UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2021/025
Judgment No.:	UNDT/2022/098
Date:	30 September 2022
Original:	English

Before: Judge Joelle Adda

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Ana Giulia Stella, OSLA

Counsel for Respondent:
Lucienne Pierre, ALD/AS/OHR/UN Secretariat
Albert Angeles, ALD/DAS/OHR/UN Secretariat

Introduction

1. The Applicant contests the "Administration's finding of misconduct and imposition of a disciplinary sanction", namely "separation from service with compensation *in lieu* of notice and without termination indemnity". The misconduct concerned the Applicant's alleged sexual abuse of AA, a daughter of another United Nations colleague who was a minor when the incidents are alleged to have occurred between 1993 and 1997. All names and workplaces are redacted for privacy reasons.

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

3. On 9, 10 and 25 May 2022, a hearing was held at which the following witnesses gave testimony: the Applicant, the AA (the alleged victim), AA's mother, AA's father, the Applicant's wife, BB (a family friend of the Applicant from the 1990s), and CC (a former colleague of the Applicant and AA's father).

4. For the reasons set out below, the application is rejected.

Facts

5. In response to Order No. 007 (NY/2022) dated 14 January 2022, the parties provided consolidated lists of agreed and disputed facts. The following chronology is based on the list of agreed facts, the written documentation on record, and some uncontested factual submissions and witness testimonies.

6. In 1989, the Applicant joined the United Nations at the United Nations Headquarters in New York. When working in this office, the Applicant and AA's father were colleagues. They also belonged to the same national community at the United Nations and soon formed a very close personal friendship. Their families often met at social gatherings, such as birthday parties and celebrations of national holidays. Between 1993 and 1997, some incidents, however, allegedly occurred at which AA

and AA's mother have accused the Applicant of having sexually abused AA, who was a minor at the relevant time.

7. On 17 June 2012, after having previously left his job in New York, the Applicant began his employment with a United Nations agency based in Geneva.

8. In June 2018, the Applicant was selected for and accepted a position at the United Nations Headquarters in New York.

9. By email of 9 July 2018, AA's mother wrote the Applicant as follows, which is translated from its original language to English in the investigation report dated 23 June 2020 of the Office of Internal Oversight Service ("OIOS"):

> I learned that you are planning to transfer to New York.
>
> And how do you imagine this? Working together with [AA's father], perhaps, crossing paths with me—I am also working at [the United Nations], looking into our eyes?
>
> After what you have done to [AA], this is out of the question.
>
> If you don't get it, then I will explain it to your superiors—and to everyone else. Rest assured.
>
> If [AA's father] and I had not been such [reference redacted for privacy reasons] idiots , you would have been in prison now, and not relocating to New York. Because it is pure sexual abuse.
>
> Your call.
>
> By the way, your wife knows what you did—I told her back then.

10. The same date (9 July 2018), the Applicant responded AA's mother as follows (also translated in the OIOS investigation report:

> Hello, [AA's mother]. Thank you for writing to me.
>
> I do not clear myself of blame for what I did then. And [the Applicant's wife] knows about this situation, of course, ever since then. I recall it with horror.

> But I repeatedly and sincerely asked you and [AA's father] for forgiveness—both at that moment and later on.
>
> Would you believe, all these years I have lived with great pain from my idiocy and its consequences for [AA], as well as from the loss of our friendship as a result of this. You can't even imagine how tormented I was, how many times I repented for it before God and, in my mind, before you!!! And now I am not at all the same as I was before.
>
> As for New York, this is not some kind of a triumphal move, but a forced step. It just happened so that [the United Nations agency] suddenly introduced universal rotation, and I, unexpectedly, as they say, was shown the door.
>
> Meanwhile, [the Applicant's daughter] had enrolled into a university and already completed two years. If we are to soon lose an education grant, all her studies will collapse.
>
> I tried to look for vacancies in other places, but nothing came of it. Therefore, New York is now our only rescue. We need to somehow hang on, at least temporarily. Perhaps, it will be possible to transfer back to Europe afterwards.
> I ask you to show at least a little mercy. After all, even those condemned to execution get pardoned. And I executed myself a thousand times already. These are not beautiful words—this is true, God is my witness.

11. The Tribunal notes that the Applicant has not questioned the translation of the emails in his closing statement, and no further consideration will therefore be given thereon in this Judgment.

12. By letter dated 19 March 2021 ("the sanction letter"), the Assistant Secretary-General for Human Resources ("the ASG") informed the Applicant of the contested decision, indicating, *inter alia*, that:

> I write to convey the decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC ["the USG"]) with respect to the disciplinary process initiated by a memorandum dated 8 December 2020 ("Allegations of misconduct"), in which it was alleged that, between 1993 and 1997, you sexually abused [AA], a minor, by one or more of the following:

> - On or about 1993, entering [AA's] bedroom while she was asleep, putting your hand under her nightgown and fondling her breast.
> - Between 1994 and 1997, on one or more occasions, putting your hand under [AA's] shirt and fondling her back and/or belly when she was dozing on your sofa while babysitting your son.
>
> …
>
> Based on a review of the entire record, including your comments, the USG/DMSPC concluded that: (i) the allegations against you are established by clear and convincing evidence; (ii) through your conduct, you violated a former Staff Regulation 1.4 ; (iii) your conduct amounts to serious misconduct; and (iv) your procedural fairness rights were respected throughout the investigation and the disciplinary process.
>
> On the basis of the foregoing, and taking into account aggravating and mitigating factors, it has been decided to impose on you the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity, in accordance with Staff Rule 10.2(a)(viii), effective upon your receipt of this letter.

13. In an annex to the sanction letter, the ASG presented the facts on which the sanction was based as the following:

> It has been determined that it is established by clear and convincing evidence that: (a) on or about 1993, you entered [AA's] bedroom while she was asleep, put your hand under her nightgown and fondled her breast; and (b) between 1994 and 1997, you, on at least one occasion, put your hand under [AA's] shirt and fondled her back and/or belly when she was dozing on your sofa while babysitting your son.

14. On 22 March 2021, the Applicant was separated from service.

Consideration

The issues of the present case

15. The Appeals Tribunal has consistently held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

16. Accordingly, the basic issues of the present case can be defined as follows:

a. Was it a lawful exercise of discretion to impose against the Applicant disciplinary sanction of separation from service, with compensation *in lieu* of notice, without termination indemnity?

b. If not, to what remedies, if any, is the Applicant entitled?

The Tribunal's limited scope of review in disciplinary cases

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

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

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

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

20. Among the circumstances to consider when assessing the Administration's exercise of 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).

21. The jurisprudence outlined in the above was, in essence affirmed in *Applicant* 2022-UNAT-1187. In *Applicant*, the Appeals Tribunal made a range of elaborate findings specifically addressed to the Dispute Tribunal's handling of cases regarding sexual misconduct. Thus, a finding of sexual misconduct against a staff member is "a serious matter", which will "have grave implications for the staff member's reputation, standing and future employment prospects". For this reason, the Dispute Tribunal "may only reach a finding of sexual misconduct on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that the elements of sexual exploitation and abuse have been established in accordance with the standard of clear and convincing evidence". In other words, the Appeals Tribunal held that "the sexual misconduct must be shown by the evidence to have been highly probable".

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

22. The Applicant generally submits that the Respondent "decided to impose a stern sanction on the Applicant, a staff member with over two decades of dedicated and illustrious service to the Organization, based on unfounded evidence". The sanction "was based on uncorroborated, flimsy, and contradictory evidence", and "[c]ontrary to the assertions of the Respondent in the sanction letter and in the present proceeding, the Applicant has never sexually abused AA". Rather, the Applicant "is a serious and trustworthy individual incapable of such acts".

23. The Respondent, in essence, contends that the facts were established by the applicable standard of proof and that the contested decision was a proper and lawful exercise of the Administration's authority in disciplinary matters.

24. In the following, for the sake of completion, the Tribunal will consider the Applicant's contentions as they were presented in his closing statement, even if repetitions occur. Where relevant, the submissions of the Applicant's final observations have been added.

Salient factors

25. At the outset, the Applicant points to some "salient factors", which he contends the Tribunal should take into account in its review of the present case.

26. Firstly, the Applicant states that the Tribunal should consider the factor of time and the fact that "the allegations date back to 1993-1995, which makes their veracity highly dubious". The complaint against the Applicant was filed by AA's mother "almost 30 years after the alleged incidents took place", and AA's parents' "rationale for filing a complaint only in August 2019 to protect their daughter or because they did not know that it was possible to complain are not credible reasons for such a delay and are contradictory". If "the alleged incidents did happen and did have an impact on AA's life, the allegations against the Applicant would be sufficient in any culture of the world to push educated people as AA's parents or even AA, currently a 40-year-old woman, to complain earlier, including when the Applicant worked on temporary assignments in New York multiple times from 2004 to 2011".

27. The Applicant further contends that "reality is that prior to the [Office of Internal Oversight Services] investigation, neither AA nor her parents complained to any authority, be it the [United Nations] or a national body. Indeed, "the 1993 episode has never happened and what occurred in 1995 was not the overstated version given by

AA, a then teenage girl, or her mother". This "explains why AA has never requested her mother to complain". In fact, "the complaint was AA's mother's initiative obviously driven by her jealousy of the Applicant's daughter's academic success compared to her own daughter's failures, which was very painful for her to accept". AA's mother "admitted at the hearing that she complained only after finding out that the Applicant was relocating to New York", and "[w]ouldn't the allegations be serious enough to justify a complaint in any circumstances if they were true"? In conclusion, "the decades-long delay in filing the complaint coupled with the aforementioned factors significantly reduce the credibility of the allegations".

28. As a point of departure, the Tribunal notes that the United Nations legal framework governing the present case does not operate with a statute of limitations, which is otherwise known in many national jurisdictions. The Tribunal considers that the total absence of statute of limitations for acts possibly committed several decades earlier is regrettable. But it will stick to the applicable legal framework. The Tribunal, nevertheless, recognizes that in terms of weight and validity of evidence, the question of passage of time could, for instance, be a relevant factor to consider in the specific circumstances of a case, especially when assessing witnesses' recollection of certain events. Also, harm felt by a victim could diminish, if not disappear, over time.

29. In the present case, in the Applicant's relatively recent email of 9 July 2018 to AA's mother, he explicitly states that he did something harmful to AA many years ago: "I do not clear myself of blame for what I did then … I have lived with great pain from my idiocy and its consequences for [AA]". The Applicant further apologizes for his actions: "I repeatedly and sincerely asked you and [AA's father] for forgiveness—both at that moment and later on … You can't even imagine how tormented I was, how many times I repented for it before God and, in my mind, before you!!! … I ask you to show at least a little mercy. After all, even those condemned to execution get pardoned. And I executed myself a thousand times already".

30. Albeit the Applicant not providing specifics on what the "consequences for [AA]" entailed, when reading the email exchange between the AA's mother and the Applicant on 9 July 2018, his explicit and manifest expressions of regret and apology are stated directly in response to AA's prior accusation of him having committed "pure sexual abuse". The Tribunal therefore finds that the only reasonable inference to be drawn is that that the Applicant in the 9 July 2018 email recognizes that, at least somehow, he sexually abused AA at the relevant time.

31. Considering the relative recency of the Applicant's email and his overt statements of remorse made therein, the Tribunal therefore finds that the factor of passage of time does not support his contentions on the veracity of AA's and her mother's testimonies on the alleged sexual abuse.

32. With regard to the interest of AA's mother in filing the complaint against the Applicant, the Tribunal notes that no evidence on file—in any possible manner—corroborates the Applicant's submissions that her sexual abuse complaint was motivated by envy of the Applicant's daughter's academic achievements. Any such claim therefore stands as speculation. From AA's testimony, on the other hand, it evidently followed that the alleged sexual abuse had been a traumatic experience, which still impacts her now many years later.

33. Rather, the Tribunal is convinced by the testimonies of AA and her mother in which they state that at the relevant time between 1993 and 1997, they made no further issue out of the matter (a) to protect the close personal and professional relationship between the Applicant and AA's father, (b) to prevent the gossip, if not even stigmatism and disgrace, of a sexual abuse case in the national community, and (c) as a result of AA's mother's (and also AA's, who was a minor at the time) lack of understanding of the concept of sexual abuse and the harm and suffering such abuse may inflict upon the victim for the rest of her/his life.

34. Secondly, the Applicant highlights the "testimonies and photographic evidence" presented to the Tribunal. The testimonies "provided by all witnesses demonstrate that the alleged facts did not occur as the families' friendship continued long after AA stopped babysitting the Applicant's son in 1995". Indeed, "AA's father indicated that his family's friendship with the Applicant lasted until the spring of 1997, while AA's mother said that it entirely ended in 1997". AA's mother "mentioned at the hearing that the babysitting incident made her cut ties with the Applicant shortly after she confronted him with no further regular contact". However, "the alleged incident could only have happened in 1995, two years prior, as the Applicant was incapacitated due to eye surgeries in early 1996".

35. The Applicant submits that "the photographic evidence also testifies to the contrary". When asked "why [AA's mother] was attending parties with the Applicant in 1997 (2 years after the alleged incident), she only argued that her daughter was not in the pictures and that she preferred inviting the Applicant to her house rather than explain to her family (husband and mother) what had happened". If the Applicant "was deemed a threat, then why did AA's mother invite the Applicant to her house", and should a mother's "concern for her child's wellbeing" not be of "highest importance"?

36. The Applicant contends that the photographic evidence "testifies to the good relationship between the families until at least 1999". Although AA's mother "was portrayed embracing the Applicant's daughter in 1999, she was unable to explain at the hearing why she was holding the Applicant's child at the Applicant's home after having claimed that she (1) had severed all ties with him and his family and (2) had never met his daughter". AA's mother argued that "this picture does not prove that the friendship continued because the Applicant and his wife were not in the picture, which is unlikely as the picture was taken at their home as confirmed by the Applicant and the Applicant's wife". The evidence also "shows that the Applicant maintained very good relations with AA's father until 2011, before leaving New York, contrary to the latter's

words". Both "BB and CC testified that they socialized on a regular basis and teamed up to organize joint events".

37. The Applicant contends that "[f]ortunately, [his] wife was present at all events that occurred after 1995 and was able to testify that the relationship between the families was good despite the conversation that the Applicant had with AA's mother about AA, which did have certain impact on their friendship". BB and CC "were also able to testify that the friendship continued post 1995".

38. In the Applicant's final observations, he adds that "[t]he change in the friendship was a result of the impact that the difficult conversation between the Applicant and AA's mother had on it after the misunderstanding over the babysitting episode and by no means supports the conclusion that the facts were established". The testimonies "have shown that the witnesses cannot even specify the exact year the alleged events occurred, let alone their chronology". Contrary to the Respondent's statements, the "photographs presented, especially the one taken at the Applicant's home [in Spring 1999] with AA's mother holding the Applicant's daughter [then aged of one year], testify to the close relationship that continued to exist between the families afterwards". The "comment on an 'unavoidable interaction' is demagogical, as AA's father and the Applicant obviously collaborated on creative activities (e.g., playing music together after hours) at their free will".

39. The Tribunal notes that the photographic evidence indeed demonstrates that subsequent to the alleged incidents of sexual abuse between 1993 and 1997, the Applicant and AA's father, as well as their families, continued to attend some of the same social and/or professional gatherings. It does, however, not seem that AA participated in any of these events, since she does not appear on any of the photos.

40. Considering particular circumstances of the case, even if AA's mother and/or father believed that the Applicant had sexually abused AA, the Tribunal finds that it is

unsurprising and only makes sense that the Applicant and AA's father, as well as their families, except AA, continued to participate in the same professional and private events. The Tribunal is convinced by the testimonies of AA's parents in which they effectively state that they showed up at these events in order to keep up an appearance at the workplace of the Applicant and AA's father and in their common social circles. Thus, despite the alleged incidents, the Applicant and AA's father remained colleagues and the two families continued to belong to the same national community.

41. Unlike what is submitted by the Applicant, none of the photos demonstrate anything further, and the fact that AA's mother is holding the Applicant's daughter (a baby, at that time) in one photo, if anything, only shows that she did not hold a grudge against the daughter. In another photo, the Applicant and AA's father can be seen playing music with some other people. AA's father convincingly testified that this photo was taken at a work event and that, as they were both hobby musicians and profoundly liked music, they habitually did so, also before the alleged incidents of sexual abuse.

Credibility of evidence

42. The Applicant thereafter challenges the "[c]redibility of the evidence". Regarding the Applicant's own testimony, he submits that he "has offered a consistent, measured and plausible account", noting that he "is still in shock by the outrageous accusations against him and all the unfair implications for him and his family". In contrast, "AA's and AA's parents' accounts are contradictory and inconsistent", and AA's and AA's mother's "portrayal of the facts reveals their hostile and biased attitude towards the Applicant". In the Applicant's final observations, he further submits that his "wife indicated her financial interest for the obvious reason of having been deprived of means of subsistence after the unjust separation of her husband without prior notice" and that regarding her "written statement, it was only natural for her husband [reference

redacted for privacy reasons] to translate it for the benefit of the Tribunal. The text, however, remains her own statement which she confirmed independently at the hearing".

43. To begin with, the Tribunal finds that the Applicant and his family indeed have significant work-related, personal and financial interests vested in the outcome of the present case. Their interests, *inter alia*, relate to the restoration of the Applicant's professional and private reputation in response to the sexual abuse accusations. This, for instance, entails the Applicant's possible return to work for the United Nations, liberating him from the severe sense of guilt expressed in his 9 July 2018 email and, possibly also, redeeming his standing in the national community. In addition, the Applicant's family have a direct financial interest in retrieving his daughter's education grant as reflected in the Applicant's reference thereto in his 9 July 2018 email.

44. Regarding the Applicant translating his wife's written statement to the Tribunal, this shows that he was indeed involved in the preparation thereof. Also considering the fact that they live in the same apartment and share many of the same interests in the outcome of the present case, the Tribunal finds that their evidence might even have been coordinated as it would seem almost impossible for them not to have discussed the present case when home together.

45. On the other hand, the Tribunal finds that, as stated above, the Applicant has not established that the interests of AA and her mother in accusing the Applicant of sexually abusing AA were any other than seeking justice for AA. As the Tribunal has also already held in the above, the Applicant has not been able to substantiate why AA's mother should have felt envy of his daughter's academic accomplishment, resulting in hostility and bias. Even if so, the Tribunal finds that the Applicant has not established why any such envy, hostility and/or bias should have caused AA's mother

to file a false sexual abuse complaint. Nor has the Applicant even provided any submissions on why AA should feel any bias, or other animosity, against him.

46. The Applicant contends that the "fact that AA's mother allowed AA to babysit the Applicant's son, and AA did so out of her own free will after the alleged New Year's Eve 1993 incident proves that the allegations are untrue and that neither AA nor her mother considered the Applicant a threat". AA's mother "testified that when AA told her that the Applicant had been in her room at New Year's Eve in 1993, she reassured her daughter that nothing inappropriate happened as he was a long-time friend of the family who could be trusted". AA "testified that she refused to go to a tennis class in 1993 alone with the Applicant but agreed to babysit the Applicant's son during the school year 1993-1994 at the Applicant's house (only a few months after the alleged 1993 episode), and in 1995 explaining that she had to continue as normal". If the Applicant "was indeed a threat why couldn't AA resort to other means to earn money (i.e., other babysitting opportunities or a different job)"? This "implies that the Applicant was not a threat, and AA was comfortable to babysit the Applicant's son". AA "also testified that she continued babysitting the Applicant's son one or two more times after the first alleged babysitting incident". This puts into question why AA would "continue to subject herself to the risk of sexual abuse if she deemed the Applicant a threat".

47. The Applicant submits that AA's mother "indicated that she first agreed with the Applicant that they were not going to tell AA's father what happened after AA babysat the Applicant's son". So "[h]ow could a relationship between the Applicant and AA's father be deemed more important for a mother than protecting her own child"? AA's mother's "weak and unconvincing response to these questions at the hearing was that it was so unimaginable that she did not want to admit it".

48. Concerning the credibility of AA and her mother's testimonies, in the Applicant's final observations he adds that "[d]uring the hearing, AA was intentionally asked very specific questions by the Respondent ([for instance]., the size of her nightgown or the lighting in the room) to make the Tribunal believe that AA remembers that night in 1993 to the smallest detail". The Applicant asks the Tribunal to "consider AA's age at that time, the passage of almost three decades since 1993 and the fact that AA was asleep during the alleged incident to assess the credibility of AA's supposed recollections. The Applicant maintains that they are all fabricated".

49. The Applicant further submits in his final observations that "[c]ontrary to AA's mother's assertion, the concept of sexual misconduct existed in [name of country redacted for privacy reasons] as early as in the 1960s, established in [the country penal code in force at the time]". Therefore, AA's mother's "inaction" could not "be justified by the inexistence of such a concept in "the [name of country's] culture she grew up in". In addition, "the statement that 'AA's mother could not fathom having the Applicant's return [to full-time service in New York] […], as if everything was perfectly normal' is pure demagogy, as by the time she filed her complaint she was already packing her things to leave New York for good and never cross paths with the Applicant again". The statement that "AA's mother 'acted in good faith' is hypocritical, as her wish to scapegoat the Applicant for AA's failures is starkly evident from her 2018 emails".

50. In the Applicant's final observations, he adds that the statements to OIOS provided by DD, a friend of AA at the time of the alleged babysitting incident, and EE (DD's mother) "do not have evidentiary value because both only attempted to recall what had been said to them by AA twenty-five years before". In no case are their statements "probative" as their "lack of connection to the [United Nations] or [the national community] does not give additional weight to their testimonies either".

51. The Tribunal also finds that the Applicant's additional submissions regarding the veracity of the testimonies of AA and her mother are speculative, because none of them are proved by any evidence. Rather, the Tribunal finds that the testimonies of AA and her mother are convincing when, in effect, stating with regard to the alleged 1993 incident that they afterwards decided simply not to consider the matter any further and move on as if nothing had occurred. Their lack of knowledge of the concept of sexual abuse and its possibly severe traumatic implications for the victim can reasonably explain this, as well as their wish not to upset the close friendly relations with the Applicant and his family and their standing in the national community. The fact that AA has a detailed recollection of the events only proves that she still vividly recalls the alleged incident, and the Tribunal does not doubt the veracity thereof.

52. Regarding the alleged babysitting incident, the Tribunal notes that the issue of possible sexual abuse was only brought to the attention of AA's mother after AA confided in DD and EE about her alleged experiences. EE then told AA to tell her mother about them, which AA then did. This is, at least, what DD and EE explained to OIOS, and the Tribunal finds these statements convincing, even when taking into account the passage of time. In this regard, it is noted that a sexual abuse claim is a very serious and significant matter that any person could reasonably be expected to remember many years later. Also, neither DD nor EE had any reason to lie about their recollection of facts to OIOS. As for AA herself, the Tribunal observes that she was a minor at the relevant time and could not be expected to fully understand what was happening, while at the same time, she was also intending to protect her father's close friendship with the Applicant.

53. The Applicant contends that the "chronology of events completely discredits the allegations". The photographic evidence that "the friendship continued into 1999 refutes AA's parent's assertion that the friendship ended in 1997". This evidence "overturns the assumption of any abuse allegedly committed by the Applicant". If AA

"only saw the Applicant once after the babysitting episode as she indicated, why did her parents continue seeing him?" Both AA's parents "continued their friendship with the Applicant after the alleged episodes, and AA's mother even asked the Applicant's assistance in buying a guitar for her husband's birthday". If the allegations were true, it "would be their first priority as parents to protect their daughter". This proves that "the incidents as presented in the complaint have never occurred".

54. The Tribunal, as also stated in the above, is convinced by AA's parents' testimonies that they continued to attend the same parties and events as the Applicant and his family in attempt to keep up their appearance at work and in the national community. The Tribunal even find it likely, in particular with regard to the 1993 incident, that AA's mother was in a state of denial, as she effectively also testified at the hearing.

55. The Applicant submits that "AA's father testified that he was avoiding the Applicant but did not want to make it obvious to other people and continued to socialize with the Applicant". Again, if the Applicant was "such a threat to his daughter, why did public opinion carry more weight than his daughter's safety"? Contrary to AA's version, her father "does not testify being on his knees begging her forgiveness". Moreover, AA's father had "no intention of filing a complaint against the Applicant". He testified that "she (AA) needed some kind of resolution and he just supported". Sadly, AA's father "appeared embarrassed to testify at the hearing and his responses to questions seemed to have been influenced by his wife and daughter".

56. In the Applicant's final observations, he adds that he was "never 'confronted' by AA's father after the babysitting episode". The Applicant offered "a get-together with both parents to discuss the babysitting episode which made AA feel uncomfortable, but it was categorically rejected by AA's mother". AA's father's statements about "protecting AA 'from shame and gossip' are idle talk, as the Applicant continued to be his family's friend

and thus AA's father could not have been deliberating on whether to make this matter public".

57. The Tribunal agrees with the Respondent that AA's father at the hearing appeared to be embarrassed by providing testimony. To the Tribunal, AA's father even seemed very discomfortable and distraught by the situation, which is only understandable considering the subject—the alleged sexual abuse of his daughter. It also follows that AA's father and the Applicant in their testimonies described AA's father as having a somehow introvert and subdued personality. From the testimonies of AA, her parents and others additionally followed that the then close personal friendship with the Applicant was very important to AA's father, just as they were both personally involved in the activities of the national community. The discrepancy between AA's and her father's testimonies as to whether he begged for her forgiveness on his knees, as well as his possible reluctance to escalate the matter any further, is to the Tribunal therefore only a reflection of his attempt to suppress the information that he learned about the alleged sexual abuse from AA and AA's mother, as according to his own testimony, he had entered a state of denial thereof. The discrepancy between the two testimonies further shows that AA's father's testimony was not influenced by the testimony of AA.

58. The Applicant contends that the "body language of AA's mother at the hearing when responding to questions such as 'did the Applicant admit it?' or when explaining the discussion she supposedly had with the Applicant's wife, which was denied by the latter, shows that she was uncomfortable with her answers". The Applicant requests the Tribunal to "assess AA's mother's body language during her testimony and see how uneasy she felt when responding to determinant questions".

59. The Tribunal, indeed, assessed the body language of AA's mother at the hearing. The Tribunal, however, did not consider that AA's mother appeared uncomfortable with answering any questions. Rather, the Tribunal saw AA's mother

as an assertive and self-confident witness, who was determined to rectify the harm which she perceived that the Applicant had inflicted upon her daughter.

60. The Applicant submits that the "sudden change of version about AA's initial mental struggles also reduces the credibility of her testimony". AA has "had clear psychological issues since an early age", but AA's mother "changed her initial testimony at the hearing" and said that "AA's issues in school began in 8th grade, and AA started therapy in 1997 at age 16 rather than 11 as she repeatedly claimed to the investigators". "How can a parent confuse such different stages of her child's life"? Moreover, "AA's mother indicated to the OIOS that her complaint had been inspired by the MeToo movement, which she subsequently retracted when questioned at the hearing".

61. The Tribunal finds that any discrepancies between AA's mother's testimony and the explanations given to OIOS regarding the timing of AA receiving psychological therapy, in and by themselves, are immaterial in terms of establishing the relevant facts of the present case, namely whether the alleged incidents of sexual abuse occurred as set out in the sanction letter. As to whether such discrepancies would discredit the testimony of AA's mother, the Tribunal finds that since the issue of the start date of the therapy dates back to 1990s, the passage of time could reasonably explain any discrepancies. Also, it is not clear whether the explanations provided to OIOS, and the Tribunal relate to the same therapy sessions. The Applicant, in addition, has failed to establish how AA's possible mental issues would have influenced her perception of the alleged incidents or, perhaps even, caused her to feel any hostility against him, in particular—if presumed—he did not sexually abuse her. Hence, the Applicant has not argued, yet alone proved, that it was AA's possible mental issues that caused her to feel bias and/or hate against him to the extent that she would falsely accuse him of sexual abuse.

62. The Applicant contends that "AA's mother's attempts to influence superiors and staff members in the Applicant's Service, corroborated by witness CC, prove that her accusations were frivolous". AA's mother was "obviously seeking to justify and give more weight to her complaint". In the Applicant's final observations, he added that, "There is no doubt that the Applicant's fairness rights were seriously breached from the beginning, as [the USG] and the main decision-maker in the present case, had a confidential meeting with AA's mother before the investigation began, which pre-determined the USG's biased attitude towards the Applicant".

63. The Tribunal notes that it is convinced by the Applicant's contention that AA's mother brought the matter of the Applicant allegedly sexually abusing AA to the attention of the USG. This, however, does not prove anything else than AA's mother took the issue very seriously—by doing so, due to the severity of the accusations, she also put her own professional reputation and career at risk. In terms of the Applicant's right to a due process during the disciplinary proceedings, the Tribunal further finds that the Applicant has not as substantiated how involving the USG made a difference to the contested decision as per the "so-called 'no-difference' principle of law" (see *Allen* 2019-UNAT-951, para 38). The Tribunal recalls that "only substantial procedural irregularities can render an administrative decision unlawful" (see *Thiombiano* 2020-UNAT-978, para. 34, and similarly in disciplinary case in, for instance, *Sall* 2018-UNAT-889 and *Ladu* 2019-UNAT-956).

64. The Applicant submits that the "sanction letter completely disregarded the above elements and real intentions behind the complaint". The "contrast between the Applicant's consistent and coherent account, supported by his wife and colleagues' objective testimonies along with photographic evidence versus AA and AA's parents' contradictions, misrepresentations and embarrassment demonstrate the absence of clear and convincing evidence supporting the allegations".

65. As stated in the above, the Tribunal was convinced by the testimonies of AA and her parents. In this regard, the discrepancy in the testimonies between AA and her father about his seeking forgiveness for the alleged sexual abuse is unimportant and explained by his circumstances. At the same time, the Applicant and his wife have, as also already held, significant professional, personal and financial interests in the present case, whereas it has not been proved that AA and her mother had or have any other interest in the present case than seeking justice for the alleged sexual abuse.

Specific episodes

66. The Applicant contends that the "charge letter identifies two episodes allegedly amounting to misconduct". The "alleged 1993 episode has never occurred and is not corroborated by clear and convincing evidence". AA's mother testified that "when AA told her about this alleged 1993 episode, she dismissed it and continued the relationship as usual". "How can an event like this be dismissed?" In addition, "if the incident really took place, AA's mother would not allow her daughter to babysit the Applicant's son two years later". Moreover, AA herself would "refuse to babysit out of fear of the risk of sexual abuse". Lastly, the Applicant "only learned about this false allegation in 2020 when he was interviewed by the OIOS, which proves that this allegation, along with the tennis class, were added to present a 'history' of the Applicant's wrongdoings before the OIOS".

67. The Applicant contends that regarding "the alleged babysitting episode, the Applicant has never treated AA the way she claimed to the Tribunal, and the allegations are not supported by clear and convincing evidence". It is "a complete distortion of the truth and an overstatement of what really occurred". The Applicant "remembers that single occasion in 1995" at which "after being out with his wife, he came home and saw AA dozing on the sofa after putting the Applicant's son to sleep and woke her up". However, he never "touched her in the way AA described and never put his hand under

her shirt". Unfortunately, "this event has never been fully clarified as AA's mother categorically refused to arrange a meeting with all the parties proposed by the Applicant to present his apologies to AA for making her feel uncomfortable".

68. The Applicant submits that "[i]n any case, the emails exchanged between the Applicant and AA's mother in 2018 do not constitute any admission to the accusations raised against him". In his email, the Applicant "only referred to the single babysitting episode mentioned above that made AA feel uncomfortable and requested forgiveness not as an acknowledgement but rather out of reassurance to AA's mother that he had never had any ill intentions towards AA". The Applicant was "very emotional in his reply to AA's mother using strong vocabulary due to his religious mindset as well as the importance he placed on their families' friendship". In the Applicant's final observations, he added that he "has repeatedly commented on his 2018 email", that his "overemotional statements cannot be interpreted as an admission of guilt" and that he "only referred to the single babysitting episode mentioned above that made AA feel uncomfortable".

69. The Tribunal notes that the Applicant's email is in direct response to the email of AA's mother of the same date (9 July 2018) in which she accuses him of "pure sexual abuse". As stated above, taking into consideration the Applicant's expressive and manifest statements of apology and regret for the "consequences" he inflicted upon AA, the Tribunal finds that this can only be interpreted as him recognizing and therefore also admitting having sexually abused AA, at least on one occasion. This is so despite the fact that the Applicant does not directly state that he sexually abused her, but when read together with AA's mother's initial email, his email cannot reasonably be read differently.

70. The situation of the present case is that only two persons, namely the Applicant and AA, were present when the alleged sexual abuse occurred, and they have presented

contradictory witness testimonies. As the present case involves termination, the question for the Tribunal to determine is therefore whether the Respondent has established with clear and convincing evidence that the factual background upon which the disciplinary sanction is well-founded. This means that AA's testimony is highly probable whereas, in consequence, the Applicant's testimony is not reliable.

71. With reference to the Tribunal's findings in the above, the Tribunal is—clearly and convincingly—persuaded by AA's testimony in which she affirms the facts as set out the sanction letter. In this regard, the Tribunal, in particular, takes into account its abovementioned findings that: (a) the Applicant in the July 2018 email effectively admits to have sexually abused AA, at minimum on one occasion; (b) AA's account of facts is corroborated by convincing hearsay evidence, especially the testimony of her mother, but also by the investigation statements of DD and EE regarding the babysitting incident; (c) the Applicant and his wife agreed that the relationship with AA's family cooled off after the babysitting incident; (d) neither AA nor AA's mother have any other perceived interest in the sexual abuse complaint than seeking justice for the sexual abuse; (e) the Applicant, as well as his wife, have significant interests in outcome of the case in terms of restoring his private and professional reputation and in retrieval of their daughter's educational grant.

72. Regarding the Applicant's explanation that he felt emotional when he drafted the 9 July 2018 email, the Tribunal find it to be very well composed and articulated. It does not appear to be prepared in a rushed and/or careless manner, but reads as a genuine and thoughtful reflection of the Applicant's unfiltered sentiments of remorse for having sexually abused AA. The fact that in the email, the Applicant also refers the possible negative impact on his own daughter's education grant only underscores this impression. The email thereby demonstrates that the Applicant carefully considered the consequences that a possible sexual abuse case could have for his employment situation, including a potential dismissal.

73. Based on the above, the Tribunal finds that the Respondent has properly established the facts set out in the sanction letter.

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

74. The Applicant makes no other submissions than since the facts were not established by clear and convincing evidence, his "behaviour did not qualify as misconduct under UN former Staff Regulation 1.4 or any other UN rule, and the sanction was therefore arbitrary and grossly disproportionate".

75. The Tribunal notes that since it found that the facts were indeed established with clear and convincing evidence, based solely on the Applicant's submissions, the straightforward conclusion is therefore that (a) the established facts did qualify as misconduct, and (b) the sanction, namely separation from service with compensation *in lieu* of notice and without termination indemnity, was proportionate to the offense, namely sexual abuse of a minor.

76. In the interest of justice, the Tribunal, nevertheless, finds it necessary to also provide its assessment of whether the Applicant's established behavior, as a matter of law, indeed amounted to sexual abuse. Hence, sexual abuse is an objective standard, even if the Applicant's 9 July 2019 email is read as him admitting that he sexually abused AA. Hence, "sexual abuse" is defined in ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) as: "the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions" (see sec. 1). In this Administrative Instruction particular reference is made to "sexual activity with children (persons under the age of 18)", which is prohibited "regardless of the age of majority or age of consent locally".

77. The Tribunal notes that in the annex to the sanction letter, the ASG highlighted the established facts as the Applicant having (a) in 1993, entered AA's bedroom while she was asleep and put his hand under her nightgown and fondled her breast; and (b) between 1994 and 1997 (also referred to as the babysitting incident) on at least one occasion, put his hand under AA's shirt and fondled her back and/or belly when she was dozing on his sofa while babysitting his son. Also, it is undisputed that AA was under 18 years when all these incidents occurred.

78. In these circumstances, the Tribunal finds that the Administration acted within its competence when finding that the Applicant had sexually abused AA in 1993 and between 1994 and 1997.

79. Regarding the severity of the sanction, the Tribunal notes that in ST/SGB/2003/13, sexual abuse is defined as an act of "serious misconduct", which is grounds for "disciplinary measures, including summary dismissal". Also taking into account United Nations' zero tolerance policy in cases of sexual misconduct (as affirmed in, for instance, *Muteeganda* 2018-UNAT-869, para. 41), the Tribunal finds that the Administration further acted within the scope of its authority when sanctioning the Applicant with separation from service with compensation *in lieu* of notice and without termination indemnity.

Conclusion

80. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 30th day of September 2022

Entered in the Register on this 30th day of September 2022
(Signed)
Morten Michelsen, Officer-in-Charge, New York