G. L. to attend the hearing by 10 January 2022.

45. On 10 January 2022, the Applicant filed a motion to request the Tribunal to call Ms. L. G. L. as a witness of the Respondent and to instruct the Respondent to confirm her availability to attend the hearing.

46. On 11 January 2022, the Respondent responded to the above motion requesting, *inter alia*, that the Applicant's motion of 10 January 2022 regarding the testimony of Ms. L. G. L. be dismissed.

47. By Order No. 2 (GVA/2022) of 12 January 2022, the Tribunal summoned Ms. L. G. L. to appear to give evidence at the hearing.

*V01's testimony*

48. On 5 January 2022, the Respondent requested that the Tribunal allow V01 to testify without the Applicant being present during her testimony.

49. On 6 January 2022, the Tribunal issued Order No. 1 (GVA/2022) notifying the parties of a tentative schedule for the hearing, which included the appearance of V01.

50. On 7 January 2022, the Tribunal ordered:

a. The Respondent to substantiate with medical evidence, by 11 January 2022, how the Applicant's presence in the virtual courtroom would cause V01 distress; and

b. The Applicant to respond to the Respondent's request concerning V01 by 14 January 2022.

51. On 11 January 2022, the Respondent requested a two-day extension to provide medical evidence regarding V01's testimony as the latter could not obtain it earlier.

52. By email dated 12 January 2022, the Tribunal granted the Respondent the requested extension and instructed him to file the required medical evidence by 13 January 2022.

53. On 13 January 2022, the Respondent filed an *ex parte* submission regarding V01's medical evidence and testimony with the five *ex parte* annexes below, confirming that V01 would not be testifying at the oral hearing, even if the Tribunal granted the Respondent's request concerning her referred to in para. 48 above:

a. Annex 1: V01's medical assessment of 1 December 2022 (document in German);

b. Annex 2: unofficial English Translation of Annex 1 above, showing that "[i]n the case of a direct encounter with the accused, a reactivation of the trauma or the psychological symptoms […] cannot be ruled out";

c. Annex 3: V01's letter to the undersigned Judge;

d. Annex 4: correspondence between V01 and the Respondent; and

e. Annex 5: Ms. L. G. L.'s out-of-office notification.

54. By Order No. 3 (GVA/2022) of 14 January 2022, the Tribunal:

a. Instructed the Geneva Registry to lift the *ex parte* status of the Respondent's 13 January 2022 main submission and of its annex 5;

b. Ordered the Respondent to redact annexes 2 and 3 to his submission and refile them on an *under seal* basis; and

c. Instructed the Applicant to file his response to the Respondent's request concerning V01 referred to in para. 48 above by 18 January 2022.

55. On 17 January 2022, the Applicant filed his response to the Respondent's request concerning V01 referred to in para. 48 above.

56. On the same day, the Applicant filed a motion concerning V01, requesting the Tribunal:

a. To provide him with the unredacted versions of the documents submitted by the Respondent or to have them redacted by the Tribunal;

b. To summon V01, reminding her of her obligation to testify and of the possible consequences of her refusal to do so, including being considered in contempt of court and potentially being referred for accountability;

c. Should V01 not appear as summoned, to expunge her complaint, interview record and all evidence provided by her from the record and to decide the case on the remainder of the evidence; and

d. In the alternative, to draw an adverse inference from V01's refusal to testify.

57. By Order No. 7 (GVA/2022) of 20 January 2022, the Tribunal denied the Respondent's request to allow V01 to testify without the Applicant being present during her testimony. To address V01's fear of a direct encounter with the Applicant, the Tribunal ordered that the Applicant turn off his camera during V01's testimony and that any cross-examination of V01 be conducted by the Applicant's Counsel, not by the Applicant.

58. By Order No. 8 (GVA/2022) of 20 January 2022, the Tribunal ordered, *inter alia*, that V01 appear to give evidence at the hearing on 25 January 2022 pursuant to Order No. 1 (GVA/2022) and rejected the Applicant's other requests listed in paras. 56. a., c. and d. above.

59. On 21 January 2022, the Respondent filed his submission regarding Orders No. 7 (GVA/2022) and No. 8 (GVA/2022) concerning V01's medical evidence and testimony, requesting the Tribunal to reconsider its instructions about the conditions under which V01 was to testify set out in Order No. 7 (GVA/2022). The Respondent specifically requested that appropriate accommodations be made to prevent even a non-physical encounter between V01 and the Applicant and that, in the event of oral testimony, V01 be allowed to have a staff member of her choice to attend the proceedings to provide her with emotional support.

60. In support of his request for reconsideration of Order No. 7 (GVA/2022), the Respondent provided the Tribunal with medical evidence, namely an attestation dated 21 January 2022 signed by the Medical Director of the Medical Service at the Vienna International Centre, showing that "from a medical perspective, [V01's] overall health can equally be harmed by a non-physical encounter, i.e., knowing that the subject is actively listening and present during her witness statement".

61. On 24 January 2022, the Applicant filed his response to the Respondent's motion dated 21 January 2022 pursuant to the Tribunal's Practice Direction No. 5.

62. By Order No. 11 (GVA/2022) of 25 January 2022, the Tribunal ordered that:

a. The Respondent's motion to reconsider Order No. 7 (GVA/2022) be granted;

b. The Applicant disconnect during V01's testimony scheduled on 25 January 2022, pursuant to Order No. 1 (GVA/2022);

c. The Geneva Registry provide the Applicant with a video recording of V01's testimony as soon as practicable;

d. V01 be available to be further cross-examined by the Applicant's Counsel on 27 January 2022; and

e. The Staff Counsellor, United Nations Office at Vienna ("UNOV"), participating at the hearing to support the Applicant, not intervene in the proceedings in any manner, not make any comments or gestures or communicate in any way with any of the participants, not disclose, use, show, convey, disseminate, reproduce, or in any way communicate without the Tribunal's prior authorization the information she obtained during the hearing.

*The Applicant's motion to adduce evidence of harm*

63. On 13 January 2022, the Applicant filed a motion requesting the Tribunal to admit the following eight documents into the record:

a. Email from Ms. B. S. to the Applicant, dated 24 June 2019, informing him of his selection to the temporary position of Regional Director (D-1 level), UNODC Dakar;

b. Email from Ms. C. W. to the Applicant, dated 2 December 2019, informing him of the extension of his temporary D-1 assignment;

c. Correspondence of the Applicant with Ms. M. K., dated 20 May 2020, informing the Applicant that he was being reassigned to his P-5 post in Vienna;

d. Email from Ms. M. K. to UNODC staff, dated 1 June 2020, informing them of the Applicant's reassignment from the D-1 post in Dakar to the P-5 post in Vienna;

e. Email from Ms. M. K. to the Applicant, dated 12 June 2020, informing him of his placement in the Regional/Country Director, D-1 roster for UNODC;

f. Correspondence of the Applicant with Ms. M. K., dated 17-20 July 2020, concerning nomination for the position of Resident Coordinator, Assessment Centre;

g. Correspondence of the Applicant with Ms. R. B. B., dated 29 October-2 November 2020, concerning the Applicant's shortlisting for a written assessment for the D-1 post of Chief of Branch, Political Affairs, United Nations Office of Counter-Terrorism; and

h. Correspondence of the Applicant with UNODC staff, dated 7 April-4 May 2021, concerning the Resident Coordinator/Humanitarian Coordinator Talent Pipeline.

64. On 18 January 2022, the Respondent filed his response to the Applicant's motion to adduce evidence.

65. By Order No. 9 (GVA/2022) of 24 January 2022, the Tribunal ordered that:

a. The Applicant's motion to adduce evidence of harm be granted; and

b. The eight documents listed in para. 63 above be part of the record of the case and included in the bundle of documents at the commencement of the hearing on the merits scheduled to start on 24 January 2022.

*Hearing*

66. The hearing on the merits was held from 24 January 2022 to 27 January 2022 via Microsoft Teams. Given the nature of certain allegations at issue, the oral proceedings were closed to the public.

67. On 24 January 2022, the hearing commenced with the parties' opening statements. Afterwards, the Tribunal heard the Applicant's testimony.

68. On 25 January 2022, V01 appeared to give testimony with the presence of the Staff Counsellor, UNOV. Pursuant to Order No. 11 (GVA/2022), the Applicant was not present during V01's testimony and was provided with a video recording of V01's testimony after the hearing. Having reviewed the video recording, the Applicant, on 26 January 2022, informed the Tribunal that he would not require the attendance of V01 for further cross-examination.

69. On 26 January 2022, the Tribunal heard testimony of three witnesses in the following order:

i. Ms. L. G. L.;

ii. Mr. K. P.; and

iii. Ms. M. J.

70. The parties made oral closing submissions on 27 January 2022.

*Production of evidence and written closing submission*

71. On 25 January 2022, during her testimony, V01 disclosed that she had secretly recorded the meeting of 1 August 2018 held between the Applicant, Mr. N. and herself. V01 further acknowledged that she prepared her complaint based on *inter alia* this recording. However, the recording itself was not part of the case record. The Tribunal thus instructed V01 to file the recording via the Respondent. V01 agreed but also mentioned that she might have deleted it. On 27 January 2022, the Respondent informed the Tribunal that V01 had confirmed that she did not have the recording.

72. Having reviewed the parties' submissions, the Tribunal found it also necessary, for a fair and expeditious disposal of the case, to instruct:

a. The Applicant to file a document showing his absence from the office between 14 February and 31 August 2018; and

b. The Respondent to file a document showing V01's absence from the office during the same period.

73. On 27 January 2022, the Tribunal conveyed its above instructions to the parties during the hearing.

74. Accordingly, on 28 January 2022, the Applicant filed a document showing his absence from the office between 14 February and 31 August 2018. On the same day, the Respondent filed a document showing V01's absence from the office from 14 February to 31 December 2018.

75. By Order No. 13 (GVA/2022) of 31 January 2022, the Tribunal ordered that:

a. The two documents filed by the parties and referred to in para. 72 above be part of the record of this case; and

b. By 21 February 2022, the parties file their respective closing submission in writing.

76. On 21 February 2022, the parties filed their respective written closing submission.

**Parties' submissions**

77. The Applicant's principal contentions are:

a. The facts upon which the disciplinary sanction was based have not been established to the standard of the preponderance of evidence:

i. The sanction letter is almost exclusively based on V01's complaint, despite various inconsistencies and indications of bias. A different interpretation of the facts should have been retained and is indeed much more probable and reasonable; and

ii. The Applicant vigorously denies some of those facts as inaccurately reported.

b. The established facts do not amount to misconduct:

i. The alleged unwelcome comments cannot be considered improper, nor can they reasonably be expected to cause offence, especially as some of them did not relate to V01 personally; and

ii. His comments in relation to V01's grievances do not constitute harassment or abuse of authority. On the opposite, as a supervisor, he took several appropriate measures to solve what he understood to be interpersonal and cultural misunderstandings.

c. Even if it were to be found that the facts were established to the appropriate standard and that they amount to misconduct taking into account objective and subjective elements, the sanction is not proportionate to the offence:

i. The practice of the Secretary-General in disciplinary matters and cases of possible criminal behaviour between 2009 and 2018 shows that in no comparable case was such a severe sanction imposed; and

ii. The sanction letter did not consider correctly mitigating and aggravating factors.

78. The Respondent's principal contentions are:

a. The facts are established by a preponderance of evidence:

i. The Applicant does not address the evidence on record that supported the USG/DMSPC's conclusion that V01's version of events is more credible as well as the other corroborative evidence on the record; and

ii. The Applicant does not address the claims of V01 regarding his statements and comments and seeks to minimize his knowledge of and responsibility to take action in relation to Mr. N.'s conduct.

b. The Applicant's conduct constitutes harassment of and abuse of authority towards V01;

c. The disciplinary measure is proportionate to the offence; and

d. The Applicant's procedural fairness rights were respected.

**Consideration**

*Preliminary issue: anonymity*

79. The present case concerns a disciplinary sanction imposed on a UNODC staff member following a complaint made by another staff member (V01) related, *inter alia*, to his alleged failure to take proper actions against one of his supervisees who had allegedly sexually harassed the complainant.

80. Moreover, as the Applicant pointed out, in V01's case against the Organization, which was registered under Case No. UNDT/GVA/2020/049, she inaccurately claimed that the Applicant sexually harassed her, a type of misconduct for which he was neither charged nor sanctioned. V01 also maintained such misrepresentation during her testimony in the present case.

81. Therefore, as a preliminary matter, the Tribunal needs to examine whether the names of the Applicant, the complainant and all other individuals involved in the present judgment should be anonymized.

82. In this regard, the Tribunal notes that art. 11.6 of its Statute states that "[t]he judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal."

83. It is well-settled law that "the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality" (see *Buff* 2016-UNAT-639, para. 21). Therefore, any deviation from the principles of transparency and accountability can only be granted if there are exceptional circumstances (see *Buff*).

84. The Tribunal considers that a false allegation of sexual harassment against the Applicant and the sensitive information regarding V01's medical history in the present case constitute exceptional circumstances warranting anonymity. Therefore, to protect the reputation of the Applicant and V01, the Tribunal finds it appropriate to anonymize the names of all persons involved in the present case.

85. Accordingly, the Tribunal decides to anonymize in the present judgment the names of all individuals involved including the Applicant and V01.

*Standard of review in disciplinary cases*

86. In the present case, the Applicant challenges the Administration's decision to impose on him the disciplinary sanction of loss of five steps, and deferment for two years of eligibility for consideration for promotion, as well as the managerial action of requiring him to take training.

87. Judicial review of a disciplinary case requires the Tribunal to consider the evidence adduced and the procedures followed during the course of an investigation by the Administration (see, e.g., *Applicant* 2013-UNAT-302, para. 29). In this context, the consistent jurisprudence of the Appeals Tribunal (see, e.g., *Haniya* 2010-UNAT-024; *Wishah* 2015-UNAT-537; *Ladu* 2019-UNAT-956; *Nyawa* 2020-UNAT-1024) 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 sanction applied is proportionate to the offence; and

d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

88. The Tribunal will address below these issues in turn.

*Whether the facts on which the disciplinary measure was based have been established*

89. The Tribunal recalls that "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred" (see *Turkey* 2019-UNAT-955, para. 32; *Miyzed* 2015-UNAT-550, para. 18).

90. The disciplinary measures in the present case are loss of five steps, and deferment for two years of eligibility for consideration for promotion. It is well-settled that the standard of proof applicable to a case where the disciplinary measures do not include separation or dismissal is that of preponderance of evidence, i.e., more likely than not that the facts and circumstances underlying the misconduct exist or have occurred (see sec. 9.1(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process); see also *Suleiman* 2020-UNAT-1006, para. 10).

91. Moreover, in determining whether the standard of proof has been met, the Tribunal "is not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the Secretary-General". Thus, it will "only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based" (see *Nadasan* 2019-UNAT-918, para. 40). In this regard, the Tribunal notes that the Applicant's comment about "smiling more" was not one of the episodes that the sanction letter found to have constituted misconduct. Therefore, it will not examine whether this fact has been established to the requisite standard or not.

92. In the present case, the facts on which the disciplinary measures were based are twofold:

a. Between February and August 2018, the Applicant making inappropriate comments towards V01, which made her feel offended and humiliated, by one or more of the following:

i. Asking her how old she was;

ii. On one occasion when V01 was sick, repeatedly telling her that he would come to her apartment after work to bring medicine or to cook for her;

iii. Making denigrating remarks towards women in Latin America and complainants in the "MeToo" movement;

iv. Making inappropriate remarks about V01's sick leave to other colleagues; and/or

v. Commenting on her weight and that her mother should come and take care of her.

b. The Applicant failing to properly address V01's complaint about Mr. N.'s unwelcome behaviour, including of a sexual nature, thereby making V01 feel offended and intimidated, by one or more of the following:

i. Saying to V01 that Mr. N.'s behaviour was not serious and she might have misunderstood it as well as the Latin American culture; and/or

ii. Saying to V01 and Mr. N. that he would be displeased if they did not resolve the issue in-house between the two of them.

93. The Tribunal will examine in turn whether each of the facts on which the disciplinary measures were based have been established to the standard of "preponderance of evidence" or not.

94. Prior to this, the Tribunal finds it necessary to examine the credibility of the evidence.

Credibility of the evidence

95. The Tribunal notes that in reaching the contested decision, the Administration relied heavily on V01's account, which, according to it, is corroborated by Ms. L. G. L.'s hearsay evidence. Given that V01 and the Applicant presented diametrically divergent accounts of the facts at issue, the credibility of the Applicant's, V01's and Ms. L. G. L.'s evidence is of significant importance to the present case.

*The Applicant's testimony*

96. The Tribunal recalls that it is not for the Applicant to disprove the facts alleged against him and he is presumed innocent (see, e.g., *Mapuranga* UNDT/2018/132, para. 110; *Bagot* 2017-UNAT-718, para. 47).

97. Having reviewed the case record on the file and heard the Applicant's testimony at the hearing, the Tribunal considers that he offered a consistent and plausible explanation in relation to the facts at issue throughout the disciplinary and judicial proceedings.

98. Nevertheless, the Tribunal will critically assess the Applicant's account in relation to each specific incident at issue in light of other evidence on record such as the testimony provided by third parties, the written evidence in the casefile and V01's contemporaneous behaviours.

*V01's evidence*

99. The Tribunal finds that a number of elements in this case cast serious doubts on the credibility of V01 and her motivation for filing a complaint.

100. First, having reviewed the evidence on record, the Tribunal notes various inconsistencies in V01's evidence throughout the investigation, disciplinary process, and the judicial proceedings. For instance, V01 testified before the Tribunal twice in a very affirmative manner that the Applicant said to her that "I am alone. You are alone. We have to take care of each other" whereas, according to her complaint, the Applicant stated that "Look, you are alone, I am alone, [Mr. N.] is alone. We have to support each other".

101. Also, before the Tribunal she repeatedly testified that the Applicant had threatened her not to talk to anybody, with no exceptions, whereas, according to her complaint, the Applicant stated that he would be upset "if someone comes to ask me what problems we have, unless it is the Ombudsman, or the personnel". Another example is that while she told her friend, Ms. L. G. L., that for the first few months she thought that the Applicant was a good person, she testified before the Tribunal that he had harassed her on her first day in RSLAC and sexually harassed her within six weeks of her joining the section.

102. The Tribunal considers that these inconsistencies in V01's account raise doubts about the credibility of her evidence.

103. Second, the Tribunal notes that V01's presentation or interpretation of the facts is not always objective and that she exhibited a bias towards the Applicant. Indeed, V01 incorrectly claimed in Case No. UNDT/GVA/2020/049 that the Applicant sexually harassed her and maintained such misrepresentation during her testimony before the Tribunal. In fact, her complaint contained no allegations of a sexual nature against the Applicant.

104. Moreover, on several occasions, V01 misrepresented the Applicant's comments in a negative manner. For example, during her testimony, in response to a question regarding whether the Applicant's comments on her losing weight could be motivated by a genuine concern about her well-being, she stated that "No, no, because I am a healthy person" whereas her own complaint, her testimony and the Applicant's testimony show that she looked unwell at the time of the incident at issue and she had been sick on several occasions in her first few months with the section. Another instance is when the Applicant defended her in front of senior managers, she claimed to have been surprised in her complaint. Also, when the Applicant told her repeatedly that she could go to the Ombudsman or Human Resources, she said that he said it mockingly.

105. In the Tribunal's view, there are elements showing V01's lack of objectivity and bias towards the Applicant, which also compromise her credibility.

106. Finally, there is also an indication of V01's motive to seek revenge against the Applicant for his alleged mishandling of her complaint against Mr. N. Indeed, the WhatsApp exchanges between V01 and her friends dated 27 July 2018 show that before filing her complaint, V01 told her friends that if she filed a formal complaint, even if it was inconclusive, it would still ruin the Applicant's and Mr. N's careers because it would remain in their file. This is further supported by Ms. L. G. L.'s testimony before the investigation panel that following the Applicant's handling of her situation with Mr. N., V01 no longer considered the Applicant "a good person", and she was almost angrier with him than with Mr. N. In the Tribunal's view, V01's retaliatory motive also undermines her credibility.

*Ms. L. G. L.'s hearsay evidence*

107. The Tribunal notes that the Administration sought to use Ms. L. G. L.'s hearsay evidence to corroborate V01's evidence. However, the Tribunal considers that Ms. L. G. L.'s hearsay evidence not only cannot remedy V01's defective evidence but also does not corroborate V01's testimony.

108. First, it is undisputed that Ms. L. G. L.'s testimony in relation to certain specific incidents at issue is purely hearsay and based on V01's account of the facts. Indeed, Ms. L. G. L. never witnessed any of the alleged comments from the Applicant or the behaviour of Mr. N. towards V01. The vague dates in relation to certain incidents she provided during her testimony suggest that she was told about the allegations months after they happened.

109. Moreover, in her interview with OIOS and in her testimony before the Tribunal, Ms. L. G. L. was unable to provide any precision about the context in which the events took place and their timing.

110. In addition, the evidence on record leads to conclude that Ms. L. G. L. might be biased towards the Applicant due to professional differences. Indeed, she testified that she did not have a "good impression" about the Applicant for professional reasons and that she did not appreciate the Applicant's communication style.

111. Accordingly, the Tribunal has serious doubts about the credibility of V01's evidence and Ms. L. G. L.'s hearsay evidence, such that little weight can be given to their evidence unless corroborated by additional evidence such as the testimony provided by third parties who were present when the incidents at issue took place, written evidence and V01's contemporaneous behaviours.

<u>Alleged unwelcome comments towards V01</u>

*Asking V01 how old she was*

112. The sanction letter states that "on 14 February 2018, V01's first day at RSLAC, the Applicant met V01 in person and asked her in front of Mr. N.: 'how old are you?', which shocked V01 and made her feel uncomfortable.

113. During the hearing, the Applicant clarified that he addressed V01 in Spanish by asking her "Como tu es joven. Cuantos años tienes?" [English translation: "You look young. How old are you?"].

114. The Tribunal notes that the Applicant did not dispute this fact and confirmed that on V01's first day at RSLAC, upon being first introduced to V01 and in the presence of Mr. N., he asked V01 about her age, stating that she looked "young".

115. Therefore, the fact in relation to this incident has been established.

*Offering to help V01 when she was sick*

116. The sanction letter states that on one occasion when V01 was sick, the Applicant repeatedly told her that he would come to her apartment after work to bring medicine or to cook for her. Specifically speaking:

> On 28 March 2018, while V01 was on sick leave, she missed two phone calls from [the Applicant] to her via WhatsApp. When V01 returned the call, [the Applicant] told her that [he] lived not far from her place and that [he] could come by and bring medicines or fruit. When V01 said she did not need anything, [the Applicant] said: "Look, you are alone, I am alone, [Mr. N.] is alone. We have to support each other, otherwise this becomes unbearable". [The Applicant] then said to V01 that [he] could come after work to cook dinner for her, which made her feel extremely uncomfortable.

117. The Applicant argues that the facts in relation to this incident are quite different from what V01 alleged. He acknowledges that he offered to bring food or medicine to V01 and that he mentioned that he did not live far to show that it would be easy for him to assist her. However, he denied other facts. Specifically, the Applicant pointed out that while he once told V01 that him, her and Mr. N. had to support each other, this was on another occasion and not during the call when V01 was sick. He also denies that he offered V01 to cook in her house. Rather, he offered to bring her cooked food. Moreover, relying on the WhatsApp conversations between the Applicant and V01 dated 27 March, 28 March, 3 April and 4 April 2018, the Applicant argues that he was not insistent as he only asked V01 discreetly if she needed anything three times over the course of nine days.

118. The Respondent submits that contrary to the Applicant's contention, his WhatsApp messages to V01 between March and April 2018 are not conclusive of whether he insisted on coming to her apartment since V01's account is that during a phone call with her, the Applicant did so.

119. During the hearing, the Applicant provided a detailed description of the context in which his offer to help was made, stating that he was concerned that V01, being at home alone and sick, would not have enough food for the weekend considering that it was Easter period when in Austria shops are usually closed and that he was going to travel to Italy. V01 testified that while she was sick, the Applicant had insistently offered to go to her apartment and cook for her and that she had to refuse his offer four times.

120. The Tribunal notes that while it is undisputed that the Applicant repeatedly offered to bring food or medicine to V01 when she was sick, there is a discrepancy between the parties' description regarding whether the Applicant insistently offered to go to V01's apartment to cook for her.

121. The Tribunal finds that the Applicant's version of this incident is credible for the following reasons. First, the Applicant's testimony is clear and convincing as he kept the same version of events throughout the entire proceedings. In contrast, V01's presentation of the context and manner of the Applicant's comments is not always consistent in this aspect. For instance, as pointed out in para. 100, V01 testified before the Tribunal twice in a very affirmative manner that the Applicant said to her that "I am alone. You are alone. We have to take care of each other". However, according to her complaint, the Applicant stated that "Look, you are alone, I am alone, [Mr. N.] is alone. We have to support each other".

122. Second, the Applicant's testimony is corroborated by the contemporaneous written record of the WhatsApp exchange between the Applicant and V01. It shows that the Applicant offered to bring her food or medicine unobtrusively and tactfully without inappropriate insistence. Indeed, the evidence on record shows that the Applicant asked three times over the course of nine days (including the Easter holidays) if V01 needed help in a polite and respectful way. In addition, the Respondent does not dispute the authenticity and reliability of this piece of written evidence.

123. Third, the Tribunal is not convinced by the Respondent's interpretation of the fact that the Applicant insistently offered to go to V01's apartment to cook for her. Indeed, it would be unreasonable to want to cook in the house of someone who was sick, particularly considering that V01 confirmed the next day that she had a virus and that common sense dictates avoiding contact to minimize the risk of infection. Thus, it is far more plausible that the Applicant just offered to bring her (cooked) food or medicine as he had done in writing.

124. Therefore, the Tribunal finds that there is no evidence that the Applicant insistently offered to go to V01's apartment to cook for her. Rather, what the Administration has established is the fact that the Applicant repeatedly offered to bring medicine to her apartment.

*Making denigrating remarks towards women in Latin America*

125. According to the sanction letter, the Applicant made denigrating remarks towards women in Latin America. Specifically speaking,

> On 14 March 2018, around 7:00 p.m., [the Applicant] proposed to [Mr. N.] and V01 to have a dinner together. On the way to a restaurant in [Mr. N.'s] car, he asked V01 what she thought about "Latin women." [The Applicant] made remarks in front of V01 about Latin women, namely, that he had never seen a beautiful Brazilian woman, that Mexican women were "gringas", and that Peruvians were not pretty. V01 was very surprised by [the Applicant's] remarks, which V01 perceived to be inappropriate and offensive.

126. The Applicant argues that he did not refer to the physical appearance of Latin American women during an informal conversation, outside the office. He claims that he rather discussed the femininity of Latin American women as a cultural phenomenon of gender. According to the Applicant, he said that contrary to the common imaginary conveyed by media, he had not met any Brazilian women who communicated the same femininity as Colombian or Venezuelan women. The Applicant denies mentioning Peruvian women. Moreover, the Applicant contends that his comments are not denigrating.

127. The Respondent contends that the Applicant admitted saying to V01 that Brazilian women "were not particularly good looking, that [he] was not particularly impressed on the opposite of the press" in the context of a conversation about women in Latin America. According to the Respondent, this contradicts the Applicant's assertion in the application that he did not refer to physical appearance of Latin American women. Moreover, the Applicant's assertion that his comments about Latin women are not "denigrating" ignores that he objectified Latin American women by starting conversations with colleagues about "which Latin countries had prettier women".

128. The evidence on record, including the testimonies provided at the hearing, shows that on the evening of 14 March 2018, the Applicant, V01 and Mr. N. went out to have a pizza together. On the way to the restaurant, Mr. N. started the conversation by mentioning that the Applicant's former wife is Colombian. Subsequently, the Applicant made some observations about Latin American women, i.e., the way they express their femininity. He mentioned that Colombian women were very sensual and that, from his point of view, Mexican women were not so feminine in their style as they "copied" the North American way. He also said that he did not find Brazilian women particularly beautiful as portrayed by the press.

129. Recalling that the Applicant was sanctioned, *inter alia*, for having made denigrating remarks towards women in Latin America, the Tribunal considers that the core issue in relation to this incident is whether the Applicant's above-mentioned comments regarding Latin American women could be considered as "denigrating remarks".

130. In this respect, the Tribunal notes that the ordinary meaning of "denigrate" as defined by the Oxford English Dictionary is "[t]o blacken, sully, or stain (character or reputation); to blacken the reputation of (a person, etc.); to defame." The Tribunal finds no evidence on record that the Applicant blackened the reputation of or defamed Latin American women. Indeed, the Applicant's comments on the femininity of Latin American women or the statement that he did not find women from a country particularly beautiful as conveyed by the media could not have reached the level of "denigrating remarks". Moreover, in her complaint, V01 did not allege that the Applicant defamed or blackened the reputation of Latin American women.

131. Accordingly, the Tribunal finds that the Administration failed to establish to the requisite standard that the Applicant made denigrating remarks towards women in Latin America.

*Making denigrating remarks towards complainants in the "MeToo" movement*

132. According to the sanction letter, the Applicant made denigrating remarks towards complainants in the "MeToo" movement. Specifically speaking:

> On 12 April 2018, [the Applicant] attended a culinary reception at the Colombia Embassy with V01 and Mr. [K. P.], Administrative Assistant, RSLAC. During the reception, when the topic of the "Me Too" movement came up during a conversation, [the Applicant] expressed a negative opinion about it and displayed contempt towards women "talking now about something that happened 20 years ago", which made V01 think that she could not "count on telling [him] anything about" Mr. N.'s unwelcome behaviour towards her.

133. The Applicant consistently maintains that he did not criticise the "MeToo" movement as a whole or denigrate its members but rather expressed his concern that infighting within the "MeToo" movement was affecting its image. According to the Applicant, V01's averment that he expressed contempt towards women participating in the "MeToo" movement is not supported by any corroborating evidence. Moreover, the Applicant argues that Mr. K. P., who was present at the event, did not remember anything out of the ordinary and that he would have remembered if the Applicant had expressed contempt towards women of that movement.

134. In response, the Respondent points out that during his OIOS interview, the Applicant confirmed that he said to V01: "why are women talking now about something that happened 20 years ago?" In his view, this comment squarely falls as an example of a "denigrating" comment about the complainants in the "MeToo" movement. Moreover, the Respondent contends that Mr. K. P.'s statement that he did not recall the Applicant's comments is not exculpatory and the Applicant's assertion that Mr. K. P. would have remembered it had the incident occurred is pure speculation.

135. During the hearing, the Applicant clarified the context of his above-mentioned comment by referring to the case of the Italian actress Ms. A. A. who disclosed, in 2018, that she had been raped by Mr. H. W. during the Cannes International Film Festival in 1997 (i.e., approximately 20 years prior). However, Ms. A. A. was not taken seriously in Italy, with the public questioning the veracity of her statements given the time elapsed.

136. The Tribunal notes that the parties do not dispute the fact that, during a culinary reception, the Applicant stated "why are women talking now about something that happened 20 years ago?", but rather dispute the interpretation and characterization of this comment, in particular, whether it would amount to denigrating remarks towards complainants in the "MeToo" movement.

137. The Tribunal considers that the Applicant's comment can have different interpretations. To ascertain the true meaning of his comment, its context and the Applicant's intention should be considered. Having reviewed the Applicant's testimony before both the investigation panel and during the hearing, the Tribunal considers that he expressed his doubts and concerns about "women speaking out 20 years later" as this would have an impact on the credibility of the movement. Therefore, the Tribunal tends to interpret the Applicant's above-mentioned comment as meaning that women should have spoken out earlier rather than as a display of contempt.

138. Moreover, the Tribunal finds no evidence on record that the Applicant made denigrating remarks towards complainants in the "MeToo" movement. Indeed, there is no indication showing that the Applicant blackened the reputation of or defamed women in the "MeToo" movement. Relying on Ms. L. G. L.'s hearsay testimony, the Administration considered V01's allegation that the Applicant expressed contempt towards women participating in the "MeToo" movement corroborated. However, Ms. L. G. L. clarified that she could not remember the specifics or the exact words but that V01 had told her that the Applicant was "mocking the movement" and "was dismissive of the movement". Furthermore, Mr. K. P., who is more objective than V01 as he is not involved as a party in the complaint and was present when the Applicant made his comments about the "MeToo" movement, did not remember anything out of the ordinary.

139. In addition, in her complaint, V01 did not allege that the Applicant defamed or blackened the reputation of women in relation to the "MeToo" movement but rather expressed a contemptuous and negative opinion. Therefore, it is inaccurate for the Respondent to interpret the Applicant's comment as being "denigrating".

140. Accordingly, the Tribunal finds that the Administration failed to establish to the requisite standard that the Applicant made denigrating remarks towards complainants in the "MeToo" movement.

*Making inappropriate remarks about V01's sick leave to other colleagues*

141. The sanction letter states that the Applicant made inappropriate remarks about V01's sick leave to other colleagues. Specifically speaking:

> On 11 April 2018, when V01 returned to the office after sick leave, [the Applicant] said to two colleagues from the Justice Section, UNODC, Ms. [M. J.] and Mr. S. P., with a mocking voice: "yeah, [V01] was sick at home and called me", and added that she had told [the Applicant] on the phone: "I'm sick" while moaning. V01 felt humiliated in front of her colleagues.

142. The Applicant argues that he does not recall saying anything like this and if he had made any such comment, it would have been in a caring and supportive manner. He further contends that Mr. S. P. and Ms. M. J., who were present during the conversation, do not corroborate V01's testimony. In particular, Mr. S. P. did not remember the incident. Ms. M. J. recalled it but said that it "was more like defending her", that "nothing was really striking [her] like it was not shocking", that "the way it was said was like someone a bit taking care of you like, no worries. I told her not to worry and to stay home". Ms. M. J. did not "recall any specific voice or tone", and that "it didn't seem negative to [her] in the context in the moment".

143. The Respondent submits that the statement of Ms. M. J. is not dispositive because while confirming that the Applicant mentioned V01's sick leave to her, Ms. M. J. could not recall "any specific tone or voice" used by the Applicant in describing V01's sick leave. In his view, the Applicant's assertion that Mr. S. P. or Ms. M. J. would have remembered the incident had it occurred as alleged by V01 is speculative.

144. The Tribunal notes that before the investigation panel, Ms. M. J. stated that the Applicant's comment "was more like defending [V01]", "like someone a bit taking care of you", like "trying to help her and to protect her because she wanted to go back to the office" and that she did not "recall any specific voice or tone". Ms. M. J.'s testimony before the Tribunal is consistent with her interview record before the investigation panel. Moreover, during her testimony, when asked whether the Applicant appeared to be mocking V01, Ms. M. J. conclusively stated "no, not at all […] He said it the way I could have said it." She further stated that she would have remembered if the Applicant had mocked V01 but that "it was absolutely not the case".

145. In the Tribunal's view, Ms. M. J.'s testimony is reliable and objective. Indeed, Ms. M. J. was present when the Applicant made the comments at issue, and she is a third party who did not demonstrate any favour towards the Applicant nor any bias against V01. Indeed, during the hearing, Ms. M. J. mentioned that she had a couple of meetings with V01, and it was obvious that at that moment, V01 looked tired and was not very happy to work in her office as she asked her whether there were any positions available in her section.

146. Therefore, the Tribunal finds that Ms. M. J.'s testimony shows that the Applicant's remarks about V01's sick leave to other colleagues were not inappropriate and more like defending and trying to help V01. This casts doubt on V01's subjective descriptions of this event in her complaint. As such, the Tribunal further considers that the Administration erroneously relied upon V01's allegations and disregarded the testimony of Ms. M. J.

147. Accordingly, the Tribunal concludes that the Administration failed to establish to the requisite standard that the Applicant made inappropriate remarks about V01's sick leave to other colleagues.

*Commenting on V01's weight and that her mother should come and take care of her*

148. The sanction letter states that the Applicant commented on V01's weight and that her mother should come and take care of her. Specifically speaking:

> Between April and May 2018, on a few occasions, [the Applicant] looked at V01 "from down up" and said that she was "thin" or "skinny". [The Applicant] asked if she had lost weight and [he] said that [he] needed to call V01's mother to take care of her as if she were a child unable to take care of herself. V01 was annoyed and offended by [the Applicant's] comment.

149. In this respect, the Tribunal notes that before the investigation panel, the Applicant admitted saying to V01 that she was looking thin and skinny. During the hearing, the Applicant admitted having commented on V01's weight by addressing V01 in Spanish: *"Estas muy delgada. Te veo muy mal. Estas perdiendo peso."* The English translation of this comment is "You look skinny. You are looking unwell. You are losing weight". Moreover, the Applicant does not dispute that he said to V01 that he should call her mother to take care of her if her health did not improve and explained that he was only concerned about her health and tried to cheer her up. Indeed, before the investigation panel, the Applicant admitted saying to V01: "Look, if you continue like that we will have to ask your mother to take care of you and cook for you, make sure you are eating".

150. Therefore, the Tribunal finds that the Administration established the fact that the Applicant commented on V01's weight and that her mother should come and take care of her if her health did not improve.

<u>Alleged failure to properly handle V01's request for assistance concerning Mr. N.'s behaviour</u>

151. The sanction letter states in its relevant part that:

> [The Applicant] failed to properly address V01's complaint about Mr. N.'s unwelcome behavior, including of a sexual nature, thereby making V01 [feel] offended and intimidated, by one or more of the following: (a) saying to V01 that Mr. N.'s behaviour was not serious and she might have misunderstood Mr. N.'s behavior and the Latin American culture; and/or (b) saying to V01 and Mr. N. that he would be displeased if they did not resolve the issue in-house between the two of them.

152. The Applicant submits that the alleged failure to properly handle V01's request for assistance concerning Mr. N.'s behaviour completely collapses months of time and unreasonably judges his conduct over the period from February to August 2018, based on the information he only acquired, partially, on 1 August 2018. According to the Applicant, V01 never told him that Mr. N. had sexually harassed her, and he never told V01 that sexual harassment was not serious.

153. The Respondent argues that the Applicant's contention that he did not know about possible sexual harassment of V01 by Mr. N. is not consistent with the evidence. In his view, the evidence from V01 indicates that circumstances pointing to the possible sexual nature of Mr. N.'s conduct were brought to the Applicant's attention during the 27 June 2018 meeting. Furthermore, the Respondent submits that since problems were detected in May 2018, the Applicant displayed a pattern of shifting blame on V01 for her reported problems and giving her opinion/advice that downplayed the seriousness of her problems.

*Saying to V01 that Mr. N.'s behaviour was not serious and that she might have misunderstood his behaviour and Latin American culture*

154. The Tribunal notes that before the investigation panel, the Applicant admitted telling V01 that her issues with her FRO were not a "disaster" and that he "[could] not think that there [was] nothing more than just misunderstanding and that the guy ha[d] no other intention than being friendly with [V01] like [with the Applicant]". Moreover, before the investigation panel and during the hearing, the Applicant confirmed having told V01 that she needed to understand the Latin American culture and to be "less from the North and more from the South", V01 being from Spain after all.

*Saying to V01 and Mr. N. that the Applicant would be displeased if they did not resolve the issue inhouse between the two of them*

155. The Tribunal notes that the Applicant admitted that during the 1 August 2018 meeting, he wanted Mr. N. and V01 to solve the issue between them when he was confronted with two members of his staff hurling accusations of relatively petty workplace incidents. He stated that he would be displeased if there was gossip or if third parties were dragged into the situation.

156. Accordingly, the Tribunal finds that the Administration established the fact that the Applicant said to V01 that Mr. N.'s behaviour was not serious, and she might have misunderstood Mr. N.'s behaviour and the Latin American culture and saying to V01 and Mr. N. that he would be displeased if they did not resolve the issue inhouse between the two of them.

157. However, the Tribunal is not convinced by the Administration's finding that the Applicant failed to properly address V01's complaint about Mr. N.'s unwelcome behaviour, including of a sexual nature by making the above-mentioned two statements.

158. In determining whether the Applicant properly handled V01's request for assistance concerning Mr. N.'s behaviour, the Tribunal considers that it is crucial to examine the comments made or action taken by the Applicant considering what he knew at the time and the contemporaneous context.

159. First, the Tribunal considers that the chronology of the events at issue shows that the Applicant did not downplay the seriousness of Mr. N.'s behaviour of a sexual nature. Indeed, the evidence on record shows that in May 2018, the Applicant noticed problems between Mr. N. and V01. Accordingly, on 18 May 2018, the Applicant invited V01 to a meeting in the parking and specifically asked V01 what was happening between Mr. N. and her. However, during this meeting, V01 did not specify the exact nature of the problems she was facing with Mr. N. Instead, she focused more on cultural differences and how she was used to a "Nordic work environment".

160. It was only on 27 June 2018 that V01 mentioned that she "had clashes" with Mr. N., and that Mr. N. had not behaved appropriately because he was invading her personal space. However, during the hearing, V01 admitted having said to the Applicant that she had a very broad sense of personal space as part of a different working culture that she had. Moreover, as shown by V01's complaint, in that meeting, V01's main contemporaneous complaints related to workplace inter-personal relationship. In this respect, V01 specifically mentioned that after a meeting in April 2018 in which V01 confronted Mr. N. and wanted to sort things

out with him directly, he began to act distantly. The Tribunal thus considers that on 27 June 2018, V01 made general comments to the Applicant concerning working culture differences with Mr. N. and personal space that she claimed had been solved but she did not clarify that those were of a "sexual nature".

161. Relying on the evidence from V01, the Respondent submits that circumstances pointing to the possible sexual nature of Mr. N.'s conduct were brought to the Applicant's attention during the 27 June 2018 meeting. In this respect, the Respondent clarified in its sanction letter that V01 told the Applicant that Mr. N. kissed her on the cheeks but the Applicant told her that Mr. N. did the same to him. However, the Tribunal notes that cheek kissing is a ritual or social kissing gesture to perform a greeting and is very common in Southern, Central and Eastern Europe and Latin America. Considering that both the Applicant and V01 are from Southern Europe whereas Mr. N. is from Latin America, the Tribunal is of the view that the Applicant may not have realized that cheek kissing would be of a sexual nature. Therefore, the Tribunal is not convinced by the Respondent's claim that the Applicant was aware of the potential sexual nature of Mr. N.'s behaviour on 27 June 2018.

162. Nevertheless, as V01's complaint shows, in the meeting of 27 June 2018, as the issues between Mr. N. and V01 continued, the Applicant expressly told V01 that if she felt that Mr. N. was harassing her or if she felt offended, she had the right to contact Human Resources and the Ombudsman.

163. Having reviewed the evidence on record, the Tribunal notes that V01's main concerns at the meeting of 1 August 2018 related to workplace issues between her and Mr. N., as well as mutual recriminations. For example, Mr. N. had talked to V01 in a loud voice from outside her office rather than going in; V01 had emailed on behalf of the section without authorization, and Mr. N. had introduced V01 in an improper way to a German delegation. It was only towards the end of the 1 August 2018 meeting that, at the Applicant's invitation to say what bothered her from Mr. N. from the beginning, V01 mentioned episodes of a potentially sexual nature (i.e., touching her back and her hand and smelling her hair) dating from the beginning of her time at RSLAC. However, she told the Applicant that she talked

about these incidents with Mr. N. and she put distance with him. Thereafter, she concentrated again on workplace issues not of a sexual nature.

164. Therefore, the chronology of the events shows that at the outset, V01 never mentioned to the Applicant that Mr. N. had sexually harassed her. When she did mention specific episodes potentially of a sexual nature, it was months after the events, i.e., 1 August 2018. However, as shown by V01's complaint and her testimony before the Tribunal, she decided to deal with the alleged unwelcome conduct of Mr. N. informally and directly by herself and admitted that her intervention in April 2018 was successful in putting an end to any unwelcome conduct of a sexual nature. Nevertheless, the Applicant told Mr. N. that he had to respect V01's space and person. He also expressly advised V01 that if she felt offended, she could approach the Ombudsman or Human Resources. This shows that the Applicant did not downplay the seriousness of Mr. N.'s behaviour of a sexual nature.

165. Second, the Tribunal is not convinced by the Respondent's submission that since problems were detected in May 2018, the Applicant displayed a pattern of shifting blame on V01 for her reported problems and gave her opinion/advice that downplayed the seriousness of her problems.

166. Indeed, the evidence on record does not support that the Applicant shifted blame on V01. In this respect, he sought to hear the views from both parties and to maintain a balance of interests between both Mr. N. and V01. However, based on the information available to him, the Applicant believed up to 1 August 2018 that there was a communication issue between V01 and Mr. N. due to different working cultures, and he addressed the issues accordingly and admonished Mr. N. to respect V01. There is also no evidence that the Applicant was trying to cover up the matter, or to minimise Mr. N.'s attitudes towards V01.

167. Furthermore, V01's complaint and testimony before the investigation panel and the Applicant's testimony before the Tribunal show that the Applicant and Mr. N. were not close friends as evidenced, *inter alia*, by the fact that on several occasions, the Applicant was not invited to take part in Mr. N.'s initiatives, e.g., a

dinner on 15 March 2018 with the Vice Minister of Justice of Colombia and another dinner on 16 March 2018 at the Beaulieu Restaurant with the Colombian delegation. The Applicant testified before the Tribunal that V01 had warned him about it. Therefore, the Tribunal concludes that the Applicant may not have had the motivation to favour Mr. N. over V01.

168. Third, the Tribunal notes that in saying that he would be displeased if V01 and Mr. N. did not resolve the issue inhouse between the two of them, the Applicant sought to address relatively minor workplace issues. He made such comments before V01 mentioned any earlier episodes that could amount to sexual harassment. Moreover, the Applicant was careful to exclude the Ombudsman or Human Resources from that message and indeed encouraged them to report the matter if there was a situation of harassment he did not know about.

169. Moreover, the evidence on record shows that the Applicant took appropriate steps to address what V01 had told her was a communication issue due to a different work culture: he conducted weekly meetings, met several times with V01, met with her and Mr. N., and mentioned to V01 that she could raise concerns with the Ombudsman and Human Resources. After being informed of the earlier episodes that could amount to sexual harassment, the Applicant decided to change V01's reporting lines and act as her FRO in August 2018.

170. Accordingly, considering the knowledge available to the Applicant at the time and the contemporaneous context, the Tribunal finds that the Applicant took V01's concerns seriously, did not downplay the seriousness of sexual harassment and took appropriate action.

171. In light of the foregoing, the Tribunal finds that the Administration failed to establish to the requisite standard that the Applicant did not properly address V01's complaint about Mr. N.'s unwelcome behaviour, including of a sexual nature.

Concluding remarks

172. In light of the above, the Tribunal concludes that the Administration failed to establish to the requisite standard that the Applicant made inappropriate comments towards V01, except for (i) asking V01 how old she was; (ii) repeatedly offering to bring medicine to her apartment; and (iii) commenting on V01's weight and that her mother should come and take care of her if her health did not improve. The Administration also failed to establish to the requisite standard that the Applicant failed to properly address V01's complaint about Mr. N.'s unwelcome behaviour, including of a sexual nature.

*Whether the established facts legally amount to misconduct*

173. In assessing whether misconduct has been established, due deference should be given to the Secretary-General to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Administration in the exercise of its rule-making discretion. The Administration is better placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements (see *Nadasan* 2019-UNAT-918, para. 41).

174. Bearing this in mind, the Tribunal notes that the Administration concluded that the Applicant's conduct constituted harassment of and abuse of authority towards V01. Specifically speaking, his making inappropriate comments constituted harassment, and his mishandling of V01's complaint against Mr. N. constituted harassment and abuse of authority.

175. In this respect, the Tribunal notes that ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) defines harassment and abuse of authority in secs. 1.2 and 1.4 as follows:

> 1.2. Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreements on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.
>
> […]
>
> 1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

176. It follows that for a staff member's behaviour to be punishable as constituting the disciplinary offence of harassment pursuant to sec. 1.2 of ST/SGB/2008/5, it is not enough for it to be found "improper and unwelcome". Indeed, no conduct automatically rises to the level of harassment merely on the basis of its "improper and unwelcome" character (see *Bagot* 2017-UNAT-718, para. 62).

177. In order for a conduct to constitute harassment under sec. 1.2 of ST/SGB/2008/5, apart from being improper and unwelcome, it is required that the behaviour in question "might reasonably be expected or be perceived to cause offence or humiliation to another person". Therefore, "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" (see *Belkhabbaz* 2018-UNAT-873, para. 76).

178. Accordingly, in determining whether a conduct amounts to harassment, the Tribunal will not give undue weight to the subjective perceptions of the alleged misconduct by an individual such as the victim.

179. The Tribunal also notes that ST/SGB/2008/5 applies to workplace relationships, and thus to constitute "harassment" or "abuse of authority", the sanctioned conduct of a staff member must be work-related (see *Bagot*, para. 52).

180. Moreover, the Tribunal is of the view that context is essential for assessing whether the comments or actions in question would constitute harassment and abuse of authority. Therefore, in examining whether the Administration has properly determined that the established facts legally amount to misconduct, the Tribunal will consider the circumstances in which a comment was made, or an action was taken.

181. Consequently, to determine whether the established facts would constitute misconduct under ST/SGB/2008/5, the Tribunal will look into each of the specific incidents in accordance with the established rules and test, taking into account its context.

Alleged unwelcome comments towards V01

*The context of alleged unwelcome comments*

182. The Tribunal recalls that context is essential for assessing the appropriateness of one's comments and actions.

183. In this regard, the Tribunal notes that Ms. L. G. L. testified before the investigation panel that V01 had told her that the Applicant was "a good person", but "he [was] not managing [her situation with Mr. N.] well". According to Ms. L. G. L.'s testimony, at the beginning, V01 thought that the Applicant could help her deal with the issue between her and Mr. N. However, when she tried to talk to the Applicant, she realized that the Applicant "should be doing better as a manager". The Tribunal recalls its finding in para. 160 that it was on 27 June 2018 when V01 first mentioned to the Applicant that she had clashes with Mr. N. Therefore, every single incident of allegedly unwelcome comments towards V01 took place before she ever talked to the Applicant about her situation with Mr. N., falling within the period when V01 perceived the Applicant to be a good person.

184. In the Tribunal's view, one cannot be reasonably simultaneously perceived as a "good person" and a "harasser" by the same person. Therefore, the most plausible explanation is that at the time when the comments at issue were made, V01 did not find them offensive or humiliating towards her. It was only after V01 perceived the Applicant as not addressing her concerns about Mr. N. appropriately that she changed her opinion about the Applicant and revisited the specific incident of allegedly improper comments and reinterpreted them as harassment.

185. This explanation is supported by Ms. L. G. L.'s testimony before the investigation panel that following the Applicant's handling of her situation with Mr. N., V01 changed her opinion about the Applicant, and she was almost angrier with him than with Mr. N. It is further supported by the fact that in the 60-page WhatsApp exchanges between V01 and her friends about her workplace, which is relevant to her complaint, it was only until 27 July 2018 that she for the first time mentioned the Applicant or any of the allegedly improper comments made by him between February and May 2018.

186. Moreover, the Tribunal notes that the WhatsApp exchanges between V01 and her friend dated 27 July 2018 show that before filing her complaint, V01 expressed misgivings about the formal process and stated that if she filed a formal complaint, even if it was inconclusive, it would still ruin the Applicant's and Mr. N's career because it would remain in their file.

187. Accordingly, to avoid potential malicious or vexatious complaints, the Tribunal considers that V01's feelings at the time when the comments in question were made are more relevant than her subsequent reinterpretation of the comments in determining whether making such comments would constitute harassment.

188. Bearing this in mind, the Tribunal will examine whether making each of the specific allegedly unwelcome comments would constitute harassment within the meaning of sec. 1.2 of ST/SGB/2008/5.

*Asking V01 how old she was*

189. The Applicant submits that mentioning to V01 "*Como tu es joven. Cuantos años tienes?*" [English translation: "You look young. How old are you?"] could not constitute harassment. Moreover, according to the Applicant, V01's testimony that this inane question shocked her and made her feel uncomfortable should be seen through the prism of the arguments made above regarding the reliability of her testimony.

190. The Respondent argues that contrary to the Applicant's contention, a remark that could be appropriate in a certain context may be perceived as offensive depending on how and in what context it is used. According to the Respondent, V01 provided a detailed context of when and how the Applicant's comments were made, which provided reasonable grounds for her feeling offended and humiliated, e.g., on her first day at work, in front of another colleague, asking about her age, which is rude and inconsiderate.

191. The Tribunal finds that this comment cannot reasonably be perceived as demeaning nor humiliating for V01. Indeed, from a reasonable person's perspective, it cannot be seen as offensive since it does not contain *per se* any subjective evaluation of the Applicant's look or physical appearance besides the fact that she looked young. For some people, this observation could in fact be regarded as a compliment.

192. Moreover, the Tribunal notes that the Applicant asked V01 how old she was on 14 February 2018, which falls within the period when V01 thought that the Applicant was a good person rather than a harasser.

193. Therefore, the Tribunal finds that the Applicant's comment addressed at V01 asking her how old she was may have not been appropriate but does not rise to the level of harassment under sec. 1.2 of ST /SGB/2008/5.

*Offering to help V01 when she was sick*

194. Having found that the Administration has established that the Applicant repeatedly offered to bring medicine to V01 while she was sick, the Tribunal will examine whether such behaviour would constitute harassment.

195. The Applicant argues that offering to help V01, a colleague who was sick and new to the city, is not improper because it stems from the humane and pastoral role that supervisors have.

196. The Respondent contends that while uninvited, insisting on coming to take care of V01 at her apartment betrayed the Applicant's patronizing attitude towards her. Moreover, according to the Respondent, V01 expressed her discomfort at having to decline the Applicant's offer to come to her home while she was sick, and then to have to repeat her refusal twice more.

197. In this respect, the Tribunal first notes that the Applicant's offer to bring medicine to V01 was motivated by a genuine concern for her well-being. At the hearing, the Applicant provided a very detailed description of the context in which his offer to help was made. Indeed, the Applicant stated that he was concerned that V01, being at home alone and sick, would not have enough food for that time period considering that it was Easter holiday when shops are usually closed in Austria and that he was going to travel to Italy. This explains why he volunteered to go to V01's place and bring her medicine. According to the Applicant, this was the usual way he used to deal with new staff members because he wanted to make sure they had enough support.

198. Under such circumstances, the Tribunal considers that it is natural and courteous to offer help more than once as the recipient, being a new staff member, may decline the offer out of politeness or believe that the offer is not genuine. A reasonable person would have been grateful for the offer, even if he or she decided to decline it.

199. Second, the Tribunal finds no evidence that the Applicant's offer to bring medicine to V01 offended her at the time of the incident. Instead, the contemporaneous WhatsApp exchanges between V01 and the Applicant show that his conduct was not unwelcome by V01 at that time. On the contrary, V01 went out of her way to thank him. Indeed, the day after the offer to help via phone call was made, on 29 March 2018, V01 took the initiative to update the Applicant on her health status and wrote "*te agradezco mucho toda la atención*" [English translation: "Thank you very much for all the attention"]. A few days later, on 3 and 4 April 2018, V01 also wrote to the Applicant to update him on her health. The Tribunal considers that this documentary evidence is credible and reliable, clearly showing the content and the tone of the exchange between the Applicant and V01. Indeed, a reasonable person cannot infer from this evidence that the Applicant's behaviour was offensive or humiliating at the time of the incident.

200. Even assuming that V01 felt uncomfortable with having to decline the Applicant's offer to help three times, this discomfort could not reasonably be perceived to reach the level of offence or humiliation within the meaning of sec. 1.2 of ST/SGB/2008/5.

201. Accordingly, the Tribunal finds that the Applicant's offer of assistance to a new staff member who was sick cannot constitute harassment. To hold otherwise would be a perverse inversion of a supervisor's duty of care. This could also have a chilling effect resulting in staff members standing passively in the face of a colleague in need of help for fear of being charged with misconduct if they offer said assistance.

*Making denigrating remarks towards women in Latin America*

202. Turning to the Applicant's comments in relation to women in Latin American, the Tribunal recalls its finding that the Administration failed to establish to the requisite standard that the Applicant made denigrating remarks towards women in Latin America.

203. Nevertheless, for the sake of completeness, the Tribunal will examine whether the Applicant's comments towards Latin American women in para. 128, i.e., discussing the femininity of Latin American women as a cultural phenomenon in a social context, would amount to harassment towards V01.

204. In finding that the Applicant's above-mentioned comments constitute harassment, the Administration relied upon V01's statement that she felt annoyed as a woman by the Applicant's objectification of women.

205. In this respect, first, the Tribunal is not convinced that the Applicant's general comments towards Latin American women would amount to "objectification of women". Indeed, the *Stanford Encyclopedia of Philosophy* defines objectification of a woman as the seeing and/or treating a woman, as an object. There are four conditions that are necessary for a man to objectify a woman:

a. Men view and treat women as objects of male sexual desire;

b. Men desire women to be submissive and object-like and force them to submit;

c. Men believe that women are in fact submissive and object-like; and

d. Men believe that women are in fact submissive and object-like by nature.[1]

206. In the present case, the Applicant talked about the differences between Latin American women in terms of femininity in response to Mr. N.'s statement that his former wife is from Colombia. The general gist of their conversation, which was informal, was on his life and his different experiences all over the world rather than on women. Therefore, the Tribunal cannot conclude that the Applicant's comments towards Latin American women would meet the above-mentioned conditions that are necessary for him to objectify Latin American women.

[1] Papadaki, Evangelia (Lina), "*Feminist Perspectives on Objectification*", The Stanford Encyclopedia of Philosophy (Spring 2021 Edition), Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/spr2021/entries/feminism-objectification/.

207. Second, the Tribunal finds no indication that V01 was offended by the Applicant's comments at the time of the incident. The evidence on record shows that V01 participated in the conversation and did not express her discomfort or displeasure with the comments at issue at that time. Indeed, in the dinner that followed the conversation, V01 sat next to the Applicant, shared food from his plate and returned home by underground with him. Thus, V01's contemporaneous actions do not support her claim that she was annoyed at that time. Instead, Ms. L. G. L.'s evidence shows that at that moment, i.e., on 14 March 2018, V01 perceived the Applicant as a good person rather than as a "harasser".

208. Moreover, the Tribunal is of the view that a staff member who is not from Latin America may reasonably not consider the Applicant's general comments in relation to Latin American women to be offensive towards herself or himself. In the present case, V01 is from Spain. The Tribunal finds no evidence showing that V01's link with Latin American women is so strong that some general remarks would make her feel targeted. Therefore, the Applicant's comments towards Latin American women cannot reasonably be expected to cause offence or humiliation towards V01.

209. Finally, the Tribunal notes that the Applicant's comments were not work-related and were made in a social and non-professional context. Indeed, it was on the way to dinner that Mr. N. triggered the conversation by saying that the Applicant's former wife is from Colombia. The Applicant was not acting in his official capacity nor was he representing the Organization in any public event. He was simply going to have dinner with two colleagues, with whom he felt at ease to express his views.

210. In this regard, the Tribunal recalls that freedom of opinion and expression is a fundamental human right pursuant to the Universal Declaration of Human Rights. Limitations on a staff member's such right should be of an exceptional nature and should only be accepted when he or she is acting in an official capacity or when the image of the Organization is at stake.

211. Therefore, in principle, expressing views on general or social matters that are neither offensive nor humiliating *per se*, outside of a work context, does not fall under the scope of ST/SGB/2008/5, which regulates work-related relationships. To hold otherwise would lead to the misuse of ST/SGB/2008/5 as a tool to limit social interactions between staff members.

212. Accordingly, the Tribunal finds that the Applicant's remarks towards women in Latin America may not be appropriate but do not meet the threshold of harassment especially towards V01.

*Making denigrating remarks towards complainants in the "MeToo" movement*

213. The Tribunal recalls its finding that the Administration failed to establish to the requisite standard that the Applicant made denigrating remarks towards complainants in the "MeToo" movement.

214. Nevertheless, for the sake of completeness, the Tribunal will examine whether the Applicant's remarks towards complainants in the "MeToo" movement in para. 136, in particular, "why are women talking now about something that happened 20 years ago?" would constitute harassment towards V01.

215. The Administration finds that the Applicant's comments towards complainants in the "MeToo" movement were inappropriate and offended V01 who was present when he made them.

216. In this respect, the Tribunal, first, finds no indication that V01 was offended by the Applicant's comments at the time of the incident. Indeed, V01 did not express any discomfort or disapproval with the comments and her subsequent action—going back home together with the Applicant—does not show that she was offended or humiliated by the Applicant. Instead, Ms. L. G. L.'s evidence shows that at the time of the incident, i.e., on 12 April 2018, V01 thought that the Applicant had been a good person rather than a "harasser".

217. Moreover, the Tribunal notes that the Applicant expressed his doubts and concerns about "women speaking out 20 years later" because this would have an impact on the credibility of the "MeToo" movement itself. As the Tribunal found in para. 137, the Applicant seemed to have suggested that women should have spoken out earlier. In the Tribunal's view, the Applicant merely expressed a personal view on a situation that is publicly known and has caused controversy throughout the world.

218. Furthermore, the evidence on record shows that those comments were made in the context of a social interaction between three colleagues, i.e., the Applicant, V01 and Mr. K. P., who were out attending a cocktail at the Colombian Permanent Mission.

219. Therefore, the Tribunal finds that making an observation about certain aspects of the "MeToo" movement in an informal conversation outside the workplace could not reasonably be expected or be perceived to cause offence or humiliation towards V01, especially considering that the comments did not relate to her personally.

220. In this regard, the Tribunal wishes to further point out that, in its view, it is not the intention of the drafters of ST/SGB/2008/5 to limit staff members' "freedom of speech", provided that the views are not expressed in their official capacity, do not cause any harm to the Organization or a colleague and do not have a negative impact on the work-environment.

221. Accordingly, the Tribunal finds that the Applicant's remarks towards complainants in the "MeToo" movement may be improper but do not meet the threshold of harassment especially towards V01.

*Making inappropriate remarks about V01's sick leave to other colleagues*

222. The Tribunal recalls its finding in para. 146 that the Applicant's remarks about V01' s sick leave to other colleagues were not inappropriate and more like defending and trying to help V01. Moreover, such remarks could not reasonably be expected or be perceived to cause offence or humiliation towards V01. As such, the Tribunal finds that the Applicant's remarks about V01's sick leave to other

colleagues could not constitute harassment within the meaning of sec. 1.2 of ST/SGB/2008/5.

223. In addition, the Tribunal notes that the Applicant made remarks about V01's sick leave on 11 April 2018, namely within the period when V01 perceived the Applicant to be a good person rather than a harasser.

224. Accordingly, the Tribunal finds that the Applicant's remarks about V01's sick leave to other colleagues cannot constitute harassment.

*Commenting on V01's weight and that her mother should come and take care of her*

*225.* Having found that the Administration has established the fact that the Applicant commented on V01's weight and that her mother should come and take care of her if her health did not improve, the Tribunal will examine whether making such comments would constitute harassment of V01.

226. The Applicant submits that asking if V01 had lost weight when she seemed unwell and saying that he would call her mother if her health did not improve to cheer her up was not improper, especially as V01 and he had a cordial relationship.

227. The Respondent argues that the Applicant suggesting that V01, an adult and a professional colleague in his office, was in need of parental care is degrading and condescending.

228. In this respect, the Tribunal first notes that at the hearing, the Applicant provided a detailed description of the context in which his comments were made. Indeed, V01 had been ill several times in her first two or three months with the section. The Applicant was concerned about her well-being and state of health and made his comments as a way of showing his support and care as a colleague and supervisor. He attempted to cheer V01 up by mentioning her mother, to whom V01 had referred to in an informal conversation.

229. Furthermore, it is undisputed that at that time, V01's physical condition, appearance and mood had deteriorated. Indeed, V01's complaint shows that she had lost weight and looked sad or even depressed, and that other colleagues also approached her at the time as they were concerned about her appearance and demeanour.

230. Therefore, the Tribunal is of the view that asking if V01 had lost weight when she looked unwell and saying that the Applicant would call her mother if her health did not improve to cheer her up, stemmed from a genuine concern for V01's well-being.

231. Second, the Tribunal is not convinced by the Respondent's argument that the Applicant suggesting that V01, an adult and a professional colleague in his office, needed parental care is degrading and condescending. Such argument seems to have taken the comments out of context by ignoring the fact that V01's physical condition and mood had deteriorated at that time and that V01 and the Applicant had a cordial relationship at the time concerned. Indeed, Ms. L. G. L.'s evidence shows that at the time of the comments at issue, between April and May, V01 thought that the Applicant had been a good person and would help her.

232. Moreover, the Tribunal is of the view that the Respondent may have misinterpreted the Applicant's comment that he would call V01'smother to take care of her if her health did not improve as suggesting that a professional colleague needed parental care. Indeed, according to the *Encyclopedia of Ecology*, "[p]arental care occurs whenever parents enhance the growth or survival of their offspring, often at a cost to the parents' own survival and reproduction".[2] The Applicant's suggestion to call V01's mother to take care of her when she was sick is not comparable to suggesting that one professional colleague needed parental care.

[2] Per T. Smiseth, in Encyclopedia of Ecology (Second Edition), 2019, available at https://www.sciencedirect.com/topics/earth-and-planetary-sciences/parental-care, accessed on 17 May 2022.

233. Third, in the Tribunal's view, being taken care by parents while being sick could not reasonably be expected or be perceived to cause offence or humiliation, much less a suggestion to this effect.

234. Accordingly, the Tribunal finds that asking if V01 had lost weight when she looked unwell and saying that he would call her mother if her health did not improve may not be appropriate but do not rise to the level of harassment.

Alleged failure to properly handle V01's request for assistance concerning Mr. N.'s behaviour

235. The sanction letter states that "[the Applicant's] mishandling of V01's complaint against [Mr. N.] constitutes harassment and abuse of authority. [His] remarks made to V01 concerning her complaint were annoying, alarming, demeaning, intimidating and/or embarrassing. By this, [the Applicant] not only offended/humiliated V01 (and her feelings were entirely reasonable), but also improperly used [his] power as Chief of Section towards V01".

236. The Tribunal recalls its findings that the Administration has established the facts that (i) the Applicant said to V01 that Mr. N.'s behaviour was not serious and that she might have misunderstood his behaviour and Latin American culture; and (ii) the Applicant said to V01 and Mr. N. that he would be displeased if they did not resolve the issue inhouse between the two of them.

237. However, the Tribunal has found in para. 171 that the Administration failed to establish to the requisite standard that the Applicant did not properly address V01's complaint about Mr. N.'s unwelcome behaviour, including of a sexual nature by making the above-mentioned two statements.

238. For the sake of completeness, the Tribunal will examine whether the Applicant's handling of V01's complaint towards Mr. N. would constitute misconduct.

239. In this respect, the Tribunal recalls that sec. 3 of ST/SGB/2008/5, titled "Duties of staff members and specific duties of managers, supervisors and heads of department/office/mission", applicable to this case, provides in its relevant part that:

> 3.2 Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. …Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner.

240. The Tribunal notes that whereas sec. 3.2 of ST/SGB/2008/5 imposes a general "duty" on the managers and supervisors "to take all appropriate measures", very limited statutory guidance is otherwise provided in the provision on what such measures could be in practice. The only example appears to be that "complaints of prohibited conduct [be] promptly addressed in a fair and impartial manner" (see *Nadeau* UNDT/2019/168, para.25).

241. In the Tribunal's view, a manager's duty to act promptly and fairly only comes into play when he or she is made aware of a real problem. Moreover, managers need to balance the interests of both parties as well as the interests of the Organization to avoid disruption of the reporting lines and negatively impacting the work environment.

242. Turning to the present case, the Tribunal is not convinced by the Administration's finding that the Applicant violated sec. 3 of ST/SGB/2008/5: "by failing to take, as a manager, all appropriate measures to promote a harmonious work environment, free from intimidation, hostility, offence and any form of prohibited conduct".

243. Indeed, as per this Tribunal's finding in para. 169 above, the Applicant took appropriate steps to address what V01 had told her was a communication issue due to a different work culture: he monitored the situation regularly, established weekly meetings, spoke to V01 several times, met with her and Mr. N. and mentioned to V01 that she could raise concerns with the Ombudsman and Human Resources. After being informed of the earlier episodes that could constitute sexual harassment on 1 August 2018, the Applicant decided to change V01's reporting lines and act as her FRO in the same month. Furthermore, the evidence from V01 suggests that the head of Human Resources commended the Applicant's handling of the situation in her meeting with V01.

244. Accordingly, the Tribunal finds that the Applicant properly exercised his managerial discretion pursuant to sec. 3.2 of ST/SGB/2008/5.

245. In relation to the Applicant's statements discussed in para. 236 above, the Tribunal notes that they were made in relation to V01's and Mr. N.'s mutual allegations of minor workplace differences and not concerning any conduct that could be of a prohibited nature, including sexual harassment that was unknown to the Applicant at that time.

246. Indeed, the Applicant did not say that any prohibited conduct was not serious, and it was within his managerial discretion to explore if a misunderstanding could be at the root of the communications issue due to workplace culture differences reported by V01. Neither did the Applicant say that he would be displeased if the issues were resolved through proper channels such as the Ombudsman, Human Resources and/or a formal report. He sought to state that he would be displeased if there was gossip or third parties were dragged into the situation. In saying so, the Applicant was careful to exclude the Ombudsman or Human Resources from that message and indeed encouraged his supervisees to report the matter if there was a situation of harassment he did not know about.

247. Considering the circumstances of the case and the knowledge available to the Applicant at the time of the incident, the Tribunal finds that he properly exercised his discretion to solve a communication issue in his team and, as such, his comments in this respect could not reasonably be expected or be perceived to cause offence or humiliation. Therefore, the Applicant making statements discussed in para. 236 above does not rise to the level of harassment.

248. Similarly, the Tribunal is not persuaded that making such statements would constitute abuse of authority under sec. 1.4 of ST/SGB/2008/5. In this respect, the Tribunal recalls its finding in *Benfield-LaPorte* that an improper way to handle an uncomfortable situation does not necessarily amount to a possible abuse of authority (see *Benfield-LaPorte* UNDT/2013/162, para. 50).

249. In the present case, the Applicant may not have adopted the best option to handle the situation at issue. However, he did not improperly use his position against anybody. Instead, in making the statements in question, the Applicant sought to settle workplace culture differences between V01 and Mr. N. based on the information available to him at that time.

250. Furthermore, the statements at issue are not comparable to "intimidation, threats, blackmail or coercion" within the meaning of sec. 1.4 of ST/SGB/2008/5 considering the circumstances of the case and the knowledge available to the Applicant at the time.

251. Therefore, the Applicant making the statements discussed in para. 236 above does not constitute abuse of authority either.

252. Accordingly, the Tribunal concludes that the Applicant's handling of V01's complaint against Mr. N. does not constitute harassment or abuse of authority, nor did it violate sec. 3 of ST/SGB/2008/5.

253. In this respect, the Tribunal wishes to highlight that a manager cannot reasonably be blamed for actions he or she took or failed to take when he did not have the necessary information. Moreover, a "zero tolerance policy" against harassment and abuse of authority implemented by the Organization cannot be a "blind policy". As such, the incidents and staff members' narratives of the incidents need to be contextualized, and subjects' versions of the facts need to be duly considered.

Concluding remarks

254. Considering the above, the Tribunal finds that the Administration erred in concluding that the Applicant making inappropriate comments between February and May 2018 constituted harassment of V01.

255. Moreover, the Tribunal finds that the Administration erred in concluding that the Applicant's handling of V01's complaint against Mr. N. constituted harassment and abuse of authority.

256. Indeed, even the Administration itself is not convinced that all the alleged conducts would constitute misconduct by stating in its decision letter that "[the Applicant] made inappropriate comments towards V01, which made her feel offended and humiliated, by one or more of the following [incidents]" and that "[the Applicant] failed to properly address V01's complaint about Mr. [N.]'s unwelcome behavior, including of a sexual nature, thereby making V01 offended and intimidated, by one or more of the following[statements]".

257. The Tribunal's above findings are also in line with the practice of other International Organization. In this regard, the Tribunal notes that sec. 3 of the World Health Organisation's Policy and Procedures Concerning Harassment, Sexual Harassment, Discrimination, and Abuse of Authority ("WHO's Policy"), effective 1 March 2021, provide examples of abuse of authority and harassment in its relevant part as follows:

3.1 "Abuse of authority" is the improper use of a position of influence, power, or authority by an individual towards others.

[…]

b) Examples of abuse of authority include, but are not limited to:

- Asking for money to approve the renewal of a contract or to provide a positive performance evaluation;
- Requesting that a person undertake personal favours that are not a part of her or his official duties (e.g., running errands of a personal nature for the supervisor);
- Coercing a person not to report or raise concerns about potential breaches of standards of conduct or ethical obligations;
- Preventing a person's professional progress by intentionally blocking or interfering with her or his promotion for unjustifiable reasons;
- Inconsistent management style where some individuals are unjustifiably and demonstrably favoured over others; and,
- Manipulating the nature of a person's work in order to undermine her or him, such as by inequitably and unjustifiably overloading her or him with work, inappropriately withholding information, setting objectives with unreasonable or impossible deadlines, repeatedly assigning unachievable tasks, or repeatedly setting meaningless or trivial tasks.

[…]

3.6 "Harassment" is any behaviour that (i) is directed at another person and has the effect of offending, humiliating, or intimidating that person; (ii) the person engaging in the behaviour knows or reasonably ought to know would offend, humiliate, or intimidate that other person; and (iii) interferes with that other person's ability to carry out her or his functions at work and/or creates an intimidating or hostile work environment.

[…]

b) Examples of harassment include, but are not limited to:

- Making humiliating or offensive remarks to another person, orally or in writing (e.g., insulting another person's professional competence or physical appearance);
- Oral or written threats or threatening physical behaviour;
- Maligning another person's reputation by gossip or ridicule, orally or in writing (e.g., on social media);
- Repeatedly ignoring or excluding someone;
- Making it impossible for another person to do her or his job by, for example, withholding information;
- Shouting;
- Repeated use of offensive gestures or repeated staring or aggressive facial expressions;
- Sharing or displaying offensive objects, images, or videos in any format;
- Physical violence, such as hitting, pushing, kicking, or throwing objects; and,
- Multiple people "ganging up" on another person by engaging in any of the conduct above (also referred to as "mobbing").

258. The Tribunal considers that none of the Applicant's comments or actions at issue are comparable to the examples of harassment and abuse of authority listed in sec. 3 of the WHO's Policy.

259. Nevertheless, the Tribunal recalls its findings in paras. 193, 212, 221, and 234 above that although not constitutive of misconduct, some of the Applicant's comments may not be appropriate.

260. In this regard, the Tribunal recalls that staff regulation 1.2 in its relevant part provides that:

> **Regulation 1.2**
>
> **Basic rights and obligations of staff**
>
> **Core values**
>
> (a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;
>
> (b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

261. Therefore, the Tribunal finds that the Administration correctly concluded that the Applicant violated staff regulation 1.2(a) by failing to uphold and respect the dignity and worth of a human person and violated staff regulation 1.2(b) by failing to uphold the highest standards of competency and integrity.

262. In the Tribunal's view, the Applicant's conduct is not of sufficient gravity to rise to the level of misconduct but rather may constitute unsatisfactory conduct under sec. 3.1 of ST/AI/2017/1, which includes "any conduct where a staff member fails to comply with the staff member's obligations under […] the Staff Regulations and Rules".

*Whether the sanction applied is proportionate to the offence*

263. In the present case, the sanction imposed on the Applicant entailed:

a. The disciplinary sanction of loss of five steps, and deferment for two years of eligibility for consideration for promotion in accordance with staff rule 10.2(a)(ii) and (vi), and

b. The managerial action of requiring him to take training to improve his gender awareness and managerial sensitivity towards handling harassment issues.

264. The Tribunal will examine in turn whether both the disciplinary measures and the managerial action are warranted in the present case.

The discipline measures at issue

*Whether the disciplinary measures are warranted in the present case*

265. Staff rule 10.3(b) provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". This legal provision is mandatory since the text contains the expression "shall". The Tribunal must therefore verify whether a staff member's right to a proportionate sanction was respected and whether the sanction applied is proportionate to the nature and gravity of the conduct.

266. The Tribunal is mindful that the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case, and to the actions and behaviour of the staff member involved. Due deference does not entail uncritical acquiescence (see *Samandarov* 2018-UNAT-859, para. 24).

267. The Tribunal interferes with this administrative discretion if "the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" (see *Nyawa* 2020-UNAT-1024, para. 89; see also *Portillo Moya* 2015-UNAT-523, paras. 19-21). It is well-settled jurisprudence that the Tribunal may interfere with

the Administration's discretion to impose a sanction when there a is lack of proportionality (see, e.g., *Samandarov* UNDT/2017/093, para. 35). "The principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result" (see *Sanwidi* 2010- UNAT-084, para. 39).

268. The Appeals Tribunal in *Samandarov* established the test for proportionality as follows:

> 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 (see *Samandarov* 2018-UNAT-859, para. 25).

269. The Tribunal recalls that some of the facts on which the disciplinary measures were based were not established to the requisite standard and that, even if the facts had been established, the Applicant's conduct does not meet the threshold of harassment, nor does it constitute abuse of authority under ST/SGB/2008/5.

270. Therefore, the disciplinary measures imposed on the Applicant were not warranted in the present case as it bore no rational connection or suitable relationship to the evidence of the alleged misconduct and the purpose of progressive or corrective discipline.

*Whether the disciplinary sanction applied is consistent with past practice*

271. Having reviewed the Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2020, the Tribunal notes that a few cases of harassment or abuse of authority resulting in sanctions of comparable severity to those imposed on the Applicant involved "shouting at staff members, tasking them with running personal errands for the staff member and engaging in intimidating behaviour" and "engagement in a pattern of verbal abuse and ridicule towards a colleague over a number of years and attempted physical assault". The Tribunal considers that even assuming that the facts relied

upon by the Administration were established, the Applicant's alleged conduct was far less serious than the above-referenced cases.

272. In this regard, the Tribunal recalls that it is well-settled that the 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 offences, the penalty, in general, should be comparable (see *Sow* UNDT/2011/086, para. 58; see also *Baidya* UNDT/2014/106, para. 66; *Applicant* UNDT/2017/039, para. 126).

273. Accordingly, the disciplinary sanction imposed on the Applicant was too harsh in comparison with the Secretary-General's past practice in disciplinary matters of allegedly comparable conduct.

*Whether the Administration properly considered aggravating and mitigating factors*

274. The Tribunal notes that the Administration concluded that there is no mitigating factor in the present case and that with respect to aggravating factors, it took into account that: (a) the Applicant had multiple opportunities to correct or adjust his approach towards the problem detected in his Section, but failed to do so; and (b) his gross mismanagement of V01's complaint breached the Organization's trust bestowed on him as a senior manager and a Chief of section in addressing prohibited conduct properly, particularly, being mindful of the "zero tolerance" policy for sexual harassment.

275. In this respect, the Tribunal recalls that the Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose (see *Nyawa* 2020-UNAT-1024; *Ladu* 2019- UNAT-956). However, such discretion is not unbounded. Indeed, the Tribunal may "consider whether relevant matters have been ignored and irrelevant matters considered" (see *Sanwidi*, para. 40).

276. First, the Tribunal finds that the Administration failed to consider the Applicant's long satisfactory service as a mitigating factor. In this regard, the Tribunal recalls that a long period of service will usually be a mitigating factor, unless acts of misconduct are of such a serious nature that no length of service can rescue an employee who is guilty of them from the harshest of disciplinary measures (see, e.g., *Yisma* UNDT/2011/061, para. 35). In the present case, the Applicant has thirty years of long and unblemished service with the Organization. The alleged misconduct is not of such a serious nature that would allow the Administration to disregard it.

277. Second, the Tribunal is not persuaded by the Administration's finding that the Applicant had multiple opportunities to correct or adjust his approach towards the problem detected in his Section but failed to do so. Indeed, without knowing the information necessary for him to take appropriate action, the Applicant did not have opportunities to correct his approach towards the matter at issue. He cannot be punished for actions he took or did not take based on information V01 did not share with him at the initial stage.

278. Considering that the Applicant only learned about some of Mr. N.'s behaviours of an alleged sexual nature towards the end of the 1 August 2018 meeting, after which he took action, the Tribunal finds that the Applicant did not breach the Organization's trust when addressing sexual harassment allegations.

279. Therefore, the Tribunal finds that the Administration failed to properly consider aggravating and mitigating factors in the present case.

280. In light of foregoing, the Tribunal concludes that the disciplinary measures imposed on the Applicant were neither warranted nor proportionate to the alleged offence.

The managerial action at issue

281. The Tribunal recalls that sec. 8.2 of ST/AI/2017/1 provides in its relevant part that:

> 8.2 On the basis of the investigation report, supporting information and any additional information obtained, the Assistant Secretary-General for Human Resources Management shall decide whether to:
>
> […]
>
> (b) Take managerial actions and/or administrative measures, if the unsatisfactory conduct, in the view of the Assistant Secretary-General for Human Resources Management, does not rise to the level of misconduct, or refer the matter to the responsible official for possible managerial and/or administrative action.

282. Sec. 2.1 (e) of ST/AI/2017/1 defines "managerial action" as "an oral or written caution, warning or advisory communication, training, coaching and/or referral of the staff member to the Staff Counsellor" whereas sec. 2.1(d) of ST/AI/2017/1 defines "administrative measures" as "an oral or written reprimand, reassignment and/or change of duties".

283. In the present case, the Administration required the Applicant to take training to improve his gender awareness and managerial sensitivity towards handling harassment issues, which falls under the scope of managerial action in sec. 2.1(e) of ST/AI/2017/1 rather than under an "administrative measure" as suggested by the Administration in its sanction letter.

284. The Tribunal recalls its finding in para. 262 above that while the Applicant's behaviours are not of sufficient gravity to rise to the level of misconduct, his making inappropriate comments is not "satisfactory" pursuant to sec. 3.1 of ST/AI/2017/1. As such, managerial action was warranted under sec. 8.2(b) of ST/AI/2017/1.

285. Therefore, the Tribunal finds that the Administration properly exercised its discretion by imposing on the Applicant the managerial action of requiring him to take training to improve his gender awareness and managerial sensitivity towards handling harassment issues.

*Whether the Applicant's due process rights were respected during the investigation and the disciplinary process*

286. Regarding the right to due process during the investigation and disciplinary proceedings, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful (see, e.g., *Abu Osba* 2020-UNAT-1061, para. 66).

287. Staff rule 10.3, setting forth rules governing due process in the disciplinary process, provides in its relevant part that:

> (a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and had been given the opportunity to respond to those formal allegations;
>
> (b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

288. The Tribunal is satisfied that the key elements of the Applicant's right to due process were met in the present case. The evidence on record shows that the Applicant was fully informed of the charges against him, was given the opportunity to respond to those allegations, and was informed of the right to seek the assistance of counsel in his defence. Moreover, before this Tribunal the Applicant did not take issue in this respect.

289. Accordingly, the Tribunal finds that the Applicant's due process rights were respected during the investigation and the disciplinary process.

*Conclusion on the lawfulness of the contested decision*

290. The Tribunal summarizes its findings below:

a. The Administration failed to establish to the requisite standard that the Applicant:

i. Made inappropriate comments towards V01, except for (a) asking V01 how old she was, (b) repeatedly offering to bring medicine to her apartment and (c) commenting on V01's weight and that her mother should come and take care of her if her health did not improve; and

ii. Failed to properly address V01's complaint about Mr. N.'s unwelcome behaviour, including of a sexual nature.

b. The Applicant's conduct is not of sufficient gravity to rise to the level of misconduct. Nevertheless, his making inappropriate comments may constitute unsatisfactory conduct under sec. 3.1 of ST/AI/2017/1;

c. The disciplinary measures imposed on the Applicant are neither warranted nor proportionate to the alleged offence;

d. The Administration properly exercised its discretion by imposing on the Applicant managerial action requiring him to take training to improve his gender awareness and managerial sensitivity in handling harassment issues; and

e. The Applicant's due process rights were respected during the investigation and the disciplinary process.

291. As such, the Tribunal concludes that the contested decision is unlawful except for the imposition of the managerial action on the Applicant.

*Whether the Applicant is entitled to any remedies*

292. In his application, the Applicant seeks the rescission of the contested decision and requests compensation for the loss of opportunity in career progression due to the sanction of deferment of consideration for promotion. In the Applicant's motion to adduce evidence of harm dated 13 January 2022, during the hearing and in his closing submission, he further requests the award of compensation for reputational harm he suffered.

293. The Tribunal recalls that the remedies it may award are outlined in art. 10.5 of its Statute as follows:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

<u>Rescission of the contested decision and specific performance</u>

294. Having found that the contested decision is unlawful except for the imposition of managerial action, the Tribunal is of the view that there has been a miscarriage of justice in the present case. As such, the contested decision except for that related to the managerial action must be rescinded and the disciplinary measures must be set aside.

295. The Tribunal further recalls that a finding of unreasonableness, and consequent invalidity of a contested decision, will "give rise to the discretion to award specific performance, [ i.e.], an order directing the Administration to act as it is contractually and lawfully obliged to act" (see *Belkhabbaz* 2018-UNAT-873, para. 80).

296. Accordingly, the Tribunal finds it appropriate to direct the Respondent to pay to the Applicant the amount of his lost earnings as a result of the loss of five steps and to remove the disciplinary measures from his official status file.

Compensation for loss of opportunity

297. Turning to the request for compensation for the loss of opportunity in career progression, the Tribunal recalls that the Appeals Tribunal in *Marsh* 2012-UNAT-205 held that "loss of chance of being selected, even if slight, and the loss of a better chance of being recommended or included in the roster has in [that] case material and financial consequences, and also deprived [the Applicant] of an opportunity to improve his status within the Organization".

298. Further, the Appeals Tribunal has often found the Dispute Tribunal to be in the best position to decide on the level of compensation. For instance, in *Solanki* 2010-UNAT-044, para. 20, the Appeals Tribunal upheld the Dispute Tribunal's award of compensation for loss of chance/opportunity, stating the following:

> We consider that compensation must be set by the [the Dispute Tribunal] following a principled approach and on a case-by-case basis. In cases such as this, [the Dispute Tribunal] should be guided by two elements. The first element is the nature of the irregularity which led to the rescission of the contested administrative decision. The second element is the chance that the staff member would have been recommended for promotion had the correct procedure been followed. The Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case.

299. While approving the method of assessing damages by way of using percentage of chance that an applicant had to be selected, the Appeals Tribunal in *Lutta* affirmed that deference was given to the Dispute Tribunal Judge as to how to determine damages based on the facts of the particular case (see *Lutta* 2011-UNAT-117, para. 14; see also *Goodwin* 2013-UNAT-346, para. 23; *Niedermayr* 2015-UNAT-603, para. 39).

300. Similarly, the Appeals Tribunal in *Muratore* reaffirmed that "[it] will generally defer to the trial court's discretion in the award of damages as there is no set way for the Dispute Tribunal to set damages for loss of chance of promotion" (see *Muratore* 2012-UNAT-245, para. 33).

301. It follows that the Tribunal has the discretion to set damages for loss of chance of promotion, while considering the nature of the irregularities that led to the rescission of the contested decision and the chance that a staff member had to be recommended for promotion.

302. The Tribunal notes that the Applicant has adduced evidence showing that due to the disciplinary sanction at issue, he was barred from being promoted for two years, despite having the qualifications, experience and being rostered. Notably, the Applicant's temporary assignment to a D-1 post in Dakar could not be renewed because of the disciplinary process, and in mid-2021 he was barred to apply for the same position on a fixed-term appointment.

303. Having found that the disciplinary sanction is unwarranted, considering the Applicant's chance of career progression for the relevant period of time, i.e., from 11 May 2020 to 11 May 2022, the Tribunal finds it appropriate to compensate him in the amount of USD10,000 as remedy for his loss of opportunity for career advancement (in comparison, see, e.g., *Nikolarakis* UNDT/2017/068, para. 75; *Niedermayr*, para. 40; *Marsh* 2012-UNAT-205, para. 32).

Compensation for reputational harm

304. In relation to the reputational harm, the Tribunal recalls that art. 10.5(b) of its Statute requires that harm be supported by evidence. In this respect, the Appeals Tribunal has consistently held that "it is not enough to demonstrate an illegality to obtain compensation: the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages resulting from the illegality on a cause-effect lien" and requires that "the harm be directly caused by the administrative decision in question" (see *Ashour* 2019-UNAT-899, para. 31; see also *Kebede* 2018- UNAT-874, para. 20).

305. In the present case, the Applicant failed to provide any evidence supporting that he suffered reputational harm. He sought to infer reputational harm from his professional trajectory and the type of conduct ascribed to him. However, the Tribunal finds that such inference is not sufficient to demonstrate that the alleged reputational harm was directly caused by the imposed sanction, in particular considering the Applicant's testimony at the hearing that "not many people know about the imposed sanction".

306. Accordingly, the Applicant's request for the award of compensation for reputational harm is denied.

**Conclusion**

307. In view of the foregoing, the Tribunal DECIDES that:

a. The application is partially granted;

b. The disciplinary sanction of loss of five steps, and deferment for two years of eligibility for consideration for promotion is rescinded;

c. As a result of the above recission, the Organization shall:

i. Remove the disciplinary measures from the Applicant's official status file;

ii. Retroactively place the Applicant at the step he should have been prior to the imposition of the rescinded disciplinary measures and recalculate since then his step increments;

iii. Pay the Applicant the loss of salary that he suffered as a result of the loss in steps; and

iv. Pay the Applicant USD10,000 for loss of opportunity for career progression.

d. All other claims are rejected.

308. The aforementioned compensation shall bear interest at the US 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 US prime rate 60 days from the date this Judgment becomes executable.

(*Signed*)
Judge Teresa Bravo
Dated this 23rd day of May 2022

Entered in the Register on this 23rd day of May 2022
(*Signed*)
René M. Vargas M., Registrar, Geneva