



Before: Judge Joelle Adda

Registry: New York

Registrar: Morten Michelsen, Officer-in-Charge

SALEH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Marcos Zunino, OSLA
Endah Ayuningsih Indini, OSLA

Counsel for Respondent:

Sandra Lando, UNHCR
Marisa Maclellan, UNHCR

Introduction

1. The Applicant, a former staff member with the United Nations High Commissioner for Refugees (“UNHCR”), contests the “[i]mposition of disciplinary sanction of separation from service, with compensation in lieu of notice, without termination indemnity”.
2. The Respondent contends that the application is without merit.
3. The case was transferred from the Nairobi Registry of the Dispute Tribunal to the New York Registry on 20 October 2021.
4. From 21 to 23 March 2022, a hearing was held via Teams and Zoom (when Arabic-English interpretation was needed) at which the Applicant, BK, AD, TK, BM, MY, HR and JZ (names redacted) gave testimony. The Tribunal expresses its appreciation with Counsel for the Respondent’s assistance with organizing this hearing.
5. For the reasons set out below, the application is granted in part.

Facts

6. In response to Order No. 104 (NY/2021) dated 3 November 2021, the parties submitted the following joint statement of agreed facts on 26 November 2021 (references to footnotes omitted):

... From 1 July 2013 to 31 December 2014, the Applicant was working under a [United Nations Office for Project Services] individual contractor agreement for UNHCR. He helped to set up the UNHCR office and warehouse in Zahle, Lebanon. Until January 2014, the Applicant managed the warehousing operations in the area. This included hiring “casual workers” (also called “daily workers”) to move items, load and unload trucks, etc.

... Since 2014, INTERSOS [judicial note: a non-profit humanitarian aid organization], a UNHCR implementing partner, has been in charge of managing the UNHCR warehouse in Zahle. As part of the normal operations of the warehouse, [BK], INTERSOS Warehouse Manager, and [BM], INTERSOS Warehouse Assistant, were responsible to hire casual workers.

... From the time when UNHCR managed the warehouse, they relied on a pool of around 30 people who were rotated and called to work when needed.

... On 12 January 2015, the Applicant was hired by UNHCR under a one-year fixed-term appointment as a Supply Associate in Zahle.

... The Applicant did not have an official role in the hiring of casual workers. He however coordinated and supervised the work of INTERSOS staff, had a “mentorship role”, and provided them with guidance and assistance in their work, as part of his functions of overseeing the warehousing operations.

... Between June 2018 and September 2018, the Applicant sent the following text messages to [BM]:

- (i) On 17 June 2018, the Applicant sent the contact of [ATS, name redacted] to [BM] and indicated, “Please I want you to call and take care of this guys [sic] he is the nephew of my wife he is a student and want [sic] to make some money for his school. He is very committed”. [ATS] is the nephew of the Applicant’s wife. [ATS] never worked as a casual worker as he was below the age of 18.
- (ii) On 19 June 2018, the Applicant shared with [BM] a voice message and a screenshot of a conversation with [MAS, name redacted] and wrote, “Please try to call him to come work”. On the same day, [BM] sent to the Applicant a screenshot showing that he called [MAS], but the latter was not available to work.
- (iii) On 7 August 2018, the Applicant forwarded to [BM] a screenshot of a message he received from [ARS, name redacted] saying in Arabic “Hello Uncle Wassim how are you I hope you’re well. You told me to go to work every day. He [BM] didn’t give me work on Friday”.
- (iv) On 8 August 2018, the Applicant shared a screenshot indicating in Arabic, “[AMB, name redacted] from [location redacted]. Age 20 years. We want the boy to work in the warehouse. He’s a hard worker and his physique helps”.

- (v) On 8 August 2018, the Applicant sent to [BM] the contact of [HAA, name redacted]. On a later unknown date, the Applicant sent to [BM] a screenshot of a conversation between himself and [HAA]. In this conversation, [HAA] indicated “for one day”. The Applicant replied, “One day?? How come? Why’s that? Why you didn’t tell me”. Following sending the screenshot of this conversation to [BM], the Applicant wrote in Arabic, “May we be able to repay you for your good deeds; one can really count on you”. On or about 2 September 2018, the Applicant shared with [BM] a screenshot of a conversation he had with [HAA] in which the Applicant asked whether [HAA] was “ok” working inside the warehouse and said that he may go to the field, and wrote, “This [unknown reference] get him working every day at the warehouse”. [HAA] is from the Applicant’s village.

... On 1 August 2018, the Applicant participated in a joint financial verification visit along with project control and programme colleagues of the INTERSOS office and warehouse in Zahle.

... On 31 August 2018, INTERSOS received UNHCR’s verification report containing negative findings on INTERSOS’ procurement processes. The verification report was signed by the Applicant and two other UNHCR staff members.

... On 15 January 2019, the Inspector General’s Office [“IGO”] received information that INTERSOS conducted an administrative investigation in relation to allegations of misconduct against the Applicant.

... In June 2019, the Applicant sent the following WhatsApp text messages to [BM]:

- (i) On 3 June 2019, the Applicant sent to [BM] photos of the ID card of [SS, name redacted], [SSS, name redacted] and [OS, name redacted].
- (ii) On 13 June 2019, the Applicant sent a WhatsApp message to [BM] asking him to give work to [MG, name redacted]. On 18 June 2019, while [BM] was being interviewed by the IGO, the Applicant wrote to [BM]: “Please try to get this man for work. But not affecting the others. From [location redacted]. [MG] is from [location redacted], the Applicant’s village.

... From 16 to 21 June 2019, an IGO investigation mission to Zahle was undertaken to gather evidence.

... On 18 June 2019, [BK], [BM], and [AD], former INTERSOS Transport Contractor, were interviewed by the IGO.

... On 20 June 2019, the Applicant was interviewed as the investigation subject. He requested that [JZ, the former Head of UNHCR's Sub-Office in Zahle] be interviewed, which was done on 29 July 2019.

... On 2 August 2019, the draft investigation findings were shared with the Applicant and his comments dated 3 August 2019 were taken into account for the finalisation of the investigation report (IR).

... By letter dated 28 November 2019, the Applicant was notified of allegations of misconduct.

... On 30 January 2020, the Applicant submitted his response to the allegations of misconduct.

... After considering the IR, its annexes and the Applicant's response to the allegations, the High Commissioner was satisfied that the following was established on clear and convincing evidence:

- (i) Between June 2018 and June 2019, the Applicant abused his authority and engaged in conflict of interest in pressuring INTERSOS personnel to hire specific individuals, at least one of whom was his relative and three others came from his village; and
- (ii) He abused his authority in telling INTERSOS personnel, in or around July 2018, that they were not working for INTERSOS nor UNHCR, but for him personally.

... On 5 June 2020, the Applicant was hand-delivered the High Commissioner's decision to separate him from service with compensation in lieu of notice and without termination indemnity pursuant to staff rule 10.2 (a) (viii).

... Before his separation from service, the Applicant was employed under a one-year fixed-term contract with an expiration date of 31 December 2020.

7. The Tribunal adds that by letter dated 4 June 2020, the UNHCR Director of Human Resources informed the Applicant of the contested decision, namely "the disciplinary measure of separation from service, with compensation in lieu of notice, without termination indemnity, in accordance with Staff Rule 10.2 (a) (viii)" ("the sanction letter"). In this letter, the Director explained the decision as follows (references to footnotes omitted):

I write further to my letter dated 28 November 2019 inviting you to respond to allegations of misconduct. After carefully considering my recommendation with the Investigation Report and the evidence attached thereto, as well as your 30 January 2020 response to the allegations, the High Commissioner exercised his prerogative under Staff Regulation 10.1 (a) and decided to impose on you a disciplinary measure.

The High Commissioner was satisfied that the alleged facts were established on the basis of clear and convincing evidence for the following allegations:

- a) Between June 2018 and June 2019, you abused your authority and engaged in conflict of interest in pressuring INTERSOS personnel to hire specific individuals, at least one of whom was your relative and three came from your village; and
- b) You abused your authority in telling, in or around July 2018, INTERSOS personnel that they were not working for INTERSOS nor UNHCR, but for you personally.

The High Commissioner found that the evidence revealed that between June 2018 and June 2019, you pressured INTERSOS staff members to hire 14 specific individuals, of which at least one is your relative and three come from your village. Of those 14 individuals, there is written evidence (Whats App messages) demonstrating some sort of pressure for eight of them and there are corroborative testimonies for two others.

Moreover, the High Commissioner found that implicated INTERSOS personnel were credible when they recounted your statement that they were not working for INTERSOS nor UNHCR, but for you personally. Contrary to what you asserted in your reply to the charge letter, it was not considered that their credibility was affected by the fact that their versions of the event differ with respect to the date of the meeting. Also, the credibility of their testimony was strengthened by your acknowledgement that it is possible you have claimed the ownership of the Zahle warehouse “in a spirit of dedication and zeal”.

The High Commissioner has found that your conduct amounted to misconduct. More precisely, he concluded that by pressuring INTERSOS personnel to hire specific individuals and by telling them that they were working for you personally, you improperly used your position of power, and therefore abused your authority. With respect to the allegation of conflict of interest, it was found that the tone used in your messages to INTERSOS personnel and the fact that you pressured for the hiring of your wife’s nephew and individuals that came from your village, strongly suggest that you had a personal interest in the hiring of those specific individuals, and were therefore in a conflict of interest. Furthermore, by putting pressure on the hiring of specific

individuals, the High Commissioner concluded that you used your office for the private gain of third parties and thus abused your office.

In light of the above, the High Commissioner concluded that you engaged in abuse of authority, misuse of office and conflict of interest, thus violating Staff Regulation 1.2 (b), (e), (g), (m), Staff Rule 1.2 (q), the Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (UNHCR/HCP/2014/4 of 29 August 2014) and Principles 2, 4 and 9 of the UNHCR Code of Conduct.

In determining the appropriate disciplinary measure to be imposed, the High Commissioner took into account mitigating and aggravating circumstances. In the present case, the High Commissioner considered as aggravating circumstances that you engaged in repeated conduct involving abuse of authority over a period of approximately one year. As mitigating circumstances, the High Commissioner considered that you have served UNHCR for over 5 years with a satisfactory record; your ePad shows that you are a very dedicated staff member; until now, you had an unblemished disciplinary record; and you appear to be remorseful.

The High Commissioner also applied the parity principle which requires equality and consistency in the treatment of employees and considered disciplinary measures imposed by the Secretary-General and the High Commissioner for similar cases.

Consideration

The Tribunal's limited scope of review in disciplinary cases

8. The Appeals Tribunal has consistently held the “[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration”. In this context, [the Dispute Tribunal] is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. In this regard, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”, and when “termination is a possible outcome, misconduct must be established by clear and convincing evidence”. Clear and convincing proof requires more than a preponderance of the evidence but less than

proof beyond a reasonable doubt—it “means that the truth of the facts asserted is highly probable”. See para. 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT-1024.

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

10. The Appeals Tribunal, however, underlined that “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” or otherwise “substitute its own decision for that of the Secretary-General” (see *Sanwidi*, para. 40). In this regard, “the Dispute Tribunal is not conducting a ‘merit-based review, but a judicial review’” explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision” (see *Sanwidi*, para. 42).

11. Among the circumstances to consider when assessing the Administration’s exercise of its discretion, the Appeals Tribunal stated “[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals

may for good reason interfere with the exercise of administrative discretion” (see *Sanwidi*, para. 38).

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

12. In essence, the Applicant submits that the facts on which the disciplinary sanction was based were not lawfully established in the sanction letter. In short summary, he contends that the INTERSOS staff who had complained against him, namely BK, BM and AD, lacked credibility and had an ulterior motive for making an allegedly false complaint. Instead, the Applicant had, in good faith, proposed certain daily workers to INTERSOS to help managing the work in the Zahle warehouse, and he did not unduly pressure anyone to hire any particular daily workers.

13. In the following, the Tribunal will address the submissions made by the Respondent in his closing statement, albeit for reasons of structure, in a different order.

The evidentiary value of the witness testimonies before the Tribunal vis-à-vis the statements made to the investigation panel

14. The Respondent submits that the Tribunal should “consider the time elapsed between the imposition of the disciplinary measure and the hearing when assessing the evidence”. While “the investigation witnesses had to recall events that occurred three to four years earlier, the Applicant had ample time to adapt his explanations, rehearse his testimony and influence his witnesses”. In this respect, the Applicant’s closing submissions refer “almost exclusively to the testimonial evidence during the hearing”. In case of doubt, however, the Tribunal should “prefer the statements taken by INTERSOS in 2018 and the IGO in 2019, as they are closer in time to the events and therefore more reliable”. The Tribunal should also consider the “available documentary evidence, which speaks for itself”.

15. Regarding the evidentiary value of witness testimonies before the Tribunal vis-à-vis the statements made to an investigation panel, the Appeals Tribunal has held that

in general, an oral testimony given before the Dispute Tribunal under oath prevails over a statement given during an investigative interview not under oath (see the Appeals Tribunal's judgment in *Dibagate* 2014-UNAT-403, paras. 33 to 34). It is further noted that Counsel for the Respondent had full and ample opportunity to cross-examine the Applicant and all his witnesses to test the credibility of their responses, and she also availed herself of the option to do so in a competent, rigorous and professional manner (in line herewith, see *Applicant* 2013-UNAT-302, para. 33).

16. Accordingly, the Tribunal will, as relevant, give the appropriate evidentiary value to the witness testimonies provided during the hearing, but as a matter of principle, not give prevalence to any statements given to investigatory panel over the witness testimonies provided during the hearing.

How to assess the credibility of contradicting witness testimonies?

17. The Tribunal observes that the Appeals Tribunal in *Applicant* 2022-UNAT-1187 (para. 67) provided guidance on how to test the credibility of witnesses and review contradicting witness accounts. The Appeals Tribunal held that “[i]n the nature of things, findings on credibility and reliability typically depend on the [Dispute Tribunal's] impression about the veracity of any witness”. This depend “on a variety of subsidiary factors”, such as:

- a. “[T]he witness’ candour and demeanour in the witness box”;
- b. “[T]he witness’ latent and blatant bias against the staff member”;
- c. “[C]ontradictions in the evidence”;
- d. “[T]he probability or improbability of particular aspects of the witness’ version”;
- e. “[T]he calibre and cogency of the witness’ performance when compared to that of other witnesses testifying in relation to the same incident”;

f. “[T]he opportunities the witness had to experience or observe the events in question”; and

g. “[T]he quality, integrity and independence of the witness’ recall of the events”.

18. The Appeals Tribunal in the same judgment *Applicant* further held that “[i]n the light of its assessment of the credibility and reliability of the testimony and the inherent probabilities, the [Dispute Tribunal], as a final step, is then required to determine whether the Secretary-General has succeeded in discharging his burden of proof to show that it was highly probable that the staff member was a thief, fraud, sexual harasser or whatever the case might be”. The Appeals Tribunal highlighted that this “task again will be made difficult for the [Dispute Tribunal] where the probabilities are equipoised”. The Appeals Tribunal recalled that “[i]n such a case, the party bearing the onus of proof (invariably the Secretary-General in disciplinary cases) may lose his case solely on the basis that he failed to discharge that onus and did not meet the standard of proof required”.

The parties’ submissions regarding the credibility and/or relevancy of the testimonies of the Applicant, MY, TK, BK, BM and AD

19. As for the Applicant’s own credibility, he submits that his “account has been consistent and clear”. The Applicant was “a hard-working and conscientious staff member who worked tirelessly in difficult circumstances, often without guidance”, and “a well-known person locally and that he treated everybody with respect”.

20. The Respondent submits that the Applicant “lacks credibility because he has a motive to hide the truth to avert the consequences of his actions”. Indeed, his testimony during the hearing was “very rehearsed”. The testimonies of the witnesses “favourable to the Applicant [MY, INTERSOS Shift Supervisor, TK, INTERSOS Shift Supervisor, and HR, UNHCR Supply Assistant]) were also very well prepared and similar in content, and they testified that they had been in contact with the Applicant after his

separation”. This “suggests that the Applicant influenced the witnesses as he prepared an explanation in his defence”. The Applicant testified that he was “not in contact with individuals from INTERSOS, but he stated that he still knew what was happening at the warehouse (e.g. which daily workers were still working there)”. When “asked how he knew what was currently happening at the warehouse, the Applicant refused to provide an explanation”, which “casts further doubt on his integrity and credibility”.

21. The Respondent contends the Applicant “contradicted himself as to the importance of daily workers’ origin”. He “first stated that it was ‘irrelevant and it was just a consequence of the location of the warehouse’, and later affirmed that where the workers are from ‘matters a lot’”. The Applicant “further contradicted himself by first defining as ‘nothing’ the relationship between him and the daily workers he requested INTERSOS to hire, but then stating that he did not suggest people whom he did not trust”. The Applicant “made inconsistent and contradictory statements with respect to individual daily workers”, and indeed, he “qualified his relationship with [HAA] as ‘nothing’ and stated that he met him at the warehouse”. This is “squarely inconsistent with: i) the Applicant’s detailed testimony about [HAA’s] personal life; ii) his later statement that they both are from the same ‘small town’ and that ‘everybody knows everybody’”; and, iii) the Applicant’s previous statement to the IGO, in which he stated that [HAA’s] mother asked the Applicant’s wife if the Applicant could help him get a job”. Evidently, there was “a relationship between both families, who lived in the same village”. This is “corroborated by the fact that the Applicant admitted he did not want [HAA] to be embarrassed by working in the field and by the various messages showing that he insisted and pressured [BM], on three different dates, to have [HAA] called to work”. The Applicant’s “explanation that ‘Get him working in the warehouse every day’ meant that he should not be working outside the warehouse is not credible and is directly contradicted: i) by his own text message saying to [HAA] that he may go to the field; and, ii) by [BM], who testified that he understood it meant he needed to call him to work every day”.

22. The Respondent submits that “the Applicant lied about daily worker [ATS]. Indeed, he told the IGO during his interview that [ATS] was not a relative”. In an email to the IGO, he “insisted that all ‘drivers and the daily workers [he] shared their names with INTERSOS are not relatives’ and that he has ‘nothing to hide’”. However, once the Applicant “saw all the evidence gathered by the IGO, he finally admitted that [ATS] was his wife’s nephew (as proven by his message)”. The “numerous contradictions in the Applicant’s statement confirm that his testimony is not credible”.

23. Concerning the testimonies of MY and TK, which were both witnesses of the Applicant, he submits that they are “impartial former INTERSOS warehouse staff” and “independently corroborate [the Applicant’s] account”.

24. The Respondent contends that the “testimonies of [MY] and [TK] are not relevant or credible and should be given no weight”, because neither of them were “involved in the hiring of daily workers and rarely dealt with UNHCR”. On this last point, HR did “not even know [MY] and stated that he would only deal with [TK] when [BK] and [BM] were not available”. MY and TK “denied that they discussed among each other their answers to the questionnaires that were submitted to the Tribunal”, but gave the “same word-for-word response to question 2, to the beginning of question 3 and to question”. Furthermore, MY “admitted to discussing the trial testimony of [TK] with the latter, before giving his own testimony”. This “demonstrates that they coordinated their testimonies as well as their lack of integrity” and in particular MY’s testimony is “tainted”.

25. The Respondent contends that MY and TK “made wild allegations of corruption and theft and stated that they had reported [BK] and [BM] to the Applicant, which would explain the alleged retaliatory complaint”. However, this “theory is directly contradicted by the Applicant, who stated that the warehouse was ‘almost perfect’” and that he had no issues with INTERSOS on a professional or personal level”. MY “acknowledged that he was upset about his termination from INTERSOS and that he decided to participate in the trial to understand the reasons behind it”. When

Counsel for Applicant asked if he came to testify because he was upset, he replied “No, I am disturbed, I want to know why I was separated”. MY’s “testimony is clearly retaliatory and has no credibility”.

26. Regarding BK (INTEROS Warehouse Manager), BM (INTEROS Warehouse Assistant) and AD (former INTEROS Transport Contractor), which were all witnesses of the Respondent, the Applicant challenges their motivation and credibility. The Applicant submits, *inter alia*, that BK, BM and AD “complained about [the Applicant] due to the 1 August 2018 verification visit and its implications for [AD’s] contract”, namely its termination. As evidence, the Applicant refers to MY’s testimony at the hearing according to which “he believed that there was a corrupt understanding” between BK and AD that led to AD “winning all the procurement exercises”. MY “filed a complaint with INTEROS against [BK], [BM] and [AD] which was not investigated”, and BK “also hired his close family to work for INTEROS”.

27. The Respondent submits that the “evidence demonstrates that, on 31 July 2018, [BK] rightfully complained to his supervisor following the [m]eeting at the warehouse because the pressure, the control, and the disrespect had become too much”. Instead of “taking responsibility for his behaviour, the Applicant came up with various theories of retaliation to deflect the blame to the victims”, which are “purely speculative and have not been established”. Indeed, the Applicant first told JZ (former Head of UNHCR’s Sub-Office in Zahle) that “he believed the complaint was retaliatory because INTEROS’ contract with UNHCR on WASH [an abbreviation for water, sanitation and hygiene] was terminated”. The Applicant later stated to the IGO that “the complaint ‘was directly linked to the [...] findings of the 2017 and 2018 financial verification’”, but “the timing of the complaint and the visit/report makes this theory groundless”. In all cases, there is “no evidence that [BK] or [BM] were aggrieved by the verification visit/report and the Applicant himself testified that he ‘never had any types of disagreements’ with INTEROS”. The Applicant then “alleged that the complaint was linked to the termination of [AD’s] contract”, which is “highly

improbable and would have been entirely disproportionate for [BK] to put his employment at risk by filing a fictitious and malicious complaint against the Applicant for the termination of a contract of a transport supplier, with whom he had a purely professional relationship”. Moreover, even if BK “disagreed with the termination of [AD’s] contract, it does not vitiate the veracity of the witnesses’ statements nor the documentary evidence that corroborates them—both can be true”. In “the absence of any established motive, the Appeals Tribunal has “consistently declined to presume that a complainant or witness will give false testimony”, referring to *Siddiqi* 2019-UNAT-913 at para. 30, *Majut* 2018-UNAT-862 at para. 80, *Mbaigolmem* 2018-UNAT-819 at para. 31, and *Aghadiuno* 2018-UNAT-811 at para. 96. The presumption has not been rebutted in this case.

28. The Respondent contends that all its witnesses, namely BK, BM, AD, HR and JZ, “provided credible, realistic and consistent testimonies”. Contrary to the Applicant’s allegations, there is “no evidence that they have lied”. Additionally, the Applicant “attempted to mislead the Tribunal when he blatantly stated that [BM] testified that [BK] ‘ordered him to complain’ against the Applicant. It was “very clear to all parties at the hearing that [BM] had a weak command of the English language and had not understood the question asked by Counsel for Applicant”. The Tribunal “even intervened to clarify the misunderstanding, after which [BM] explained, ‘When was happened [sic], I told my line manager and my line manager told me we should tell our management’”. As for JZ, he “candidly admitted during his testimony that, given that the meeting with the Applicant had happened years ago, he could not remember its details or timing, but he was adamant that he had discussed with the Applicant the subject of the INTERSOS complaint, i.e. the undue pressure on INTERSOS staff to hire specific individuals as daily workers”.

The Tribunal’s general assessment of the challenged witness testimonies

29. The Tribunal notes that the various testimonies provided at the hearing shows that by the time of the complaint against the Applicant, the work environment at the

Zahle warehouse was troubled by a power struggle between the Applicant from UNHCR and BK and BM from INTERSOS. The background is not clear from the facts, and it does not fall within the purview of the Tribunal in the present case to investigate any potential corruption allegations against BK, BM and AD.

30. The Tribunal notes, however, the disagreements at the Zahle warehouse arose against the backdrop of a looming financial crisis in Lebanon in 2018. As explained by the Applicant, BM, HR and MY in their testimonies, employment in the local area had become scarce and the Lebanese government required that Lebanese citizens be recruited in priority, including for jobs like daily workers. Thus, jobs requiring hard physical labor, such as a daily worker in the warehouse, which had previously been considered unattractive and predominantly undertaken by foreigners, were now sought after in the local community. At the same time, MY testified at the hearing that favoritism is widespread in Lebanon.

31. Regarding the testimonies of the Applicant, MY and TK, while recognizing that the Applicant has a strong self-interest in the case, the Tribunal does not find that his testimony came across as inappropriately rehearsed. The Applicant responded to the questions in a direct and frank manner, and did not deny to having provided recommendations of daily workers to INTERSOS. Instead, the Applicant openly explained the circumstances thereabout. As said, the Respondent also cross-examined the Applicant.

32. The Tribunal finds that the Applicant only appeared to hesitate when he was asked if he had been in contact with MY and TK prior to the hearing. Such contact would, on the other hand, only be logical since they all reside in the same area and, in the Applicant's own word, he is a well-known figure in the community. Evidently, the Applicant must also have approached MY and TK for the purpose of asking them if they would give oral evidence at the hearing as his witnesses. In addition, it followed from the witness testimonies that the Applicant, MY and TK would occasionally run into each other by coincidence.

33. Whereas the Applicant, MY and TK might therefore have discussed the topics of the present case before the hearing, the Tribunal, however, does not find that the Respondent has adequately substantiated that the Applicant coordinated, or otherwise inappropriately, influenced their testimonies. Counsel for the Respondent also had the opportunity to test their responses in cross-examination and did so. In addition, the fact that the Applicant keeps himself abreast with the current affairs in the Zahle warehouse and does not wish to reveal his information sources thereabout makes no difference in this context. The Applicant's interest therein is not surprising as he participated in setting up the warehouse, and since then, spent much time and energy there.

34. In line herewith, the alleged contradictions in the Applicant's testimony do not by themselves render them incredible. Indeed, the Applicant's statements regarding the importance of the origin of the daily workers and not recommending people he did not trust were rational. Notwithstanding the Applicant's own opinion, it was in UNHCR's best interest to hire reliable and local people, as according to the Applicant's testimony, the Lebanese Government had requested UNHCR to hire Lebanese workers rather than foreigners, even if, as testified by TK, foreign workers were often better fitted for the hard physical work. Similarly, the Applicant's explanations concerning the circumstances surrounding the assignment of tasks to HAA were compelling. UNHCR had charged the Applicant with the responsibility of coordinating and supervising the work of INTERSOS staff at the Zahle warehouse. Taking certain workers' particular personal circumstances into account when assigning tasks, such as those of HAA, was only reasonable to ensure harmony at the workplace. Finally, it could plausibly be argued that the family ties between ATS and the Applicant were too remote to consider them, at least close, relatives—as the nephew of his wife, ATS did not share a direct bloodline with the Applicant. In any case, eventually, ATS never worked as a casual worker as he was below the age of 18.

35. Concerning BK, BM and AD, having filed the initial complaint against the Applicant, they also have a strong self-interest in the outcome of the present case.

36. Specifically with regards to BM, the Tribunal finds that his testimony was candid and credible, and he had no difficulty in providing direct and precise answers to the questions posed by Counsel. In general, BK evidently did not appreciate the Applicant's management style and the manner by which he perceived that the Applicant intended to influence INTERSOS' hiring of daily workers.

37. As for BM, he also explained that he felt that the Applicant had been inappropriately meddling in his work by pushing him to hire certain daily workers. Parts of BM's remaining testimony came across, however, as incoherent and also inconsistent with BK's testimony. While this could, at least partially, have been caused by him not fully mastering the English language, as also submitted by the Respondent, the Tribunal notes that the Respondent could have avoided this by requesting Arabic-English interpretation, which was provided with regard to some of the other witnesses, namely AD, TK and MY.

38. The incoherence and/or inconsistencies in BM's answers, for instance, concerned the following:

a. The recruitment of daily workers at the Zahle warehouse. BM appeared to state that all hiring was only done at the Zahle warehouse either by using a rotation scheme of already known workers or by hiring people who showed up at warehouse at their own initiative. BK instead proposed that workers were also hired upon recommendations from others, such as non-governmental organizations. BK's explanation is corroborated by the testimonies of the Applicant and MY;

b. BM's capability of rejecting to hire daily workers recommended by the Applicant. BM appeared to say that he could not do so, but BK suggested that ATS was never recruited albeit being recommended by the Applicant, because INTERSOS's human resources had rejected him as underaged (below 18 years). Also, it does not follow from the casefile that any of the other persons

recommended by the Applicant, as per the text messages included in the agreed facts, were actually hired by INTERSOS;

c. BM's fear of losing his job if rejecting the Applicant's recommendations. BM himself explained that he worked for INTERSOS and that his line manager was BK. BM was not able to explain how the Applicant, a UNHCR employee, would have been able to fire him or influence any such decision;

d. Relatives of the INTERSOS staff working at the Zahle warehouse. BM explained that he did not hire his father as a driver to work at the warehouse, but that a truck company had done so. On the other hand, MY explained that it was imposed on him to hire BM's father. Also, BM stated that his wife did not work for INTERSOS at the warehouse, at least not as a daily worker. This was contradicted by MY, who testified that BK's brother and brother-in-law were also hired by INTERSOS to work there. At the same time, BK testified stated that even in the absence of any written guidance thereon, INTERSOS employees could not hire family or relatives in the Zahle warehouse, which would amount to a conflict of interest.

39. Regarding AD's testimony, the Tribunal finds that he explained that he was upset with the Applicant, thinking that the Applicant was responsible for his losing a transportation contract with INTERSOS. There, however, seem to be compelling reasons why he lost his transportation contract with INTERSOS, which were unrelated with the Applicant.

The Tribunal's assessment of the factual allegations made in the sanction letter

40. In the following, the Tribunal will review whether UNHCR—with clear and convincing evidence—established the two factual allegations that were made in the sanction letter as background for the termination of the Applicant's employment, namely that:

a. The Applicant allegedly pressuring INTERSOS personnel to hire specific individuals, at least one of whom was his relative and three others came from his village; and

b. The Applicant allegedly telling INTERSOS personnel, in or around July 2018, that they were not working for INTERSOS nor UNHCR, but for him personally.

41. The Respondent submits that BM and AD stated that “some of the individuals told them that they were related to the Applicant and that others referred to him as ‘Uncle Wassim’”. BK, BM and AD “all expressed how they felt obliged to hire these individuals and that it was not mere recommendations, but pressure that became intolerable”. BM stated that he was “scared he could lose his job if he did not comply with the Applicant’s orders”. AD believed that “his contract with INTERSOS was terminated because he had defied the Applicant and refused to hire [OS] as a pick-up driver when there was no need”. This fear that the Applicant “could or had terminated their employment demonstrates the intimidation that the Applicant subjected them to”.

42. The Respondent further contends that the Applicant “acknowledged that he did not have a role in the hiring of daily workers and gave various contradictory explanations to justify his behaviour”. He stated that it was “in fulfilment of his mentorship role”, but both BM and BK testified that they “did not request or need assistance for the hiring of daily workers and that the current UNHCR Supply Associate has never sent names for them to hire”. The Applicant “alleged during the hearing that depending on the period, there was a lack or a surplus of Lebanese individuals interested in the job”, but “the pressure on INTERSOS staff all happened during the same period when, according to the Applicant and [BM,] many Lebanese workers were looking for work”. Indeed, the Applicant testified before this Tribunal that “Lebanese people started coming to them in ‘huge numbers’ to find work and that they were people ‘waiting at the door of UNHCR office looking for work’”. The Applicant “acknowledged that they needed to have a rotation between approx. 50

workers”; yet, the WhatsApp messages and the statements of BK and BM “demonstrate that the Applicant was insisting that the individuals he referred be called to work every day”. A message from a daily worker “shows that the Applicant had told him to go to work every day”. In another case, the Applicant “reacted with surprise when he learned that a worker had only been called for one day and asked the worker why he had not told him sooner”. Finally, the Applicant “acknowledged that Lebanese individuals called asking for favours, and [MY] admitted that “recommending workers was a normal thing in Lebanon because of favouritism”.

43. The crux of the Tribunal’s factual assessment is to determine whether the Respondent’s has proven by clear and convincing evidence that the Applicant in his communications with INTERSOS personnel, in particular BM, pressured them to hire certain individuals as daily workers. The question of the Applicant’s possible abuse of authority and conflict of interest are legal issues and therefore considered under the heading of misconduct further below.

44. The parties agree that the Applicant proposed certain persons to BM for possible employment with INTERSOS in the Zahle warehouse.

45. In this regard, the Tribunal finds that in the Applicant’s text communications with BM, which was stated in the agreed facts, his tone was demanding rather than suggestive—“I want you to call and take care of ... [ATS]”; “We want the boy [AMB] to work in the warehouse”; “This [unknown reference] get him [HAA] working every day at the warehouse”. Also, in the messages concerning ARS and HAA, the Applicant gives the impression of having the power to decide on which daily workers are to be hired and when.

46. This indicates that the Applicant’s intent was not only to recommend certain daily workers to INTERSOS for hiring, but that he was actually trying to order them to do so. The Respondent, however, has not established if and how the Applicant was actually in a position to assert any effective pressure on BM if he did not follow his recommendations.

47. Firstly, it does not follow from the facts on record that any of the people referred to in text communication between the Applicant and BM were indeed hired by INTERSOS. Rather, it would seem that no one were. ATS was rejected as underaged and the other recommended daily workers do not seem to have been hired by INTERSOS or to have worked more often than previously because of the Applicant's message.

48. Secondly, BM explicitly referred to BK as his line manager and not the Applicant, and he was unable to explain why he, an INTERSOS employee, would risk his job if not following the directions of the Applicant, a UNHCR staff member. Instead, BM testified that the Applicant was a powerful person in the Zahle warehouse, but did not further substantiate from where he got this power other than he had a loud voice.

49. The Tribunal therefore finds that whereas BM might likely have felt embarrassed by the Applicant and his style of communication, the Respondent has not demonstrated with the required evidentiary standard that it was reasonable for BM to fear for his employment with INTERSOS and therefore feel pressured to hire certain daily workers.

50. In this regard, BK, BM and AD all referred to a meeting in the Zahle warehouse in 2018, where the Respondent alleges that the Applicant should have stated that they worked for him and not UNHCR or INTERSOS. Even if this allegation is regarded truthful, BK, BM and AD all knew that the Applicant had no basis for making that statement and that it was incorrect. Whether the mentioned meeting occurred or not, it is therefore not relevant as to the question of whether Applicant actually asserting any pressure on BK, BM and AD. At most, it can be regarded as the Applicant attempting to influence them in a nonconsequential manner.

51. Also, the Tribunal finds that the Respondent has not been able to establish with required evidentiary standard that the Applicant made any of the hiring recommendations with any other motive than to undertake his duties in the Zahle

warehouse as a UNHCR Supply Associate, as described in the agreed facts. A responsibility of the Applicant was, henceforth, to monitor and supervise the work there, and UNHCR's best interest in this regard was to ensure that local and fit daily workers were recruited, as according to the Applicant, not everyone who were otherwise recommended or showed up at the warehouse to look for work were fit for the tasks. In this regard, JZ testified that in reality, it was the Applicant's sole responsibility to ensure that INTERSOS undertook the work at the warehouse properly. The Respondent has not with the required evidentiary standard proven that the Applicant had any other motivation than this.

52. Accordingly, the Tribunal finds that with clear and convincing evidence, the Respondent has only managed to establish that the Applicant intended to assert some, albeit ineffective, pressure on BM in the hiring process of daily workers.

Whether the established facts qualify as misconduct?

53. The Respondent refers the judgment of the Dispute Tribunal in *Buyoya* UNDT/2022/002, which he contends "is similar to this case". In *Buyoya*, the Dispute Tribunal concluded that "a staff member failed to uphold the highest standard of integrity, engaged in misuse of office and conflict of interest, because she used her position of 'influence and authority' to request that a vendor hire her brother and other individuals that she 'favoured'". The Tribunal also "found that she 'attempted to enrich [them] using her official connections to get them employment' and that 'by repeatedly suggesting and inquiring about the possibility of hiring her brother and her other candidates, she placed undue pressure on [the vendor] to accede to her request'".

54. Like in the present case, the Respondent argues that the Dispute Tribunal found "that the vendor did not ask 'for assistance from the Applicant to identify candidates' and that her 'actions compromised the reputation and image of the Organization'". Similarly, the Applicant "used his official position of power over a UNHCR implementing partner to get work for individuals he favoured, hence engaging in conflict of interest and abuse of office". Indeed, his "concern for hiring select

individuals from his community shows that his motivation was not professional and that this personal interest interfered with his official duties”. The Applicant’s behaviour is “even more serious than the *Buyoya* case, since he not only requested that his acquaintances be hired, but he also intimidated and exerted undue pressure, thus engaging in abuse of authority”. The evidence demonstrated that “the Applicant intimidated the victims, who felt that they could not decline the pressure without consequences”.

55. The Respondent avers that the Dispute Tribunal in *Buyoya* “emphasized the importance for staff members involved in procurement, like the Applicant, ‘not [to] engage in any conduct which could create the impression of favouring third parties, that is to say, they must be and appear to be above reproach, particularly when interacting with persons or entities who could potentially become involved in supplying goods or services to the Organization, or are currently in such a relationship”.

56. The Tribunal observes that the administrative instruction to which UNHCR refers in the sanction letter, UNHCR/HCP/2014/4 of 29 August 2014 (UNHCR’s Policy on Harassment, Sexual Harassment, and Abuse of Authority), defines “abuse of authority” as follows (see para. 3):

The improper use of a position of influence, power or authority by an individual against another colleague or group of colleagues. This is particularly serious when an individual misuses his/her influence, power or authority to negatively influence the career or employment conditions (including—but not limited to—appointment, assignment, contract renewal, performance evaluation or promotion) of another. It can include a one-off incident or a series of incidents. Abuse of authority may also include misuse of power that creates a hostile or offensive work environment, which includes—but is not limited to—the use of intimidation, threats, blackmail or coercion.

57. Under this statutory definition of abuse of authority, the only pertinent aspect would be if the Applicant is found to have created a hostile or offensive work environment for BK and BM by using intimidation, threats, or coercion against them

BK and BM. Thus, it is noted that only BK and BM's situations are relevant in this context as the sanction letter only refer to the Applicant pressuring INTERSOS personnel and AD was a contractor. In addition, BK and BM were not colleagues of the Applicant (see para. 3, first sentence); the Respondent does not contend that the Applicant misused his influence, power or authority to negatively influence BK or BM's career or employment conditions (see para. 3, second sentence); and no blackmail claims have been made (see para. 3, third sentence).

58. The Tribunal notes that both BK and BM in their testimonies expressed that the work environment had become intolerable by the time when the alleged meeting between the Applicant, BM, BK and AD took place. Also, the Applicant had a loud voice, according to both BK and BM, and the tone of text communication with BM was demanding. At the same time, both BK and BM explicitly understood that the Applicant did not have any instruction authority over them and, as a UNHCR staff member, could not fire them.

59. In addition, it follows from the agreed facts that before INTERSOS took over the daily management of the Zahle warehouse in 2014, the Applicant helped to set up the UNHCR office and warehouse in Zahle and used to be in charge of hiring the daily workers. When the responsibility of managing the warehouse was transferred to INTERSOS, the previous practice of hiring daily workers simply continued and INTERSOS also inherited the pool of daily workers that the Applicant had previously established and used.

60. At no point in time has it been demonstrated that any UNHCR superiors gave the Applicant any guidance regarding the appropriateness of his established practices on hiring daily workers at the Zahle warehouse. The only direction that seems to have been provided is that hiring Lebanese workers should be preferred. Also, no complaints regarding the Applicant's recommendations on hiring certain daily workers were submitted before BK, BM and AD did so. Until then, the Applicant had therefore no

reason to believe that his recommendations of certain daily workers to INTERSOS posed a problem.

61. As a result, the Applicant was very much left to his own devices by his UNHCR superiors to decide how to organize and administer his own work. In line herewith, according with the testimony of JZ, the former Head of UNHCR's Sub-Office in Zahle, he appeared to be mostly unaware of how the warehouse was managed on a daily basis—he only visited it two or three times albeit it was only five minutes by car from his own office. JZ specifically testified that: (a) he did not give the Applicant any instruction on the procedures for hiring daily workers at the warehouse; (b) no UNHCR guidelines applied thereto; and (c) he did not monitor how this was undertaken by the Applicant in practice. Regarding the complaint by BK, BM and AD against the Applicant, he only testified that he discussed it with his peer in the INTERSOS administration after it was submitted. The Tribunal is therefore led to believe that JZ did not speak about the problems in the Zahle warehouse with anyone with actual firsthand knowledge of the situation or otherwise intended to better understand what was happening or even resolve the matter amicably.

62. The Tribunal further notes that other judgments of the Dispute Tribunal, such as *Buyoya*, only have persuasive value for this Tribunal (see, for instance, *Igbinedion* 2014-UNAT-410). In any event, the circumstances of *Buyoya* substantially differs from those of the present case, and it is therefore not relevant in the present case.

63. In light of these circumstances, the Tribunal finds that the Applicant's behavior did not amount to abuse of authority under UNHCR's statutory definition.

64. Regarding conflict of interest, this is defined as follows in staff regulation 1.2(m):

A conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant.

65. The Tribunal finds that the recommendation of the Applicant of his wife's nephew and three other persons from his village as daily workers did not amount to a conflict of interest. The point was that the Government of Lebanon had encouraged UNHCR to hire Lebanese people. As the Applicant resided and was a well-known figure in the local community near the Zahle warehouse, it was only logical that some of the recommended daily workers came from his village and his wife's nephew cannot be regarded as a close relative.

66. Accordingly, under *Sanwidi*, the Tribunal finds that the termination of the Applicant's appointment was manifestly incorrect and led to a disproportionate outcome. The contested decision was therefore unlawful. In light thereof, it is not necessary for the Tribunal to review the third prong of the legal test, namely proportionality of the sanction, or the Applicant's submissions on due process irregularities.

The legal framework for relief before the Dispute Tribunal

67. The Statute of the Dispute Tribunal provides in art. 10.5 an exhaustive list of remedies, which the Tribunal may award:

5. 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.

Rescission under art. 10.5(a) of the Dispute Tribunal's Statute

68. The Applicant principally seeks the rescission of the contested decision and reinstatement in his former post. The Respondent makes no submissions on remedies other than the Applicant has failed to established “any of the four bases on which the disciplinary measure should be rescinded or for moral damages should be awarded”.

69. Considering its abovementioned findings on the unlawfulness of the contested decision, the Tribunal finds that the most appropriate remedy would be to rescind this decision (in comparison, see *Lucchini* 2021-UNAT-1121). As for reinstating the Applicant in his former post, the Tribunal notes that this is impossible as the evidence shows that a new person has been recruited on it (see, for instance, the testimonies of BK and BM).

In lieu compensation under art. 10.5(a) of the Dispute Tribunal's Statute

General principles and elements to consider when deciding the *in lieu* compensation amount

70. Under art. 10.5(a) of the Statute of the Dispute Tribunal, in cases concerning termination, like the present one, the Administration may elect to pay as an alternative to the rescission *in lieu* compensation.

71. In *Laasri* 2021-UNAT-1122 (para. 63), the Appeals Tribunal set out that “the very purpose of *in lieu* compensation is to place the staff member in the same position in which he or she would have been, had the Organization complied with its contractual obligations”. It further held that the Tribunal “shall ordinarily give some justification and set an amount that the Tribunal considers to be an appropriate substitution for rescission or specific performance in a given and concrete situation”.

72. In this regard, the Appeals Tribunal held that “the elements which can be considered are, among others”,

- a. “[T]he nature and the level of the post formerly occupied by the staff member (i.e., continuous, provisional, fixed-term)”;
- b. “[T]he remaining time on the contract”; and
- c. “[C]hances of renewal”.

The nature and the level of the post formerly occupied by the Applicant and the remaining time on the contract

73. The Tribunal notes that at the time of the termination of his employment with UNHCR, according to the agreed facts and the application, the Applicant held a one-year fixed-term appointment at the level of G-6, step 9 that expired on 31 December 2020.

The Applicant’s chances of renewal

74. Considering the circumstances surrounding the termination of the Applicant’s appointment, the Tribunal finds it unlikely that—in the hypothesis that UNHCR had not terminated the appointment—it would have been renewed any further than 31 December 2020.

The *in lieu* compensation amount

75. The Applicant submits that as an alternative to reinstatement, he should be granted compensation of three years net-base salary.

76. The Tribunal notes that under the consistent jurisprudence of the Appeals Tribunal, the very purpose of compensation, including *in lieu* compensation, is that the Applicant is to be placed in the same position he would have been in had UNHCR complied with its obligations (see *Laasri* and also, for instance, the seminal judgment in *Warren* 2010-UNAT-059, para. 10). As much as *in lieu* compensation is “not compensatory damages based on economic loss” (see *Eissa* 2014-UNAT-469 as affirmed in *Zachariah* 2017-UNAT-764 and *Robinson* 2020-UNAT-1040), the point

of departure for the Tribunal's considerations is the actual financial impact that the unlawful contested decision had on the Applicant's situation, also because it "shall not award exemplary of punitive damages" under art. 10.7 of its Statute.

77. In the present case, if the Applicant's temporary appointment had not been unlawfully terminated on 4 June 2020, it is reasonable to assume that he would have kept his job until the expiry of his fixed-term appointment on 31 December 2020. This means that he would have been paid his regular salary from UNHCR, including all related benefits and entitlements, until then.

Non-pecuniary (moral) damages

78. The Applicant finally requests "adequate moral damages" without further specifying what this would be.

79. The Tribunal notes that such damages can only be awarded under art. 10.5(b) of the Dispute Tribunal's Statute, which requires that such compensation for harm must be supported by evidence. As the Applicant has submitted no evidence of non-pecuniary (moral) harm, the Tribunal finds that no basis exists for awarding any such compensation.

Conclusion

80. In light of the foregoing, the Tribunal DECIDES that:

- a. The contested decision is rescinded;
- b. As *in lieu* compensation under art. 10.5(a) of the Dispute Tribunal's Statute, the Applicant shall be awarded the full salary, including all related benefits and entitlements, he would have obtained until 31 December 2020 had his fixed-term appointment not been terminated;

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

(Signed)

Judge Joelle Adda

Dated this 30th day of June 2022

Entered in the Register on this 30th day of June 2022

(Signed)

Morten Albert Michelsen, Officer-in-Charge, New York Registry