UNITED NATIONS DISPUTE TRIBUNAL

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| Case No.: | UNDT/GVA/2020/036 |
| Judgment No.: | UNDT/2022/071 |
| Date: | 28 July 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:**
Jeffrey C. Dahl

**Counsel for Respondent:**
Lucienne Pierre, AAS/ALD/OHR, UN Secretariat
Albert Angeles, AAS/ALD/OHR, UN Secretariat

**Introduction**

1. The Applicant, a former staff member of the United Nations Office on Drugs and Crime ("UNODC"), contests the decision to impose on him a disciplinary measure of separation from service, with compensation in lieu of notice and with 25 per cent of the termination indemnity otherwise applicable, following a disciplinary process of sexual harassment and harassment.

**Facts**

2. Prior to his separation, the Applicant held a fixed-term appointment expiring on 31 December 2021 and served as Social Affairs Officer at the P-3 level in the Data Development and Dissemination Unit ("DDDU"), UNODC, Vienna. V01 was an intern between July and December 2015 at DDDU, reporting directly to the Applicant. In October 2016, V01 returned to work as an individual contractor in DDDU. The Applicant was not her first reporting officer, but she worked directly with him as the Applicant managed projects assigned to her.

3. On 20 July 2018, the Investigations Division of the Office of Internal Oversight Services ("OIOS") received a report of sexual harassment, harassment and abuse of authority implicating the Applicant. It was reported that the Applicant behaved inappropriately towards V01.

4. OIOS interviewed V01 and several witnesses, including the Applicant, who was interviewed on 4 and 5 February 2019.

5. On 28 June 2019, OIOS concluded its investigation of the matter, finding that the Applicant sexually harassed and abused his authority vis-à-vis V01 by sending her an email on 8 November 2018, in which he suggested that they share a room on the last night of an official trip to South Korea; and harassed and abused his authority vis-à-vis V01 by:

   a. Controlling her movements and creating a hostile working environment after she refused his advances and reproached him for his conduct towards her;

b. Making offensive comments on International Women's Day of 2017;

c. Humiliating V01 and being rude to her in the presence of other colleagues during team meetings;

d. Causing V01 embarrassment by making comments about her age during a dinner in June 2018;

e. Speaking to V01 using a loud tone, especially when she had done something wrong; and

f. Raising his voice towards V01 during a discussion on 5 July 2018, and by being harsh and unfriendly with her during the subsequent meeting.

6. On 24 September 2019, the Director of the Administrative Law Division, Office of Human Resources, issued a memorandum entitled "allegations of misconduct". The Applicant was requested to provide any written statements or explanations he might wished to give in response to the allegations of misconduct.

7. On 29 November 2019, the Applicant responded to the allegations.

8. On 19 May 2020, the Under-Secretary General for Management, Policy and Compliance ("USG/MPC") concluded that OIOS's investigation established by clear and convincing evidence that the Applicant made unwelcome sexual advances towards V01 and, from January to July 2018, created an intimidating and hostile environment for her. USG/MPC concluded that the Applicant's actions constituted serious misconduct in violation of staff regulation 1.2(a), staff rule 1.2(f) and secs. 2.1 and 3.2 of ST/SGB/2008/5 "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority". As a result, USG/MPC decided to impose the disciplinary measure of separation from service, with compensation in lieu of notice and with 25 per cent of the termination indemnity otherwise applicable, pursuant to staff rule 10.2(a)(viii).

9. On 3 August 2020, the Applicant filed an application before this Tribunal contesting the above-mentioned decision.

10. On 4 September 2020, the Respondent filed his reply.

11. By Order No. 37 (GVA/2022) of 15 March 2022, the Tribunal called the parties to a case management discussion ("CMD") which took place on 30 March 2022.

12. By Order No. 49 (GVA/2022) of 8 April 2022, the Tribunal instructed the parties to provide written submissions on the use of prior conduct as evidence in disciplinary investigations, to identify whether an oral hearing is needed, and to provide a list of potential witnesses, if any, explaining the relevance of each testimony for the determination of the issues in dispute.

13. On 20 April 2022, the Applicant filed a motion for extension of time to comply with Order No. 49 (GVA/2022).

14. Also on 20 April 2022, the Tribunal received, after working hours, the Respondent's response to said motion requesting that the same extension of time be granted to him.

15. By Order No. 53 (GVA/2022) of 21 April 2022 and Order No. 54 (GVA/2022) of 22 April 2022, the Tribunal granted the parties' request for extension of time to comply with Order No. 49 (GVA/2022) until 29 April 2022.

16. On 29 April 2022, the parties filed their respective submissions.

17. By Order No. 58 (GVA/2022) of 19 May 2022, the Tribunal instructed the parties that a hearing would be held from 13 to 15 June 2022, and that the Applicant and four witnesses would provide testimony.

18. From 13 to 15 June 2022, the Tribunal held a hearing in the present case.

19. By Order No. 66 (GVA/2022) of 17 June 2022, the Tribunal instructed the parties to provide closing submissions and informed them that upon their receipt, it would be moving forward with adjudication.

20. On 27 and 28 June 2022, the Respondent and the Applicant filed their respective closing submission.

**Parties' submissions**

21. The Applicant's principal contentions are:

a. The prior conduct evidence was deliberately used by the Administration to create bias against the Applicant. It is irrelevant, not probative, and it masks the lack of clear and convincing evidence;

b. Relevant positive prior conduct evidence supports the Applicant's testimony, and the Respondent's bad faith refusal to hear it during the investigation process violated the Applicant's due process rights;

c. There is no clear and convincing evidence that the Applicant made "unwelcome advances of sexual nature towards V01". The evidence of sexual harassment is not unequivocal and manifest, V01's claim that the Applicant unfairly excluded her from subsequent missions is inconsistent with her claims of sexual harassment. The Applicant's hesitancy in his answers during the investigation interview was due to the aggressive and misleading questioning. The Administration wrongly found him not believable as a result;

d. The Respondent failed to establish misconduct in the workplace through harassment or abuse of power to a clear and convincing standard. The Applicant could not have violated ST/SGB/2008/5 as he was not a manager or supervisor, and the Applicant did not harass V01 nor created an intimidating and hostile work environment. The pressure noted by V01 was related to meeting deadlines, and the "monitoring" behaviour was a misinterpretation of normal work activity. The Applicant was formal and direct during team meetings, and the single moment of disagreement established was a work-related issue;

e. The Applicant's due process rights were violated during the investigation and disciplinary process by the improper and biased use of prior conduct evidence that was not relevant, probative or uncontroversial. As a result, V01's version of the facts was found more credible than that of the

Applicant's, which, in turn, created a bias against him and led to the determination of misconduct without clear and convincing evidence; and

f. The Applicant reasonably raised contentions regarding V01's ability to objectively process and recollect events and was unfairly punished for doing so. The Respondent had the obligation to reconcile the impact of V01's other sexual harassment allegations as part of his burden of proof.

22. The Respondent's principal contentions are:

a. Regarding the sexual harassment incident, it is established by clear and convincing evidence that, from November to December 2017, in connection with and during travels for a mission to South Korea, the Applicant made unwelcome advances of a sexual nature towards V01. The Applicant's inappropriate comments and advances towards V01 caused her to feel objectified, disappointed, stressed and depressed;

b. Regarding the workplace harassment, it is established by clear and convincing evidence that, from January to July 2018, the Applicant created an intimidating and hostile work environment for V01 by closely and excessively monitoring her work and movements in the office, treating her rudely in team meetings, making demeaning remarks to or about her in work contexts, and raising his voice at her in public settings in the workplace;

c. The credibility of V01's evidence is such that, even if taken alone, without consideration of the Applicant's prior conduct, V01's account of the facts is established to a clear and convincing standard. OIOS investigators who assessed V01's oral evidence first-hand found her version of events to be credible and her testimony to have been consistent, detailed, coherent, convincing, and corroborated by other evidence;

d. The delay in V01 reporting the incidents of November and December 2017 does not discredit her account. She provided credible reasons as to why she did not report these incidents immediately, including that she was scared of the Applicant's reaction given his authority, and she did not

want to lose her employment. Further, there is no apparent, plausible reason why V01 would invent the allegations. Both the Applicant and V01 gave evidence that their working relationship formerly had been a harmonious one. Finally, V01's reason for eventually informing her first-reporting officer about the South Korea incident, namely that she could no longer bear the Applicant's ill-treatment of her, is credible;

e. Some aspects of the Applicant's evidence, when considered against the credible nature of V01's, render the Applicant's account less convincing. These ranges from inconsistencies, denial, unreliable memory, unconvincing explanation, and claims that V01 invented the allegations for unknown malicious reasons;

f. Furthermore, contrary to the Applicant's assertions, the use of prior conduct evidence in this case is both lawful, probative, and relevant. It is notable that V01's account is consistent with evidence that the Applicant previously made unprompted and persistent propositions of a sexual nature to a female colleague, and on one occasion touched a female colleague's backside in the workplace without her consent and in a manner which the female colleague considered "overstepping the line";

g. The Administration correctly considered V01's perception of the Applicant's conduct, as the victim's perception is relevant in a case of sexual harassment. Moreover, the Applicant has not offered any explanation as to why such an approach is improper or how a multicultural approach to understanding his acts could have led to a different conclusion, i.e., that his acts did not amount to sexual harassment;

h. The Applicant's conduct regarding sexual harassment and workplace harassment amounts to misconduct in violation of staff regulation 1.2(a), staff rule 1.2(f), and secs. 2.1, 2.3, and 3.2 of ST/SGB/2008/5;

i. The sanction imposed against the Applicant's established serious misconduct was neither blatantly illegal, arbitrary or discriminatory nor

otherwise abusive or excessive. It is in line with past practice in comparable disciplinary cases and, hence, proportionate to the offense;

j. Finally, the Applicant's due process rights were respected throughout the investigation and the disciplinary process;

k. The administration was correct to consider the prior conduct evidence, as per UNAT's jurisprudence, and said consideration did not violate the Applicant's due process rights. While interviewing witnesses about V01's allegations against the Applicant, OIOS investigators became aware of the Applicant's conduct towards Ms. M. and Ms. K. OIOS was correct to follow up on this information, and to present this evidence to the Applicant during his interview for comment;

l. Evidence of the Applicant's prior conduct was lawfully considered as it was relevant and probative with respect to the credibility of V01's allegations of sexual harassment. Ms. M. and Ms. K. testimonies were especially valuable as they consisted of direct evidence of the Applicant's conduct. The probative value outweighs any prejudicial value, as the Applicant had an opportunity to comment on their account during both the investigation and the disciplinary process. The use of prior conduct evidence was also not controversial, as during the investigation, the Applicant acknowledged that the incident involving Ms. M. happened, and that the incident involving Ms. K may have happened. He had an opportunity to deny his conduct, which he did not;

m. The Applicant was not prejudiced by the Administration not considering his proffer of good character evidence, since such evidence would have had no bearing on determining whether the facts, as alleged by V01, were established to the clear and convincing standard.

n. In any event, the fact that the Dispute Tribunal allowed the Applicant to present witnesses he had intended to submit as good character evidence during the investigation process cured the claimed procedural irregularity.

**Consideration**

*Preliminary issue: anonymity*

23. The present case concerns a disciplinary sanction imposed on a UNODC staff member following a complaint of sexual harassment and harassment. Thus, as a preliminary matter, the Tribunal will examine whether the names of the Applicant, complainants, victim, and all other individuals involved should be anonymized.

24. 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".

25. 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" (*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 present in the case.

26. The Tribunal considers that, in this case, the victim could be easily identified by the factual circumstances surrounding the case, especially because she has been victim of two consecutive incidents of sexual harassment by two individuals of the same unit. Thus, to protect the victim's identity and privacy, the Tribunal finds it appropriate to anonymize the names of all persons involved.

27. In this respect, we are of the view that anonymize the names of all the people involved does not impact accountability nor transparency as the facts of the case (as described in this judgment), clearly reflect not only the evidence produced, but also the procedural steps followed by the Tribunal in pursuing justice for both parties.

28. Accordingly, the Tribunal decides to anonymize in the present judgment the names of all individuals involved, including the victim, the witnesses, and the Applicant.

*Preliminarily issue: the use of prior conduct evidence*

29. The use of prior conduct evidence in this case has been a very contentious issue, which is why the Tribunal will address it preliminarily before reviewing the facts and evidence on record.

30. The Applicant argues that his due process rights were violated during the investigation, particularly by the irregular use of prior conduct evidence which created a bias against him and masked the lack of clear and convincing evidence in relation to the sexual harassment complaint.

31. According to the annex to the sanction letter and the OIOS's investigation report, two prior incidents were considered as corroborating evidence of the accusations held by V01 against the Applicant. They were considered to establish V01's credibility over that of the Applicant, whose prior conduct was found to be indicative of a behavioural pattern of unprompted sexual advances and inappropriate gestures towards female colleagues. According to the investigation report:

> On at least two occasions before the events reported by V01, [the Applicant] engaged in inappropriate conduct towards two female staff members. Ms. M, a former UNODC staff member, explained that on one occasion, in December 2015 or January 2016, [the Applicant] made unwelcome advances towards her. Ms. K, a UNODC staff member, explained that four or five years before her interview with OIOS, [the Applicant] touched her buttocks as you were passing her in the corridor at work as she was standing discussing with a female colleague.

32. The Tribunal recalls both parties that the nature and scope of the current procedures is not of a criminal nature but rather, a hybrid field of law in which administrative and employment law interconnect. Consequently, the parties need to take into consideration that employment relationships are not episodic, they tend to persist over a certain period and are based on mutual trust.

33. One of the pillars of this mutual trust relates to interpersonal relationships. A staff member is expected to interact with his peers, supervisors, consultants and

interns in a respectful and adequate manner throughout the whole duration of his employment contract.

34. Therefore, the Tribunal considers it is proper and not unlawful for the Organization to consider the staff member's background and behaviour towards others in the context of a disciplinary case.

35. As a matter of principle, when the Organization decides to put an end to the employment relationship (in particular, after a finding of misconduct) it is expected to do it properly, *i.e.,* in accordance with its internal regulatory framework and established procedures, and to balance whether mutual trust is definitively broken between employer and employee.

36. This delicate assessment cannot be performed in the context of corroborating evidence but instead, when assessing aggravating and/or mitigating circumstances provided that due process rights are respected.

37. From the Tribunal's point of view, considerations of prior conduct cannot be considered as "corroborating evidence" when, as it is the case here, they refer to a totally different set of factual circumstances, involving different persons and contexts. In sum, corroborating evidence needs to be directly linked to the evidence gathered in relation to the same set of factual circumstances.

38. In addition, considerations on "prior conduct" should not be made without providing the staff member the opportunity to comment and without giving him/her the possibility of providing counter-veiling evidence.

39. Furthermore, when considering prior conduct evidence, the Tribunal must be satisfied that the evidence is relevant, uncontroversial and probative (*Negussie* UNDT/2019/109).

40. From our perspective, these are the minimum applicable fair trial rights in international administrative law.

41. According to the United Nations Appeals Tribunal ("UNAT") most recent jurisprudence in *Appellant* 2022-UNAT-1210, para. 40: "[a] staff member

challenging a disciplinary measure before the UNDT should have a reasonable opportunity of presenting his or her case under conditions that do not place him or her at a substantial disadvantage. The staff member should normally be afforded an opportunity to challenge the substance, credibility and reliability of the evidence against him or her".

42. Although, the above-mentioned jurisprudence does not specifically refer to "considerations of prior conduct", the Tribunal finds this reasoning is applicable *mutatis mutandis* to those issues as it sets the standards of due process rights in disciplinary cases.

43. Moreover, UNAT jurisprudence holds that prior conduct evidence may be considered in determining whether a staff member committed misconduct, provided that the conduct was investigated properly or sufficiently for it to become a legitimate and significant consideration in addressing a subsequent conduct (*Negussie* 2020-UNAT--1033, para. 53).

44. In addition, the UNAT case law indicates that once the Organization takes into consideration "prior conduct", the role of the UNDT is to establish if there is clear and convincing evidence that those facts have occurred, as per *Negussie* 2016-UNAT-700, para. 12, which provides:

> As the disciplinary measure is based on two aspects (that Mr. Negussie initiated the fight and continued to fight in a severe manner) and an **aggravating factor** (that he had previously committed a physical assault in April 2013), **it is the task of the Dispute Tribunal to examine whether there is clear and convincing evidence for all these facts** (emphasis added).

45. In the case at hand, there is no evidence that the facts that were taken into consideration to substantiate the investigator's finding of "prior conduct" were properly investigated up to the threshold of clear and convincing evidence.

46. Clear and convincing evidence means the veracity of facts is highly probable and that the available evidence is not unequivocal and is manifest.

47. In *Mbaigolmem* 2018-UNAT-819, the UNAT held that:

> The undisputed facts, the evidence of the first report, the coherent hearsay evidence pointing to a pattern of behaviour, the internal consistency of the witness statements, the unsatisfactory statement of Mr. Mbaigolmem and the inherent probabilities of the situation, taken cumulatively, constitute a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred.

48. However, the only available elements on file are those contained in the investigation report prepared by OIOS, *i.e.*, the witness statements of Ms. M. and Ms. K., who were interviewed by OIOS in the context of the current procedures.

49. The Applicant was confronted with the content of those witness statements but, as per the OIOS investigation report: "[w]hen asked about these incidents in [his] interview with OIOS, [the Applicant] explained that [he] made advances to Ms. M. but that [he] did not pressure her, and that Ms. M. was not someone who would "be shocked … by a proposal" as she is a self-confident woman. As it related to Ms. K., [he] could not remember the exact incident but explained that Ms. K. "would not find this offensive".

50. The Tribunal had the opportunity to listen to the audio-recordings of Ms. M. and Ms. K.'s witness testimonies at the hearing and found them reliable and credible. Both witnesses were clear and objective and there was no evidence of bias or prejudice against the Applicant.

51. The problem at stake is whether those incidents were duly and properly investigated, as per UNAT's case law. The Tribunal is of the view that those incidents were not fully and thoroughly investigated as there is no record of that.

52. Apparently, none of those witnesses made a complaint against the Applicant, nor a panel was established to investigate the alleged incidents. There is absolutely no evidence whatsoever that an investigation was open.

53. Since there was no investigation and the evidence indicates that the conclusions withdrawn by the Administration only rely on the witnesses' accounts, the Tribunal finds it cannot consider those facts as proof of prior conduct.

54. As a result, the credibility assessment made by the Administration via the use of prior conduct evidence in this case cannot stand. Accordingly, the *alleged* prior conduct will not be considered as evidence by this Tribunal in its judicial review of the facts of the present case.

*Scope of judicial review in disciplinary cases*

55. This case refers to a disciplinary proceeding, for sexual harassment and harassment, which culminated with sanctioning the Applicant with separation from service, with compensation in lieu of notice and with 25 per cent of the termination indemnity.

56. As per the well-settled case law of the UN internal justice system, the scope of judicial review is limited to a review of findings and the procedural aspects of both the investigation and the disciplinary process. Consequently, the UNDT is not empowered to perform a "de novo" review of the whole case.

57. Therefore, the Tribunal is seized to assess the following issues:

a. Whether the facts are established according to the applicable "standard of proof" of clear and convincing evidence;

b. Whether the established facts qualify as misconduct;

c. Whether the sanction is proportionate to the misconduct; and

d. Whether the Applicant's due process rights were respected;

58. The decisionmaker has the discretion to impose the disciplinary measure that he/she considers adequate having regard to the nature of the misconduct, the objective of punishment and deterrence, and other relevant considerations. The decision-maker also has the discretion to weigh aggravating and mitigating circumstances.

59. Also, when reviewing proportionality, the test applied by the Tribunal is whether the measure is blatantly illegal, arbitrary or discriminatory or otherwise abusive or excessive.

60. Accordingly, the Tribunal must examine each criterion individually and proceed to rule on the legal issues that emerge in the case.

*Whether the facts are established by clear and convincing evidence*

61. Disregarding the prior conduct evidence from its consideration, the Tribunal will now determine whether the facts and evidence of the case are established to the clear and convincing standard.

62. The Applicant contests the findings that he made unwelcome sexual advances towards V01 before and during a trip to South Korean in December 2017, and that he created an intimidating and hostile work environment for V01 between January and July 2018.

63. In cases of sexual harassment and harassment it is rather common that direct evidence is not always available and that two distinct versions are presented to the investigators.

64. Therefore, the Tribunal's role is to evaluate the admissibility of the available evidence, its probative value and establish its relevance to the issues in dispute (*facta probanda*).

65. After a careful analysis of the documentary evidence on file and the witnesses' and Applicant's statements at the hearing, the Tribunal concludes that there is clear and convincing evidence of the facts alleged by V01, as explained below.

66. Indeed, the Applicant was charged with two sets of facts:

a. In November and December 2017, in connection with and during travels for a mission to South Korea, he made unwelcome advances of a sexual nature towards V01; and

b. Between January and July 2018, he created an intimidating and hostile work environment for V01 by closely and excessively monitoring her work and movements in the office, treating her rudely in team meetings, making

demeaning remarks to or about her in work contexts, and raising his voice at her in public settings in the workplace.

Sexual harassment

67. The Tribunal finds V01's statements congruent, clear and objective as she always kept the same narrative throughout the course of the investigation and there is corroborating evidence of her account of the events.

68. Moreover, V01 provided a significant number of details about her interactions with the Applicant that render her testimony even more credible, for instance the fact that he has shared with her intimate details about his marriage and divorce and his former girlfriend (of around the same age as the victim).

69. In addition, the chronology of events also renders her account reliable. In this regard, we recall that the Applicant invited V01 to the training in South Korea, he suggested they stay an extra day and insisted to share a common place in an Airbnb. Moreover, the day before the flight, he went to V01's office for the check-in and booked a seat next to hers.

70. The Tribunal also notes it was only after the mission to South Korea that the team members noticed a change in the Applicant's conduct towards V01. He started being aggressive to the point of leading her to tears in UN premises and during working hours.

71. The incidents that occurred during the mission to South Korea were also corroborated by the testimony of Mrs. T., who confirmed before OIOS that V01 told her about the Applicant's insistence to spend an extra day in South Korea, and to share a room in an Airbnb, at his expenses. Mrs. T. also confirmed that V01 found this proposal inappropriate and asked her for advice.

72. Furthermore, the email exchanges between the Applicant and V01 confirm the veracity of V01's account, *i.e.,* that he insisted that V01 reserve a common place for them to stay, whereas she preferred to book two separate hotel rooms.

73. According to the OIOS investigation report, the Applicant made comments about his personal life to V01, he mentioned that he was divorced and showed her pictures of his former girlfriend in Costa Rica which was around V01's age. These facts show the Applicant's attitude towards V01 and demonstrate his romantic intentions towards her. Concurrently, his romantic intentions provide a rational explanation for his behaviour during the preparation and the travel to South Korea.

74. There is also clear and convincing evidence that this situation had a negative impact on V01, who confided these events to a friend, Mrs. S., and who, in turn, confirmed to OIOS during her interview how depressed and stressed V01 was.

75. The Tribunal found these testimonies credible not only because they were all consistent but also due to fact that there is no evidence of bias or prejudice against the Applicant.

76. The Tribunal underlines that, in cases of sexual harassment due regard should be given to the victims' account as they do not face these situations lightly.

77. In fact, due to the sensitive nature of the matter at stake in most cases, it is extremely difficult for the victims to make a formal complaint and go through a formal procedure.

Workplace harassment

78. Subsequently to the travel to South Korea and V01's rejection of his approach, the Applicant started to "retaliate" against her by creating an intimidating and hostile work environment for V01 by closely and excessively monitoring her work and movements in the office, treating her rudely in team meetings, making demeaning remarks to or about her in work contexts, and raising his voice at her in public settings in the workplace.

79. V01 gave several examples to OIOS of the Applicant's behaviour. For instance, V01 mentioned that on one occasion, she had come from the gym and stopped by the cafeteria when the Applicant found her and, in front of other

colleagues, asked her repeatedly where she had been because she was not at her desk.

80. According to the evidence on file, V01 had a constant feeling of being watched and monitored by the Applicant.

81. The Tribunal finds there is clear and convincing evidence of a causal link between the events in South Korea and the way the Applicant treated V01 in the office between January and July 2018.

82. The evidence gathered by OIOS during the investigation points to a pattern of harassment in the workplace, which was confirmed by several witnesses' testimonies, namely Mr. B., Mr. R. and Ms. K.

83. The Tribunal finds the witnesses' testimonies reliable, and it underlines that there is no evidence of bias or prejudice against the Applicant. In this regard, we underline that it is the Applicant who bears the burden of proving the alleged bias.

84. According to the testimony of Ms. K., on one occasion, after 8 March 2018, V01 became anxious while working in Ms. K.'s office as she was worried about the Applicant's reaction if he did not see her at her desk. Ms. K explained that V01's anxiety came from her feeling that she was being "controlled" by the Applicant.

85. Another colleague, Mr. B., observed work -related tensions between V01 and the Applicant after the mission to South Korea.

86. Moreover, Mr. R also noted that, during team meetings, the Applicant was "rude" to V01 and interrupted her. Mr R. mentioned that the Applicant was not acting professionally and that this only started after the trip to South Korea.

87. The Tribunal is of the view that all these testimonies, combined with the documentary evidence available, render V01's account credible and reliable.

88. Therefore, the Tribunal finds that the facts have been established by clear and convincing evidence.

89. Finally, in relation to the Applicant's argument that the Respondent had the obligation to reconcile the impact of V01's other sexual harassment allegations as part of his burden of proof. There is no evidence on record to suggest that V01's account was in any way tainted by past experiences, nor that she was unable to objectively process and recollect events. On the contrary, her testimony was found credible and consistent throughout the entire investigation.

90. To cast doubt on the word of a victim of sexual harassment simply because she has been a victim before is speculative at best. The Applicant is in no position to question V01's mental state and this Tribunal will not follow such deflection. Accordingly, there is no reason why the investigation should have taken the other incident into consideration when assessing V01's credibility.

*Whether the established facts qualify as misconduct*

91. The Tribunal highlights that staff members are expected to behave with integrity and respect ethical standards. Concomitantly, the Organization has implemented a zero-tolerance policy to prevent and to punish sexual harassment and promote a respectful work-environment.

92. In this context, the Tribunal recalls staff regulation 1.2(a), which states:

> 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;

93. And staff rule 1.2(f), which provides:

> Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

94. ST/SGB/2008/5 provides, *inter alia*, 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.
>
> …
>
> 1.3 Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.
>
> …
>
> 2.1 In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2 (a) and staff rules 101.2 (d), 201.2 (d) and 301.3 (d), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, any form of discrimination, harassment, including sexual harassment, and abuse of authority is prohibited.
>
> ….
>
> 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. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

95. The above-mentioned legal framework clearly defines sexual harassment in a broad manner to include any "behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another".

96. The Tribunal finds that his suggestions to share a room with the victim in the context of a work mission, the fact that he had confided to her he was divorced and had "feelings for her" leaves no doubt about the nature of his intentions.

97. Sexual harassment can take many different forms and sometimes even the most subtle attitudes may reasonably be perceived as having an underlying sexual connotation.

98. Moreover, the evidence on record shows that V01 felt anxious, concerned and distressed due to the Applicant's conduct. His subsequent aggressive behaviour towards her had an impact on the work environment and affected her morale.

99. Therefore, the Tribunal is of the view that the set of facts attributed to the Applicant constitutes harassment and sexual harassment within the meaning of secs. 1.2 and 1.3 of ST/SGB/2008/5, and violation of staff regulation 1.2(a), staff rule 1.2(f), and secs. 2.1 and 3.2 of ST/SGB/2008/5.

*Whether the sanction is proportionate to the misconduct*

100. While performing judicial review of disciplinary sanctions, the Tribunal must take into consideration the overall context in which the facts have occurred as well as all the mitigating and aggravating circumstances surrounding it.

101. It is well-established jurisprudence that the Secretary-General has wide discretion in applying sanctions for misconduct and that, at all relevant times, he must adhere to the principle of proportionality (*Applicant* 2013-UNAT-280, para. 120).

102. Once misconduct has been established, the level of sanction can only be reviewed in cases of obvious absurdity or flagrant arbitrariness (*Aqel* 2010-UNAT-040, para. 35).

103. In *Rajan* 2017-UNAT-781 para. 48, the Appeals Tribunal held that:

> The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.

104. The UNAT found in *Mbaigolmem* para. 33 that "[t]he Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment."

105. In *Conteh* 2021-UNAT-1171, para. 48, the Appeals Tribunal recently held that sexual harassment does not depend on ill intent, but rather on the attitude of the person, and that the absence of ill intent is not a relevant consideration for the proportionality of the sanction.

106. Under the applicable legal framework, staff members must uphold the highest standards of integrity and conduct themselves in a manner befitting their status as international civil servants when they are at work and off-duty.

107. In this context, the Tribunal highlights the "zero-tolerance policy" the Organization has adopted against sexual harassment and endorses the Appeals Tribunal jurisprudence in *Conteh* para. 46, where UNAT held that "if there is zero tolerance, there should be no requirement for the conduct to be repetitive. Depending on the circumstances, one instance could conceptually be sufficient to be misconduct subject to the sanction of separation".

108. The impact on a victim of sexual harassment can have long lasting effects and is not quantifiable.

109. The judgment in *Conteh* recognized that acts of sexual harassment do not require "any concrete or palpable result," and held that "[u]nwelcome advances and inappropriate behaviour towards colleagues such as […] making comments of a sexual nature are *per se* grave enough to cause harm".

110. The Tribunal is not persuaded by the Applicant's argument concerning his long service or unblemished disciplinary record. In fact, as a long serving staff member who is familiar with the Organization's policies, he had the legal and ethical obligation to conduct himself in a manner befitting his status as international civil servant. Unfortunately, he did not do so.

111. In light of the above, the Tribunal finds the sanction adequate and proportionate to the gravity of the offence.

*Were the Applicant's due process rights respected during the investigation and the disciplinary process?*

112. According to UNAT's jurisprudence, due process entitlements only come into play in their entirety once a disciplinary proceeding is initiated (*Akello* 2013-UNAT-336 para. 36), whereas at the preliminary investigation stage only limited due process rights apply (*Powell* 2013-UNAT-295, para. 17).

113. After having carefully reviewed the case record, including the investigation stage and the disciplinary process, the Tribunal is satisfied that the Applicant's due process rights were fully respected throughout both phases.

114. The evidence shows that the Applicant was informed that OIOS was investigating in relation to the reported matters and that he was the subject of the investigation. He was interviewed by OIOS investigators on 4 and 5 February 2019, the interview was audio recorded and he was provided with a digital copy of the audio recording and given two weeks to present any additional information that he deemed appropriate and/or a written statement in relation to the matter under investigation. There is also evidence that he submitted a list of 11 individuals that he believed should be interviewed by OIOS to provide their "observations".

115. The Tribunal notes that OIOS investigators did not interview the witnesses proposed by the Applicant since the investigators considered they did not have any knowledge about the facts at stake.

116. In this regard, the Tribunal underlines that the investigators have a certain margin of discretion in relation to the methodology of the investigation and the

relevant evidence. Therefore, they can refuse to interview witnesses who are not deemed relevant to the case, and this does not constitute a violation of due process rights.

117. The Tribunal concludes that during the investigation phase, the Applicant's due process rights were observed.

118. On 24 September 2019, the Applicant was notified of a charge letter, according to which, he would be subject to a disciplinary process and formally charged of misconduct.

119. The charge letter contained not only an account of the facts alleged against him but also, a description of his "due process rights" during the course of the disciplinary procedure namely:

a. He was entitled to submit a response to the charges within one month from receipt of the charge letter;

b. He was given the opportunity to include in his response all information relating to the formal charges; and

c. He was informed that he could avail himself of the assistance of the Office of Staff Legal Assistance ("OSLA") or seek the assistance of any other counsel in his defense at his own expense.

120. Bearing in mind all the relevant elements of the case file, the Tribunal finds that the Applicant's due process rights were observed and fully respected during the disciplinary proceedings.

121. In relation to the use of prior conduct evidence as part of the credibility assessment, the Tribunal finds that it did not contribute to the outcome of the disciplinary process. In fact, the misconduct was based on facts that were established by clear and convincing evidence, which were unrelated to those *alleged* prior conduct incidents. The Tribunal further recalls that the *alleged* prior conduct was not considered as evidence by this Tribunal in its judicial review of the facts of the present case.

**Conclusion**

122. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(*Signed*)
Judge Teresa Bravo
Dated this 28th day of July 2022

Entered in the Register on this 28th day of July 2022
(*Signed*)
René M. Vargas M., Registrar, Geneva