UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2020/060
Judgment No.: UNDT/2022/115
Date: 20 October 2022
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

NKOYOCK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Setondji Roland Adjovi

Counsel for Respondent:
Miryoung An, DAS/ALD/OHR, UN Secretariat
Albert Angeles, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a staff member at the United Nations Office of Counter Terrorism ("UNOCT"), Vienna, contests the disciplinary sanction of loss of three steps in grade and deferment for three years of eligibility for consideration for promotion, together with a requirement to attend on-site or online interactive training on workplace civility and communication, for creating a hostile, offensive and humiliating work environment between 2015 and 2018, when he was Officer-In-Charge ("OiC"), at the Department of Software Products for Member States ("SPMS"), United Nations Office on Drugs and Crime ("UNODC").

Facts

2. On 24 December 2020, the Applicant filed an application contesting the aforementioned decision, dated 23 September 2020, taken by the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/DMSPC") to sanction him for misconduct. Together with the application, the Applicant submitted a motion for a hearing and proposed to call 11 witnesses.

3. On 28 January 2021, the Respondent filed his reply.

4. On 29 April 2021, the Applicant filed a motion for production of evidence.

5. On 5 May 2021, the Respondent responded to the Applicant's motion objecting to it.

6. On 24 May 2022, the instant case was assigned to the undersigned Judge.

7. By Order No. 60 (GVA/2022) of 2 June 2022, the Tribunal instructed:

   a. The parties, to inform it whether a hearing is warranted, to provide a list of potential witnesses, if any, explaining the relevance of each testimony for the determination of the issues in dispute; and

b. The Applicant, to provide detailed justification for the production of the "0019/20 investigation report" by the Office of Internal Oversight Services ("OIOS") referred to in his above-mentioned motion.

8. In response to Order No. 60 (GVA/2022), on 13 June 2022, the Respondent submitted that an oral hearing was not needed because there was no material dispute about the facts. With respect to a potential list of witnesses, the Respondent provided the names of the complainants and the witnesses whose evidence was referred to as part of the basis of the factual findings in the respective investigation.

9. On the same date, the Applicant submitted that a hearing was warranted, explained the relevance of each testimony he required, provided a detailed justification for production of the OIOS' 0019/20 investigation report, and submitted a motion for production of evidence of OIOS' investigation reports 0413/019 and 0847/020.

10. By Order No. 68 (GVA/2022) of 24 June 2022, the Tribunal instructed the Respondent to file on an *ex parte* basis a copy of the three investigation reports requested by the Applicant so that it could rule on their relevance.

11. On 1 July 2022, the Respondent submitted the reports in question.

12. By Order No. 77 (GVA/2022) of 4 August 2022, the Tribunal rejected the Applicant's motion for production of evidence of investigation report 0019/20, and partially granted the motion for production of investigation reports 0413/19 and 0847/20 by only disclosing the findings therein to the Applicant. In the same Order, the Tribunal granted the Applicant five days to provide his comments, if any, in relation to the disclosed findings, and informed the parties that past that deadline it would rule on the matter of the hearing.

13. On 10 August 2022, the Applicant filed his comments pursuant to Order No. 77 requesting reconsideration of the Tribunal's ruling regarding his motion for production of evidence.

14. By Order No. 78 (GVA/2022) of 19 August 2022, the Tribunal denied the Applicant's requests for reconsideration of Order No. 77 and for a hearing. Accordingly, the Tribunal informed the parties that the case would be decided on the papers and instructed them to file closing submissions by 29 August 2022.

15. On 23 August 2022, the Respondent filed a motion for extension of time to file his closing submission.

16. By Order No. 80 (GVA/2022) of 24 August 2022, the Tribunal granted the extension of time requested by the Respondent and equally extended the deadline for the Applicant to file his closing submission.

17. On 6 September 2022, the Applicant and the Respondent filed closing submissions.

Parties' submissions

18. The Applicant's principal contentions are:

a. The decision was procedurally flawed, unreasonable and disproportionate;

b. The decision violated sec. 5.18 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) by imposing both a disciplinary sanction and a managerial action, whereas the applicable law only allows for one of the aforementioned courses of action;

c. The sanctions are based on facts not established to the correct standard of proof. The Administration determined that the facts of this case were established by a preponderance of evidence, whereas the facts must be established by clear and convincing evidence where termination is a possible sanction;

d. The Chief, Human Resources Management Service ("HRMS"), Division for Management ("DM"), UNOV/UNODC, had a serious conflict of interest in the process. Despite the Applicant's objections, she still appointed an investigation panel made up of retired investigators who owed her their remuneration and loyalty. In addition, the Chief was a close friend of Mr. A.G. and a colleague of the complainants. This serious conflict of interest vitiated the process by impacting the impartiality of the investigation panel and the Applicant's procedural fairness rights;

e. The choice of retired investigators violated the requirements of sec. 5.14 of ST/SGB/2008/5, as they were not "individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct". Instead, the chosen investigators were retired staff members from the investigators roster. In this regard, the Applicant submits that the Organization has failed "to establish that it was impossible to find staff members in the department, office or mission who could undertake the investigation before considering selecting individuals from the roster maintained by OHRM", in direct conflict with this Tribunal's caselaw (*Duparc* UNDT/2022/074);

f. The investigation panel failed to comply with parts of the Terms of Reference ("TOR") and sec. 5.17 of ST/SGB/2008/5. Instead of simply giving a full account of the facts ascertained, written statements by witnesses and relevant documents, the investigators produced a report where they drew conclusions about the facts. The investigation report is thus tainted and represents another procedural violation of the Applicant's rights;

g. Relevant matters such as the Applicant's positive performance records for the previous seven performance cycles were ignored, whereas irrelevant matters were considered in the sanction letter, such as the unrelated letter of reprimand used as an aggravating factor that resulted in a manifestly unjust and disproportionate sanction;

h. The complainants and many witnesses did not like the Applicant's management style and the stricter measures he imposed in the section's work routine, and they were also angry with him for not promoting them. The Applicant was consistently undermined by these complaining staff. Their testimonies are biased, inconsistent, designed to hurt the Applicant and to push him out the Organization;

i. Mr. B., Mr. A-K. and the Chief, HRMS DM, UNOV/UNODC, were "racially motivated" against the Applicant. Their racism is clear in their OIOS interviews and clearly establishes the toxic environment in which the Applicant was working and the pejorative attitudes towards him, rendering their testimony biased and unreliable; and

j. The complainants had a hidden agenda against the Applicant because of the corrupted scheme they were involved with their former supervisor, and because of the Applicant's role in reporting them for intellectual property theft.

19. The Respondent's principal contentions are:

a. Following the complaints of four staff members, a fact-finding investigation panel was convened and conducted a thorough investigation into the four complaints. The investigation panel revealed ample evidence in support of the facts underpinning the allegations of misconduct against the Applicant;

b. The facts are established by the applicable standard of proof, *i.e.*, preponderance of evidence. The facts underpinning the disciplinary measures are established by the direct evidence from the four complainants who provided a consistent and detailed account of events. Their evidence is corroborated and consistent with testimonial evidence from seven other witnesses, all of whom had direct knowledge about the Applicant's behaviour at issue and had no reason to lie;

c. The Applicant displayed no efforts to meaningfully address the ample evidence demonstrating his offensive and humiliating behaviour towards the four complainants. Instead, the Applicant raised unfounded accusations against some of the witnesses that they were racially biased against him, without providing any reasonable basis in support of this serious allegation. The onus to show improper motive is on the party asserting it and the Applicant has failed to do so;

d. The Applicant insists that the complainants had a hidden agenda against him because of a corrupted scheme they were allegedly involved in with their former supervisor. This allegation finds no support in the findings of the OIOS investigation reports disclosed to the Applicant. The investigation did neither reveal any intellectual property theft nor find evidence of involvement of complainants other than Mr. S in assisting Mr. A. G. The two OIOS investigations are not relevant to any possible motivation for the complaints against the Applicant because said complaints pre-date the report of possible unsatisfactory conduct that resulted in said investigations;

e. The Applicant's actions amount to misconduct. He was in a leadership role heading SPMS, during which he exhibited a pattern of abusive and offensive behaviour towards multiple complainants under his supervision for a number of years, thereby creating a hostile and intimidating work environment for them. In addition, while knowing that SPMS was in the middle of a structural reform and that his staff, including the complainants, faced uncertainty about their job security, the Applicant targeted and marginalized them, thus fomenting an atmosphere of fear and division, instead of showing managerial sensitivity and care. These actions were a serious violation of staff regulation 1.2(a), staff rule 1.2(f) and secs. 2.1, 3.1 and 3.2 of ST/SGB/2008/5;

f. The imposed sanction was proportionate to the misconduct. It reflects the gravity of his conduct and is consistent with the past practice of the Organization. In comparable cases involving harassment (excluding sexual harassment) and abuse of authority, sanctions ranging from written censure to demotion have been imposed;

g. Furthermore, all relevant circumstances, including aggravating and mitigating factors, were considered. The Applicant's previous positive performance was rightfully not accepted as a mitigating factor because the established conduct reflects the Applicant's misuse of the position of trust given to him by virtue of his long positive service with the Organization;

h. As for the aggravating factor, it was appropriate for the Secretary-General to consider the letter of reprimand dated 20 August 2018, as the Applicant was duly investigated and there was no dispute about the content of the letter; and

i. Finally, the Applicant's procedural rights were respected throughout the investigation and disciplinary process. In particular, the Applicant was interviewed in connection with the investigation and asked about the material aspects of the matter, he signed the interview record declaring that it was true and accurate, and denied having had any objections to the way the interview was conducted. In the Allegations Memorandum, the Applicant was informed of his right to seek the assistance of counsel and was given the opportunity to comment on the allegations, which in turn were duly considered.

Consideration

Scope and standard of judicial review

20. The Tribunal is seized of an application where the staff member contests the disciplinary sanctions of loss of three steps in grade and deferment for three years of eligibility for consideration for promotion, for creating a hostile, offensive and humiliating work environment between 2015 and 2018 while he was OiC, SPMS, UNODC.

21. As per the well-established case law of the internal justice system, the UNDT is not competent to conduct a "*de novo*" investigation but rather to analyse the evidence on record, to determine if said evidence established the facts *as per* the applicable standard of proof and if due process rights were fully respected throughout the procedure.

22. Judicial review of a disciplinary case requires the Tribunal to consider the evidence adduced and the procedure followed during the course of an investigation by the Administration (*Applicant* 2013-UNAT-302, para. 29).

23. In this context, the consistent jurisprudence of the Appeals Tribunal (*Haniya* 2010-UNAT-024, para. 31, *Wishah* 2015-UNAT-537, para. 20, *Ladu* 2019-UNAT-956, para. 15, *Nyawa* 2020-UNAT-1024, para. 48) requires the Dispute Tribunal to ascertain:

a. Whether the facts on which the disciplinary measures were based have been established to the applicable standard of proof;

b. Whether the established facts qualify as misconduct;

c. Whether the disciplinary measures applied were proportionate to the offence; and

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

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

Whether the facts have been established

25. It is well settled case law that the standard of proof applicable to a case where the disciplinary measures do not include separation or dismissal is that of preponderance of evidence. Pursuant to sec. 9.1(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), this means that the Administration must prove more likely than not, that the facts and circumstances underlying the misconduct exist or have occurred (*Suleiman* 2020-UNAT-1006, para. 10).

26. In the case at hand, dismissal is not at stake. Contrary to what is argued by the Applicant, the applicable threshold of "preponderance of evidence" is not determined by the fact that dismissal is an option generally available to the Secretary-General but by the sanction imposed.

27. Moreover, in determining whether the standard of proof has been met, the Tribunal "is not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the Secretary-General". The Tribunal will only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based (*Nadasan* 2019-UNAT-918, para. 40).

28. In the present case, the Applicant was accused of having created a hostile work environment for his colleagues between 2015 and 2018 by:

a. Engaging in a behavioural pattern of using words and/or acting in a demeaning, intimidating, humiliating, and/or abusive nature towards Mr. S, Mr. T and/or Mr. R;

b. In April 2016, expressing his dissatisfaction with Mr. A-K in a meeting with several participants and in an e-mail to his subordinates, both of which Mr. A-K and others perceived as demeaning, intimidating and humiliating;

c. Repeatedly asking Mr. R and Mr. T if they had reported prohibited conduct on his part to the Staff Council or to the management, which Mr. R and Mr. T perceived as offensive and intimidating;

d. Repeatedly asking Mr. S, Mr. T, Mr. R and Mr. K to give him the name of the person who gave the letter of 15 February 2018 from South Africa to his supervisor implying reprisal against the person; and

e. In April 2018, pressuring Mr. T, whom he assigned to lead the software deployment team, to tell Mr. A-K not to copy Mr. T on e-mails relating to goCASE deployment.

29. The Tribunal has carefully reviewed the whole investigation record as well as its annexes and recalls that the burden of proof to demonstrate the alleged misconduct lays with the Organization. On the other hand, it is incumbent upon the Applicant to provide evidence that substantiates his arguments to successfully challenge the facts that were established by the investigation.

30. In this regard, the Applicant argues that the complainants' testimonies are not reliable and raises several allegations in this respect. One of them pertains to an alleged violation of intellectual property rights by Mr. S with the assistance of other complainants and witnesses. The Applicant claims that because he made such accusation, the complainants were biased and wrongly motivated to incriminate him by raising false allegations of workplace harassment.

31. However, the Tribunal does not find any evidence of collusion or bias against the Applicant. On the contrary, the Tribunal finds that there were several testimonies that corroborated the complainants' statements and confirmed the allegations of bullying and harassment by the Applicant.

32. In May 2015, the Applicant was assigned to SPMS as OiC and he implemented one of the objectives of the restructuring exercise, which was to break up silos of teams grouped around products ("silos approach") and to work along functional lines ("matrix approach") with an aim of fostering collaboration across functional areas and cross-team communications.

33. Having reviewed the case record, the Tribunal notes that the investigation panel interviewed not only the complainants but also a wide range of staff members, peers and supervisors, who were not directly involved in the complaints.

34. The common denominator in all these testimonies relates precisely to the Applicant's managerial style. In fact, in all these testimonies the Applicant is described as "showing an aggressive, intimidating and uncompromising management and interpersonal style".

35. The witnesses gave specific examples illustrating his behaviour in the office and the way he usually interacted with his team members, for instance, by privileging some to the detriment of other(s), by using aggressive language and demeaning the quality of their work and by threatening to end their contracts.

36. As per the record, Mr. E. N., stated that the Applicant was a "bully" and "harasser" and that he "hang on every word of Mr. A. A." (who Mr. E. N. observed had "a history with the goAML team and some vendetta") and that Mr. A. A. told him that "he could convince [the Applicant] to do anything".

37. Another witness, Mr. K. A. S., stated that "[i]f someone in a discussion [went] against what Mr. [A. A. said], [the Applicant] [would] stop the discussion immediately." Mr. Mr. H. H. stated that the Applicant could be very "temperamental" and that he treated "people like kids." According to Mr. H. H., when he criticized Mr. A. A.'s idea, the Applicant told him that he should "never ever write in that away again". This made him feel that the Applicant favoured Mr. A. A. Mr. H. H. also stated that the Applicant used a "shaming technique" by copying several people on his e-mail criticizing a staff member.

38. Ms. S. D. T. perceived that the Applicant managed "almost by intimidation". She added that regardless of whether it would work or not, the Applicant would say "this is how we are going to do it and if you like it or not, this is what we will do". Also, Mr. Z. K. described the Applicant's management style as "dictatorship".

39. Mr. K. A. S. also stated that the Applicant's management style was as if he was working on a "military base, with soldiers" and he gave specific examples of this situation, as follows:

a. In June 2015, the Applicant did not consult with Mr. K. A. S. before confirming with a client the dates of a mission travel to the Netherlands; and

b. In August 2018, in a meeting concerning issues on database administration for which Mr. K. S. A. had expertise, the Applicant asked him if Mr. K. S. A. wanted him "to hire a new DBA (database administrator)?", implying that the Applicant would replace him.

40. The Tribunal notes that these testimonies are all congruent and they point to a certain pattern of behaviour by the Applicant, *i.e.*, that he abused his authority by not treating his colleagues with respect, by threatening their jobs, by ignoring their expertise and skills and undermining their self-esteem.

41. In opposition, the Applicant tried to establish that all the testimonies were unreliable or not credible. However, he was not able to demonstrate his claims that the complaints were maliciously raised and that the complainants had colluded against him to make false allegations.

42. In his submissions, the Applicant argues that his colleagues filed a complaint against him as a result of him denouncing some of them for an alleged violation of UN's intellectual property rights, and that they resented him for his managerial style and the changes he made in the section. He also claims that some witnesses were racially biased against him.

43. However, there is no evidence on record that supports the Applicant's claims. Indeed, the Tribunal notes that the investigation reports whose disclosure was requested by the Applicant to prove the alleged bias and wrongful motivations, do not have the probative value he argues.

44. In fact, pursuant to Order No. 77 (GVA/2022), the Tribunal analysed all three investigation reports requested by the Applicant and concluded that none of them demonstrated the alleged bias. In addition, the Tribunal noticed that all issues related to said investigations, were subsequent to the complaints against the Applicant that are currently under judicial review, hence not supportive of the Applicant's claim of malicious motives.

45. Indeed, the Tribunal recalls that the retaliation complaint against the Applicant was filed in December 2019, whereas the complaints of prohibited conduct implicating him were filed in April and May 2018, and the witnesses interviewed in October 2018. Thus, the retaliation complaint against the Applicant was filed after the complaints of prohibited conduct. It follows that the retaliation complaint cannot serve as evidence of ulterior motive to the complaints of prohibited conduct against the Applicant, filed a year later.

46. In addition, the fact that the Applicant was found to not have committed retaliation against the complainants has no link nor does it interfere with the result of the investigation of workplace harassment and abuse of authority against him, which is the subject of the instant judicial review.

47. Having examined the investigation report concerning a complaint for possible unsatisfactory conduct implicating Mr. S., one of the complainants in the instant case, the Tribunal noticed that it was received on 23 April 2019, namely after the filing of the complaints of workplace harassment and abuse of authority against the Applicant. During said investigation, OIOS found evidence that Mr. S. engaged in unauthorized outside activities but did not find evidence of intellectual property theft or of violation of the UN's intellectual property rights by Mr. S. or any other staff member.

48. Accordingly, the Tribunal found that this investigation report had limited probative value as the investigation concerned a different set of issues reported after the filing of the complaints of prohibited conduct against the Applicant. Furthermore, as stated above, it is worth noticing that Mr. S.' complaint against the Applicant was corroborated by the other complainants and the testimony of several witnesses. The Tribunal is also of the view that there is no link between the complaint made by the Applicant and the alleged "intellectual property theft" that could have led to a false accusation of harassment.

49. Therefore, the Applicant's allegations fail when confronted with the evidence on record. Since he was not able to prove or cast doubt otherwise, the complainants and witnesses' testimonies stand as credible and reliable.

50. In relation to the accusations of racial bias, the Applicant claims that the testimonies of Mr. B., Mr. A-K., and the Chief, HRMS DM, UNOV/UNODC, are tainted as they are racially motivated. He argues that the racial bias can be found in the OIOS's interview transcripts where these staff members respectively said: "we call it African Management", "brother", and "his style appears to be better suited to a different time and place".

51. However, the Tribunal notes that besides the aforementioned remarks picked from the interview transcripts, there is no evidence on record to support a conclusion of racial bias. It is not enough to allege "racial prejudice", the allegation must be supported by evidence.

52. In the case at hand, the Applicant did not provide any examples of racism and/or discrimination that he might have suffered and that could demonstrate a malicious motivation behind the testimonies of Mr. B., Mr. A-K., and of the Chief, HRMS, DM, UNOV/UNODC. In fact, it is impossible to conclude that racial prejudice motivated the complaints or the testimonies solely from the remarks selected by the Applicant, who himself states to have never seen or heard anything in this regard before.

53. Thus, lack of evidence and of examples to support the allegation of racial bias against Mr. B., Mr. A-K., and of the Chief, HRMS, DM, UNOV/UNODC, coupled with the fact that the information provided by these witnesses is corroborated by other witnesses whose testimony was not allegedly racially biased, it is impossible for this Tribunal to dismiss their testimony as racially motivated.

54. Consequently, the Tribunal finds that the Applicant was not able to substantiate his arguments against the complaint and the complainants, and that the facts are established by a preponderance of evidence.

Whether the established facts legally amount to misconduct

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

56. The Tribunal must consider the internal legal framework to qualify the facts attributed to the Applicant. In this regard, the Tribunal further recalls that staff rule 10.1(a) provides that:

> Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

57. According to the investigation report and sanction letter, the Applicant was found to have committed harassment and abuse of authority under the framework of ST/SGB/2008/5, thus violating secs. 2.3, 3.1 and 3.2 of that bulletin as well as staff rule 1.2(f).

58. ST/SGB/2008/5 provides the following in its relevant part:

> **Section 1**
> **Definitions**
>
> …
>
> 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. Disagreement on work performance or on other work-related- issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.
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> …
>
> 1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to,

the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

…

Section 2
General Principles

…

2.3 In their interactions with others, all staff members are expected to act with tolerance, sensitivity and respect for differences. Any form of prohibited conduct in the workplace or in connection with work is a violation of these principles and may lead to disciplinary action, whether the prohibited conduct takes place in the workplace, in the course of official travel or an official mission, or in other settings in which it may have an impact on the workplace.

…

Section 3
Duties of staff members and specific duties of managers, supervisors and heads of department/office/mission

3.1 All staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations.

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.

59. Staff Rule 1.2(f), addressing basic rights and obligations of staff, provides that

> [a]ny 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.

60. The complainants and several witnesses testified that the Applicant engaged in a behavioural pattern of using words of and/or acting in a demeaning, intimidating, humiliating, and/or abusive nature towards the complainants and others while acting as OiC, SPMS, UNODC, between 2015 and 2018.

61. The Tribunal finds that the established facts attributed to the Applicant, which were proven *as per* the applicable standard, demonstrate that the Applicant abused his authority and created a hostile, offensive and humiliating work environment for the complainants, and constitute misconduct.

Whether the disciplinary measures applied were proportionate to the offence

62. As per the internal legal framework, specifically, staff rule 10.3(b) "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". This legal provision is mandatory since the text contains the expression "shall". The Tribunal must, therefore, verify whether the sanction applied is proportionate to the nature and gravity of the conduct.

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

64. In the present case, the Applicant submits that the sanction was unfair and disproportionate. In support of his submissions, he specifically argues that:

a. The decision violated sec. 5.18 of ST/SGB/2008/5 by imposing both a disciplinary sanction (i.e., loss of steps in grade and deferment of eligibility for consideration for promotion) and a managerial action (i.e., requirement to attend on site or online interactive training on workplace civility and communication), whereas the applicable law only allows for one of the aforementioned courses of action; and

b. Relevant matters such as the Applicant's positive performance records for the previous seven performance cycles were ignored whereas irrelevant matters were considered in the sanction letter, such as the unrelated letter of reprimand used as an aggravating factor that resulted in a manifestly unjust and disproportionate sanction.

65. The Tribunal recalls that the Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding on the appropriate sanction to impose (*Nyawa* 2020-UNAT-1024, para. 89; *Ladu* 2019-UNAT-956, para 40). However, such discretion is not unfettered. Indeed, the Tribunal may "consider whether relevant matters have been ignored and irrelevant matters considered" (*Sanwidi* 2010-UNAT-084, para. 40). 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**. (emphasis added)

66. The Tribunal notes that the applicable disciplinary framework does not prevent the Administration from applying cumulatively a disciplinary sanction and a managerial action to the same set of facts. However, the sanctions/managerial actions must be legal and proportionate to the gravity of the offence and to the overall circumstances of the case.

67. Bearing in mind the nature of the facts attributed to the Applicant, namely harassment and abuse of authority, the Tribunal finds that it is not unreasonable that he be obliged to attend mandatory training to improve his managerial and communication's style in addition to the imposition of a disciplinary sanction.

68. According to the case record, the Administration chose to follow sec. 5.18(c) of ST/SGB/2008/5, which states that:

> On the basis of the report, the responsible official shall take one of the following courses of action:
>
> …
>
> (c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question (footnote omitted). The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

69. Pursuant to sec. 5.18(c), the Assistant Secretary-General for Human Resources Management ("ASG/HRM") is required to proceed in accordance with the applicable disciplinary procedures, which in this case are governed by ST/AI/2017/1. According to secs. 9.2 and 9.3 of ST/AI/2017/1, the USG/DMSPC is allowed to impose disciplinary measures cumulatively with, where relevant, administrative measures/managerial action. ST/AI/2017/1 provides in its relevant part as follows:

> 9.2 On the basis of the investigation report, all supporting documentation, and responses from the subject staff member, the Assistant Secretary General- for Human Resources Management shall decide whether to:
>
> (a) Take no further action and inform the responsible official and the subject staff member accordingly;

(b) No longer pursue the matter as a disciplinary case and determine whether to take administrative measures and/or managerial action or refer the matter to the responsible official for possible managerial and/or administrative action;

(c) Recommend to the Under -Secretary -General for Management that the latter:

(i) Decide that the facts are established to the requisite standard of proof;

(ii) Impose disciplinary measures provided for in staff rule 10.2 (a);

(iii) Where relevant, take administrative measures and/or managerial action; and

(iv) Where relevant, make the determination referred to in section 9.5 and decide to recover the financial loss to the Organization, in full or in part.

Decision by the Under -Secretary -General for Management

9.3 Upon receipt of a recommendation of the Assistant Secretary-General for Human Resources Management, the Under -Secretary-General for Management shall make a decision on the recommendation. The decision of the Under -Secretary-General shall be communicated in writing to the staff member by the Assistant Secretary-General, with a copy to the responsible official. The decision may be communicated in hard copy or electronically. The date of receipt by the staff member of the decision shall be determined in accordance with section 2.4. However, a decision to separate or dismiss the staff member under staff rule 10.2 (a) (viii) or (ix) will be deemed to be received on the date the decision was electronically communicated.

70. Since there is no legal obstacle to the cumulative application of disciplinary sanctions and managerial action, the Tribunal finds groundless the Applicant's argument against it.

71. In relation to the decisionmaker considering the written reprimand received by the Applicant on 20 August 2018 as an aggravating factor, the Tribunal is of the view that in cases touching upon allegations of harassment/work environment, the whole professional background of the employee, including past administrative or disciplinary sanctions are relevant considerations to take into account (*Timothy Kennedy* 2021-UNAT-1184, para. 69.d)).

72. In this regard, the Tribunal highlights that it is proper and not unlawful for the Organization to consider a staff member's background and behaviour towards others in the context of disciplinary proceedings (*Applicant* UNDT/2022/071, para. 34). The consideration of past behaviour, or prior conduct evidence, is limited, however, to conduct and/or instances that have been properly and sufficiently investigated for it to become a legitimate and significant consideration in addressing a subsequent conduct (*Applicant*, para. 43, *Negussie* 2020-UNAT-1033, para. 53), in line with the principle of similar facts evidence whereby a court must be satisfied that the evidence considered is relevant, uncontroversial and probative (*Negussie* UNDT/2019/109, para. 66).

73. In the case at hand, the written reprimand received is, on the one hand, probative because it refers to facts established after a factfinding investigation under ST/SGB/2008/5 and, on the other hand, relevant, because it shows a behavioural pattern related to complaints of prohibited conduct. Said reprimand is also uncontroversial because the Applicant did not contest it at the time and is thus not under dispute.

74. Therefore, the Tribunal does not share the Applicant's concerns and finds that the Administration properly exercised its managerial discretion by considering the Applicant's record in applying two cumulative sanctions, particularly in considering the written reprimand as an aggravating factor.

75. In relation to mitigating circumstances, the Applicant claims that his positive performance record from 2012 to 2019 should have been considered as a mitigating factor and that by not doing so, the Organization violated his rights.

76. In this regard, the Tribunal notes that the sanction letter stated that:

> The present case is, in essence, about [the Applicant's] misuse of the position of trust given to [the Applicant] by virtue of [his] long service with the Organization. Therefore, [the Applicant's] service record or performance appraisal, including positive performance record for 2017-2018, does not constitute mitigating factor.

77. It is relevant to mention that at entry-level grades, performance appraisals focus on a staff member's technical skills, as no or very little managerial functions are entrusted to junior professionals. As a staff member's career advances, performance evaluations will also assess managerial skills, which in time will most likely weigh more than technical skills as supervisory functions become the essence of a staff member's responsibilities. In the present case, the established facts reproached to the Applicant relate to a period during which he acted as a manager and even served as OiC between 2015 and 2018. Given the importance of assessing the nature of the Applicant's interactions with his peers, supervisors and supervisees, it is reasonable to limit any relevance given to his previous performance appraisals to his managerial competencies. It follows that any positive rating of the Applicant's technical skills has no bearing on his case.

78. The decision-maker considered that the Applicant's positive performance appraisals from previous performance cycles did not constitute mitigating factor and explained the rationale for this conclusion in the sanction letter. The Tribunal agrees with said conclusion. Indeed, even if previous performance appraisals did not flag any supervisory/managerial shortcomings, the established misconduct, namely harassment in the form of toxic environment and abuse of authority against supervisees, cannot be mitigated by a sound appraisal from supervisors who were not at the receiving end of the misconduct. Furthermore, the fact that the established misconduct started the same year the Applicant was appointed OiC tends to indicate that previous positive performance appraisals could not be an accurate reflection of the Applicant's prior managerial behaviour so as to amount to a mitigating factor for his misconduct during the period in question.

79. Accordingly, the Tribunal finds that the Applicant failed to substantiate his claims on the lack of proportionality of the disciplinary sanction and the administrative measures, which for the Tribunal were appropriate and proportionate to the misconduct.

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

80. In assessing whether the procedural rights of the Applicant were breached during the investigation stage and the disciplinary proceedings, the Tribunal will consider the arguments raised by the Applicant, as well as the jurisprudence of the Appeals Tribunal.

81. The Applicant's arguments that the disciplinary sanctions are procedurally flawed are summarized in paras. 18.d to 18.f above, and relate to claims about conflict of interest, the choice of retired investigators and the alleged investigation panel's failure to comply with parts of its TOR.

82. The Tribunal recalls that, as per UNAT's case law, 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).

83. After having carefully reviewed the case record, particularly at the investigation stage and the disciplinary process, the Tribunal is satisfied that the Applicant's due process rights were fully respected throughout both phases. The evidence shows that the Applicant was interviewed in connection with the investigation and asked about the material aspects of the matter, he signed the interview record declaring that it was true and accurate, and denied having had any objections to the way the interview was conducted.

84. In the Allegations Memorandum, the Applicant was informed of his right to seek the assistance of counsel and was given the opportunity to comment on the allegations, which in turn were duly considered.

85. However, the Tribunal must assess if the arguments raised by the Applicant, particularly that of conflict of interest and irregularity of the investigation panel, are relevant and correct, and whether, if established, constitute irreparable procedural flaws impacting the whole procedure.

Conflict of interest

86. According to the applicable rules, a conflict of interest arises when an individual has a direct or personal interest in the outcome of a case or of an investigation. Indeed, staff regulation 1.2(m) provides that:

> [a] conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

87. In this respect, the Tribunal notes that the Administrative Tribunal of the International Labour Organization ("ILOAT") has consistently held that:

> [i]t is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to her or his jurisdiction must withdraw in cases in which her or his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the persons affected by the decision to suspect its author of prejudice. Persons taking part in an advisory capacity in the proceedings of decision-making bodies are equally subject to the above-mentioned rule. It applies also to members of bodies required to make recommendations to decision-making bodies. Although they do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence on the decision to be taken" (ILOAT Judgment No.3958, C. (No. 3) (2017), para. 11; see also ILOAT Judgment No.179, In re Varnet.

88. The Applicant argues that the Chief, HRMS, DM, UNOV/UNODC, had a serious conflict of interest that should have barred her from the role of Responsible Official. The Applicant claims that she is a close friend of a former staff member involved in the alleged UN's intellectual property rights violation and with whom one of the complainants was engaged in unauthorized outside activities, while also knowing and being colleagues with some of the complainants. He also claims that despite his objections, the Chief, HRMS, DM, UNOV/UNODC, appointed an

investigation panel constituted of retiree investigators who owed her their remuneration and loyalty.

89. The Applicant relies on this Tribunal's judgment in *Duparc* UNDT/2022/074 as precedent to support his arguments. However, the Tribunal is of the view that said Judgment cannot be considered as a precedent for this case because the circumstances surrounding both cases are totally different.

90. In *Duparc*, confirmed in *Duparc et al.* 2022-UNAT-1245, an investigation launched in 2018 looked into a 2017 complaint against a staff member that was grounded on numerous incidents that allegedly took place between 2012 and 2016. In that case, the official who appointed the members of the investigation panel ("panel appointing official") decided, back in 2012, not to take further action on an incident involving a water pump. As the 2012 water pump incident was among those to be investigated in 2018, the Tribunal concluded that a reasonable person could perceive the panel appointing official could have a biased view on the outcome of the 2018 investigation given his 2012 involvement in one of the incidents to be investigated in 2018.

91. Moreover, the Tribunal noted that due to the inclusion of the 2012 incident in the 2018 investigation, the panel appointing official was a material witness in the 2018 investigation and was highly likely to be interviewed by the 2018 investigation panel.

92. In view of the above, this Tribunal found in *Duparc* that the constitution of the investigation panel was procedurally flawed as it considered inappropriate for the panel appointing official to play an instrumental role in its constitution.

93. In the current case, however, the Chief, HRMS, DM, UNOV/UNODC, was not previously involved in the complaints made against the Applicant nor was she the decision-maker. It was the ASG/HRM who took the disciplinary sanction based on the investigation report. In addition, the fact that the Chief, HRMS, DM, UNOV/UNODC, allegedly worked with some of the complainants in the past does not *per se* affect her ability to appoint an investigation panel. It bears reminding that she only appointed the investigation panel and was not directly involved in the

investigation, nor is there any evidence that she interfered in the investigation to benefit her colleagues in any way.

94. Concerning the allegation that the Chief, HRMS, DM, UNOV/UNODC, might be friends with Mr. A.G., it is not relevant for the case at hand as the latter is not a complainant, was not interviewed as a witness and is no longer a staff member.

95. Furthermore, the fact that the Chief, HRMS, DM, UNOV/UNODC, served as a witness is not determining to support that she had a prior conflict of interest in appointing the investigation panel, as she was not involved in the issues raised in the complaint nor made any decision on the alleged facts prior to the constitution of the investigation panel.

96. With respect to the Applicant's argument in relation to remuneration and loyalty of the investigation panel, the Tribunal finds that it is completely misplaced.

97. The Applicant claims that "as retirees, [the investigation panel members] were specially remunerated for conducting the investigation on a consultancy basis" and concludes that "it is axiomatic that as a result of [the Chief, HRMS, DM, UNOV/UNODC's] decision to appoint [the investigation panel members] to conduct the investigation, both directly owed their remuneration to [the Chief, HRMS, DM, UNOV/UNODC]" and "gave motive for both [investigation panel members] to lie to protect [the Chief, HRMS, DM, UNOV/UNODC].

98. However, the investigation panel was not hired by the Chief, HRMS, DM, UNOV/UNODC, on an individual capacity but, rather, hired on behalf of and paid for by UNODC. To attempt to cast doubt over the integrity of retired staff members, which are trained investigators, on the grounds put forward by the Applicant is speculative at best.

99. In view of the foregoing, the Tribunal finds that there is neither a conflictual interest involving the Chief, HRMS, DM, UNOV/UNODC, nor a substantiated lack of credibility of the members of the investigation panel.

Choice of the investigation panel members

100. The Applicant takes issue with the choice of the investigators alleging that it violated the requirements of sec. 5.14 of ST/SGB/2008/5, which provides:

> 5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

101. The Applicant submits that the Organization failed "to establish that it was impossible to find staff members in the department, office or mission who could undertake the investigation before considering selecting individuals from the roster maintained by OHRM", in contradiction with this Tribunal's caselaw (*Duparc* UNDT/2022/074, para. 72).

102. The Tribunal agrees with the Applicant in this regard as the Organization did not indeed demonstrate that it was impossible to select individuals from the department, office or mission concerned, before choosing individuals trained in investigating allegations of prohibited conduct registered in the Office of Human Resources Management ("OHRM") roster.

103. Nonetheless, it is incumbent on the staff member to demonstrate that such a procedural error negatively impacted the outcome of the investigation or his defence rights. The Applicant did not meet this burden of proof.

104. There is no evidence on record showing how and/or why the choice of the investigation panel members who are retirees and rostered investigators affected the outcome of the investigation or his procedural rights. The Tribunal observes that the investigation panel members were in fact trained investigators with no demonstrated inadequacy to undertake the investigation in question.

105. It follows that the procedural irregularity is of no consequence given the kind and amount of evidence proving the Applicant's misconduct. His case falls under the scope of the "no difference" principle, on which the Appeals Tribunal stated the following in *Michaud* 2017-UNAT-761, para. 60:

> A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted, or an employee spurns an opportunity to explain proven misconduct.

106. Thus, although the Tribunal agrees with the Applicant that there was a procedural irregularity, this procedural irregularity had no consequence on the investigation process as it neither affected its outcome nor the Applicant's rights.

107. Accordingly, the procedural irregularity that the Applicant raised does not by itself invalidate or nullify the entire investigation and disciplinary process.

Investigator's Terms of Reference and scope of their mandate

108. According to the Applicant, the investigation panel failed to comply with parts of its Terms of Reference ("TOR") and sec. 5.17 of ST/SGB/2018/5 as instead of simply giving a full account of the facts ascertained, the witnesses' written statements and the relevant documents gathered, the investigators allegedly produced a report where they drew conclusions about the facts.

109. To support this allegation, the Applicant submits that the investigators made conclusions in paras. 364 to 369 of the investigation report, which, in turn, improperly influenced the referral of the matter to DMSPC/OHR as well as the subsequent charge and sanction letters.

110. As per the TOR, namely an Interoffice Memorandum dated 28 August 2017 from the Chief, HRMS, DM, UNOV/UNODC, to the members of the investigation panel, said panel was tasked with conducting a fact-finding investigation to establish the facts with respect to allegations made by four complainants and to present a report upon completion of the investigation, which would form the basis

of further action to be taken in accordance with sec. 5.18 of ST/SGB/2008/5. The investigation panel was, however, explicitly "not requested to make the decision, neither to make explicit the legal consequence of [its] findings".

111. The paragraphs of the investigation report to which the Applicant refers to are under a section titled "Conclusions in relation to [the Applicant]", they read as follows:

> 364. The copious evidence generated by the fact-finding supported the allegations of a lack of meaningful consultation and transparency by [the Applicant], as one of the key players, in the realignment process in 2015 and a failure by several stakeholders to follow through on the proper structure, reporting lines and job descriptions, which created lack of transparency and impacted on the morale and negative environment in SPMS. This was confirmed by the fact that the organogram did not reflect the reality on the ground, there people were shown to be managing. Certain managers sought to ascribe the mismanaged reconfiguration to their staff members being resistant to change, which the fact-finding did not support.
>
> 365. Staff asked [the Applicant] several times to clarify their roles and responsibilities. However, [the Applicant] failed to do so and the ambiguity was allowed to continue, which permitted him to manage people ad hoc while shifting the blame upward whenever convenient.
>
> 366. The hostile environment was particularly reinforced by [the Applicant]'s demonstrated favouritism towards [Mr. A.A.] in terms of allowing his encroachment on the work of others, of supporting his use of a misleading functional title and of overvaluing [Mr. A.A.]'s technical opinion at the expense of other staff member´s views and sense of professional worth.
>
> 367. [Mr. AK.] appeared to have been a particular focus of [the Applicant]'s hostility, but it must also be noted that [Mr. AK.], a seasoned IT professional, challenged [the Applicant] as the new manager of SPMS, no doubt exacerbated the situation. Nonetheless, the evidence was clear that [Mr. AK.] had been side lined through his supervisees being taken away and humiliated through bringing matters in meetings with several participants than discussing it privately.

> 368. The fact-finding revealed that many of the incidents alleging harassment, although often small individually, did constitute a pervasive pattern of demeaning, intimidating, humiliating and abusive words and actions towards not only [the Applicant]'s subordinates but also his superiors, peers and external counterparts. The number of incidents involving angry and uncontrolled behaviour by [the Applicant] intensified in early 2018 specially surrounding the FIC South Africa letter in mid-February and then appeared to continue through to April 2018 when the formal complaints were filed. A number of complainants and witnesses in fact continued to supply the Panel with evidence of additional instances of alleged harassment and, in some cases, possible retaliatory conduct following the submission of the complaints, upon the subject's learning about the investigation and even in the course of the investigative process in October 2018.
>
> 369. The allegations of fraudulent acts, beyond [the Applicant] allowing [Mr. A.A.] to inflate his role and title, which the Panel considered to be more appropriately subsumed under abuse of authority, were twofold. The first concerning funds allegedly being diverted to GPML was not substantiated or considered to fall within the scope of prohibited conduct. The second, much more important allegation concerned the alleged misuse of resources in relation to mission travel. [The Applicant]'s managers testified that he had managed to reduce the number and length of missions. However, allegations regarding travel largely concerned, first, [the Applicant]'s introduction of scoping missions, and second, in relation to the fact that a small number of staff appeared to benefit from trips as observers, partly also as on-the-job training. There may have been elements of favouritism involved, although there were plausible reasons (language skills) for the choice of persons participating in such missions. However, it was not evident that there was fraud or conduct that would amount to abuse of authority. They may well have been poor judgment in costly training travel and performance management issues, which might warrant a separate management review of SPMS travel during 2015-2018.

112. Having carefully examined the above quoted paragraphs, the investigation panel's TOR, the investigation report and its findings, the Tribunal does not find that the investigation panel exceeded its mandate. The Tribunal notes that the investigation panel interviewed 29 people, included in its report the methodology used and provided therein a detailed description of the context in which the Applicant operated. It also described in detail the events that led to the complaints and the Tribunal cannot but confirm that the investigation panel, as mandated, issued conclusions on whether the investigated facts had been established.

113. The investigation panel would have exceeded its mandate if it had issued conclusions on whether the facts constituted misconduct, a matter reserved to the decision-maker. It follows that the Applicant's challenge of the investigation panel's conclusions is baseless.

Remedies

114. Given this Tribunal's finding that the sanctions applied are neither illegal nor disproportionate to the gravity of the offence, the Applicant is not entitled to any of the remedies requested.

115. In relation to the procedural irregularity in the constitution of the investigation panel, the Tribunal reminds the Applicant that not every violation of a staff member's rights will necessarily lead to an award of compensation (*Nyakossi* 2012-UNAT-254, para. 19, *Antaki* 2010-UNAT-095, para. 20). Also, where a staff member does not show that a procedural defect had an impact on him, his circumstances or his entitlements, and that he suffered adverse consequences or harm from the procedural defect, compensation should not be awarded (*Nyakossi*, para. 19, *Sina* 2010-UNAT-094, para. 25). It follows that no entitlement to a remedy arises in this case for the Applicant.

Conclusion

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

(*Signed*)
Judge Teresa Bravo
Dated this 20th day of October 2022

Entered in the Register on this 20th day of October 2022
(*Signed*)
René M. Vargas M., Registrar, Geneva