



**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Ron Mponda

**Counsel for Respondent:**

Sandra Lando, UNHCR

Chenayi Mutuma, UNHCR

## **Introduction**

1. By application filed on 9 July 2021, the Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity for alleged sexual harassment.

## **Facts and procedural history**

2. The Applicant joined UNHCR in 2003 as a Resettlement Assistant (GL-6) in Accra. In 2008, he resigned and in 2010, he was re-hired on a fixed-term appointment as a Resettlement Officer (P-3) in Kakuma, Kenya. On 1 June 2017, he was promoted to the P-4 level. On 1 January 2020, he was assigned to the Quetta Sub-Office (“SO”) in Pakistan as Senior Protection Officer (P-4).

3. On 3 September 2020, the Inspector General’s Office (“IGO”) received a report, alleging that the Applicant had sexually harassed his supervisee—the Complainant—who was at the relevant time an International United Nations Volunteer (“IUNV”) stationed in Quetta SO as an Associate Protection Officer. It was alleged that, on several specific occasions, the Applicant made unwelcome sexual advances and comments, and attempted to touch the Complainant without her consent, while they were both living in the UNHCR Guesthouse for international staff members with one other staff member. At the time of the misconduct, the Applicant was Officer-in-Charge (“OiC”) and Acting Head of Office at the duty station.

4. On 12 October 2020, the IGO initiated an investigation into the allegations. During the investigation, the IGO interviewed three individuals and reviewed available documentary evidence primarily in the form of WhatsApp messages.

5. On 23 October 2020, the Applicant was informed that he was the subject of an investigation and was invited to a subject interview on 28 October 2020.

6. On 28 October 2020, the Applicant was interviewed as the subject of the investigation. On 5 November 2020, the IGO shared with him his record of interview and asked him to provide any corrections where accuracy was concerned by 12 November 2020.
7. The IGO shared the draft investigation findings with the Applicant on 12 November 2020, and took into account his comments dated 19 November 2020, for the finalization of the investigation report dated 20 November 2020.
8. By charge letter dated 14 December 2020, the Applicant was notified of the allegations of misconduct.
9. On 13 January 2021, the Applicant provided his response to the charge letter, which was accompanied by a separate document entitled “Counsel’s Submissions”.
10. After considering the investigation report, its annexes and the replies to the allegations of misconduct, the High Commissioner was satisfied that the allegations had been established to the clear and convincing standard. The High Commissioner further concluded that making unwelcome sexual advances towards the Complainant was inconsistent with the Applicant’s basic obligations as a UN staff member, and that he breached his obligations under staff regulations 1.2(a) and (b), staff rule 1.2(f), sec. 4.2 of the UNHCR/HCP/2014/4 Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (“the Policy”) and those set out in the UNHCR Code of Conduct.
11. By letter dated 18 May 2021, the Applicant was notified of the High Commissioner’s decision to separate him from service with compensation in lieu of notice and without termination indemnity pursuant to staff rule 10.2(a)(viii).
12. On 9 July 2021, the Applicant filed an incomplete application, which he completed on 12 July 2021.
13. Upon its completion, the application was served on the Respondent on 13 July 2021, who had until 12 August 2021 to file his reply.

14. On 11 August 2021, the Respondent filed a motion for leave to exceed the page limit suggested in the Tribunal's Practice Direction No. 4.

15. On the same day, the Respondent filed his reply.

16. On 21 August 2021, the Applicant filed a rejoinder to the Respondent's reply, in which he, *inter alia*, objected to the Respondent's motion for leave to exceed the page limit.

17. By Order No. 92 (GVA/2022) of 20 October 2022, the Tribunal granted the Respondent's motion to exceed the page limit, admitted the Applicant's rejoinder into the case records and invited the Respondent to file his comments, if any, on the Applicant's rejoinder by 28 October 2022.

18. Considering that the matter at issue concerns a disciplinary measure of separation from service for alleged sexual harassment, the Tribunal decided to convoke the parties to a case management discussion ("CMD") by Order No. 97 (GVA/2022) of 27 October 2022.

19. On 28 October 2022, the Respondent filed his comments on the Applicant's rejoinder.

20. On 2 November 2022, the CMD took place, as scheduled, virtually through Microsoft Teams with Counsel for each party present. At the CMD, although the Applicant disputed certain facts underlying the disciplinary measure at issue, both parties agreed that the case could be determined on the written pleadings without holding a hearing on the merits.

21. By Order No. 101 (GVA/2022) of 2 November 2022, the Tribunal instructed the parties to file their respective closing submission, which they did on 14 November 2022.

## **Consideration**

### *Preliminary issue: anonymity*

22. The present case concerns the disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity, imposed on a former staff member for alleged sexual harassment.

23. In this regard, the Tribunal notes that art. 11.6 of its Statute states that “[t]he judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal.” It is thus well-settled law that “the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality” (see *Buff* 2016-UNAT-639, para. 21). Nevertheless, a deviation from the principles of transparency and accountability is warranted if there are exceptional circumstances (see *Buff*, para. 23).

24. The Tribunal considers that the sensitive nature of the sexual harassment allegations and the fact that the victim may be easily identified by the factual circumstances surrounding the case constitute exceptional circumstances that warrant granting anonymity. Accordingly, the Tribunal finds it appropriate to anonymize the Applicant’s name in the present judgment.

### *Scope of judicial review in disciplinary matters*

25. As per well-settled case law of the internal justice system, judicial review of a disciplinary case requires the Tribunal to consider the evidence adduced and the procedures utilized during the course of an investigation by the Administration (see, e.g., *Applicant* 2013-UNAT-302, para. 29). In this context, the consistent jurisprudence of the Appeals Tribunal (see, e.g., *Haniya* 2010-UNAT-024, para. 31; *Wishah* 2015-UNAT-537, para. 20; *Ladu* 2019-UNAT-956, para. 15; *Nyawa* 2020-UNAT-1024, para. 48) requires the Tribunal to ascertain in this case:

- a. Whether the facts on which the disciplinary measure was based have been established according to the applicable standard;
- b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules;
- c. Whether the disciplinary measure applied is proportionate to the offence, and
- d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

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

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

27. Regarding whether the facts on which the disciplinary measure was based have been established, the Tribunal recalls that “the Administration has the burden of proof to establish that the alleged misconduct for which a disciplinary measure has been taken occurred” (see, e.g., *Zaqout* 2021-UNAT-1183, para. 31).

28. Moreover, when the disciplinary process results in separation from service like the case at hand, the alleged misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see sec. 9.1(a) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process); see also, e.g., *Molari* 2011-UNAT-164, para. 30; *Ibrahim* 2017-UNAT-776, para. 34).

29. Clear and convincing proof requires more than a preponderance of evidence but less than proof beyond a reasonable doubt (see, e.g., *Molari*, para. 30). To meet this standard, “[t]here must be a very solid support for the finding; significantly more evidence supports the finding and there is limited information suggesting the contrary” (see *Applicant* 2022-UNAT-1187, para. 64). “Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of

evidential inferences that can be properly drawn from other direct evidence” (see *Negussie* 2020-UNAT-1033, para. 45).

30. In the present case, the facts on which the disciplinary measure is based are as follows:

a. On 1 August 2020, the Applicant called the Complainant at 3.13 a.m. and asked her to come to his room. When she arrived at his room, the Applicant was lying in bed. When the Complainant placed herself some distance from him and the bed, he repeatedly asked her to come to the bed, whereupon he attempted to touch her, without her consent;

b. On 4 August 2020 at 11.03 p.m., a time well outside official working hours, the Applicant invited the Complainant for a “night cap”;

c. On 9 August 2020, via a series of WhatsApp messages, the Applicant repeatedly sent communications of a sexually suggestive nature to the Complainant, as follows:

i. At 2.54 a.m. he sent a WhatsApp message to the Complainant, stating: “I really enjoy all time spent with you and will surely be dreaming of you”;

ii. At 2.56 a.m. he sent another message, stating: “Wish you were sleeping next to me but you need to sleep in your bed”;

iii. At 3.01 a.m. he stated: “So just be truthful to your feelings and act accordingly. I know we have quite a lot in common but are all holding back”. To which the Complainant responded: “Let’s keep holding back then”;

iv. At 3.03 a.m. he responded: “Don’t be a psychologist!! Put that aside and be human”; and

v. From 3.11 a.m. to 3.23 a.m., without being asked, he sent multiple photos to the Complainant, including one that the IGO established translates to “I love you”, a picture of a rose, a picture of himself, and a short video of a baby sucking on the naked breasts of a doll.

31. The Applicant does not dispute the facts regarding the incident occurring on 9 August 2020 but vigorously disputes the facts related to the incidents occurring on 1 August 2020 and 4 August 2020.

32. The Tribunal will examine whether the Administration has established the facts in relation to these three incidents to the requisite standard.

#### The 9 August 2020 incident

33. In relation to the 9 August 2020 incident, the Applicant does not dispute the facts but submits that he made a timely and unconditional apology that was accepted, thereby closing the matter.

#### *Undisputed facts*

34. The Tribunal notes that this incident arose from a series of WhatsApp messages that the Applicant sent to the Complainant on the early morning of 9 August 2020. Having reviewed the documentary evidence on record retained through WhatsApp messages, and considering that the Applicant does not dispute the facts, the Tribunal is satisfied that the facts in relation to the 9 August 2020 incident have been established by clear and convincing evidence.

#### *Whether an accepted apology could have undone or vitiated sexual misconduct*

35. The Tribunal notes that the Applicant claims that his timely and unconditional apology, which was accepted by the Complainant, would have vitiated the alleged sexual misconduct or closed the matter. In this respect, referring to *Hallal* UNDT/2011/046, the Applicant argues that in accepting his apology for making sexual advances at her, the Complainant absolved him of sexual misconduct and that the Respondent’s position that an apology does not vitiate an allegation of sexual misconduct is erroneous and inconsistent with existing precedent.



36. The Tribunal finds no merit in the Applicant's submission for the following reasons.

37. First, the Tribunal considers that the facts in *Hallal* are not similar to the case at issue. In that case, it was the complainant herself who attempted to handle the matter privately and then proceeded with a formal complaint several weeks later (see *Hallal* UNDT/2011/046, paras. 37, 40). However, in the present case, the Complainant did not intend to privately resolve the matter at issue, as evidenced by her complaint. The mere acceptance of an apology does not in itself waive one's right to file a complaint.

38. Moreover, the Tribunal is of the view that the Applicant seems to have misread the Judgment *Hallal* UNDT/2011/046, which contains no suggestion to the effect that an apology would vitiate an allegation of sexual misconduct. Indeed, in *Hallal*, despite the applicant's apology and the complainant's initial attempt to handle the matter privately between themselves, the applicant was separated from service without notice for alleged sexual harassment.

39. Contrary to the Applicant's assertion, it is well-settled jurisprudence that an apology does not vitiate or undo the misconduct, in particular sexual misconduct. Indeed, in its Judgment *Applicant* UNDT/2020/111, the Tribunal upheld the Administration's decision to separate a perpetrator from service with compensation in lieu of notice and termination indemnity for having sexually harassed a victim despite his apologies. In *Mdoe*, the Tribunal clarified that "any purported apology would not preclude [a conduct of a sexual nature] from constituting sexual harassment" (see *Mdoe* UNDT/2021/065, para. 80).

40. Accordingly, the Tribunal finds that the Applicant's apology, despite being accepted by the Complainant, does not in itself undo or vitiate his conduct at issue, and has no bearing on the determination of whether the facts have been established to the requisite standard.

The 1 August 2020 and 4 August 2020 incidents

41. The Applicant disputes the facts related to the incident of 1 August 2020, in which he repeatedly asked the Complainant to come to the bed, whereupon he attempted to touch her, without her consent, and the incident of 4 August 2020, in which the Applicant invited the Complainant for a “night cap” at 11.03 p.m.

42. In relation to these two incidents, the Applicant contests the Complainant’s credibility and argues that she “gave incoherent, contradictory and evasive responses to investigators”. He further submits that there was no basis for finding that the alleged facts had been established by clear and convincing evidence when reliance was only placed on the Complainant’s claims while unjustifiably dismissing everything he said.

43. The Tribunal will examine in turn these two issues below.

*Whether the Complainant’s account of facts is credible*

44. Having reviewed the parties’ submissions and the evidence on record, the Tribunal is satisfied that the Complainant’s account of facts in relation to the 1 August 2020 and 4 August 2020 incidents is credible and reliable.

45. First, the Complainant’s account of facts in relation to the incidents at issue is corroborated by documentary evidence and the Applicant’s admission. In this respect, the Tribunal notes that the facts in relation to the 4 August 2020 incident are fully evidenced by the WhatsApp exchanges between the Applicant and the Complainant, indicating that the former invited the latter for a “night cap” at around 11.03 p.m.

46. Turning to the 1 August 2020 incident, the WhatsApp records show that at 3.13 a.m., the Applicant called the Complainant. While the Applicant could not explain this call when asked by the investigation panel, he admitted that the Complainant visited his room late at night, and that he remained lying in his bed during the time that she was in his room. This is consistent with the Complainant’s statement that the Applicant called her during the night to ask her to come to his bedroom.

47. In the WhatsApp message dated 15 August 2020, the Complainant further confronted the Applicant, stating, *inter alia*, that “you invited me to sleep with you, inviting me to your bed, trying to touch me, asking me not to leave, trying to persuade me to have sex with you”. Notably, in his response to the Complainant, the Applicant did not deny or question these assertions. Instead, he acknowledged that he was “disappointed in [himself] that [he] behaved like that” and that he “had crossed the line” and stated that “[he did] take responsibility for that on [his] part”.

48. In this regard, the Tribunal notes that as was the case in *Mbaigolmem*, it is not disputed that the Complainant made a first report about the incidents at the first reasonable opportunity by confronting the Applicant on the last day of her assignment. Such report is “a previous consistent statement of the kind exceptionally admissible in cases involving sexual harassment or assault and is of considerable evidentiary weight” (see *Mbaigolmem* 2018-UNAT-819, para. 31).

49. Second, contrary to the Applicant’s assertion, the Tribunal finds that the Complainant’s account of facts in relation to the incidents at issue is coherent, detailed, reliable, and consistent. Indeed, the Complainant described these incidents consistently and coherently on 15 August 2020, the day she left Quetta at the end of her assignment, in a WhatsApp message to the Applicant, confronting him about his unwelcome sexual advances, which, as his direct supervisee, made her feel objectified and powerless; on 16 August 2020, in an email to the Head of SO in Quetta at the time, reporting in a detailed and specific manner the misconduct committed by the Applicant; and on 17 October 2020 during her interview with the IGO.

50. Third, the Tribunal finds that the Applicant fails to adduce any evidence that could have undermined the credibility of the Complainant’s evidence. In this respect, it recalls that “the party who alleges a fact bears in principle the burden of proving its veracity” (see, e.g., *Bye* UNDT/2009/083, para. 59). The Tribunal notes that in support of his claim that the Complainant’s evidence is not credible, the Applicant specifically relied upon the following arguments, which he requests the Tribunal to examine:

- a. The Complainant was given the option of telecommuting which she did not take up;
- b. The Complainant left her post in Quetta not because of the allegations in this case but because she was unhappy being confined to the office, and not undertaking field missions due to the Covid-19 restriction measures;
- c. The reason the Complainant filed her complaint is that she wanted to protect other women not because there was repeated conduct of unwanted sexual advance after his apology; and
- d. The Complainant's description of her relationship with the Applicant on record is inconsistent with her allegations of the past, and unwanted sexual advances.

51. The Tribunal considers that the Applicant's submissions lack the minimum level of specifics to discharge his burden of proof. Having closely examined the Applicant's arguments, the Tribunal further fails to see how they could have undermined the Complainant's credibility or excused his behaviour.

52. Indeed, in relation to the Complainant's decision not to take up the telecommuting option during the notice period of her resignation, she explained to the investigation panel that she was "so motivated and, because [she] wanted to leave with good memories, [she] wanted to prove [to] the people that [she was] there, even in those difficult times, that [she did] not escape from difficulty per se". The Tribunal considers that the Complainant's explanation is entirely plausible and legitimate.

53. In this respect, the Tribunal further wishes to highlight that "sexual harassment can occur regardless of the scale of the impact on the possible victim" (see *Ramos* 2022-UNAT-1256, para. 64). The same holds true regarding the Applicant's arguments in relation to the Complainant's resignation from her post and her decision to file the complaint at issue, which seek to suggest that the Applicant's sexual misconduct had almost no impact on the Complainant's decisions and actions.

54. There is also no merit in the Applicant's argument that the way the Complainant described her relationship with him is inconsistent with her allegations of unwanted sexual advances.

55. Considering the power imbalance between the Applicant, who was acting Head of Office at the relevant time, and the Complainant, who was an IUNV supervised by him, in light of the circumstances of the case, the Tribunal concludes that there is no justification for behaviour of a sexual nature on the part of the Applicant. The evidence on record further shows that the Complainant repeatedly rejected the Applicant's sexual advances while trying to safeguard her professional relationship with her supervisor.

56. Finally, the Tribunal finds no evidence of ulterior motives on the part of the Complainant. In this respect, the Applicant sought to suggest that the Complainant fabricated the 1 August 2020 incident in retaliation for an unfavourable performance evaluation at the conclusion of her assignment. The Tribunal is not persuaded by this allegation. Indeed, the Complainant had informed the Administrative Officer in Quetta SO of the sexual harassment at issue before the Applicant completed her performance assessment form. Furthermore, the evidence on record shows that the Complainant considered that she had received a positive performance assessment, and that a minor disagreement regarding the Applicant's recommending her only for family duty stations had been resolved as per her wish and their discussion prior to her filing the complaint at issue. As such, any trigger for the alleged retaliation had disappeared.

57. Accordingly, the Tribunal finds that the Complainant's account of facts in relation to the 1 August 2020 and 4 August 2020 incidents is credible and that the Applicant has not adduced any evidence that would have either undermined the Complainant's credibility or excused his behaviour.

*Whether the Administration properly relied upon the Complainant's account of facts*

58. The Applicant further argues that reliance was only placed on the Complainant's account of facts in relation to the incidents at issue, while everything he said was unjustifiably dismissed.

59. The Tribunal finds no merit in the Applicant's submission for the following reasons.

60. First, contrary to the Applicant's assertion, the Administration did not dismiss everything he said. Instead, the evidence on record shows that both the investigation panel and the High Commissioner critically assessed the Applicant's account of the incidents in light of the totality of the evidence on record and, relied upon portions of his statements to verify the Complainant's evidence.

61. Moreover, the Applicant failed to demonstrate how the alleged discrepancies between the Complainant's testimony and his testimony would have resulted in a manifestly unreasonable determination of the facts in question.

62. Finally, the Tribunal recalls that "it is typical in disputes concerning sexual harassment that the alleged conduct takes place in private, without direct evidence other than from the complainant" (see, e.g., *Haidar* 2021- UNAT-1076, para. 43) and, thus, "in sexual harassment cases, credible oral victim testimony alone may be fully sufficient to support a finding of serious misconduct, without further corroboration being required" (see, e.g., *Hallal* UNDT/2011/046, para. 55, affirmed by the Appeals Tribunal in *Hallal* 2012-UNAT-207).

63. Considering the above and having found that the Complainant's account of facts in relation to the incidents at issue is credible, the Tribunal finds that the Administration appropriately relied on the Complainant's account of facts.

64. In light of the foregoing, the Tribunal finds that the Administration has succeeded in discharging its burden of proof to show that the facts on which the disciplinary measure was based have been established by clear and convincing evidence.

*Whether the established facts legally amount to misconduct*

65. Having found that the alleged facts have been established by clear and convincing evidence, the Tribunal will proceed to examine whether the established facts legally amount to misconduct under the Staff Regulations and Rules of the United Nations (ST/SGB/2018/1).

66. In this respect, the Tribunal notes that ST/SGB/2018/1 stipulates in its relevant parts the following:

**Regulation 1.2**

**Basic rights and obligations of staff**

**Core values**

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

...

(f) [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations ...

**Rule 1.2**

**Basic rights and obligations of staff**

...

**Specific instances of prohibited conduct**

...

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

67. Moreover, the Policy provides in its relevant part as follows:

**4.2 Duties of UNHCR Personnel**

UNHCR Personnel, including Staff Members and Affiliate Workforce, are expected to:

- a) maintain a harmonious working environment for other colleagues by behaving in a manner which is free of disrespect, intimidation, hostility, offence and any form of discrimination, harassment, sexual harassment or abuse of authority;
- b) not to condone discrimination, harassment, sexual harassment and abuse of authority.

68. In turn, sec. 5.3 of the Policy defines sexual harassment as:

any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another. Sexual harassment is particularly serious when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. Sexual harassment may be unintentional and may occur outside the workplace and/or outside working hours. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between or amongst persons of the opposite or same sex.

69. Therefore, conduct is considered as sexual harassment when it meets the following criteria: first, “there has to be sufficient, credible and reliable evidence proving a high probability that the perpetrator: i) made a sexual advance; ii) made a request for a sexual favour; iii) engaged in conduct or behaviour of a sexual nature; or iv) made a gesture of a sexual nature”; second, “the advance, request, conduct or gesture must be shown to have been unwelcome”; and third, it “might reasonably have been expected or perceived to cause offence or humiliation to another; or have caused an intimidating, hostile or offensive work environment” (see *Appellant 2022-UNAT-1210*, para. 35; *Ramos 2022-UNAT-1256*, para. 37).

70. In this respect, the Appeals Tribunal held in *Ramos 2022-UNAT-1256* that (footnotes omitted):

38. Sexual harassment can encompass numerous types of conduct, some overtly sexual in nature and others more subtle. There is a wide spectrum of conduct that can be defined as sexual harassment and its determination is entirely context specific. Whether a particular type of conduct constitutes sexual harassment will depend on a number of factors and the circumstances of each



case. Importantly, a determination of whether a particular type of conduct is sexual in nature does not turn on the intentions of the perpetrator but on the circumstances surrounding the conduct, the type of conduct complained of, the relational dynamics between the complainant and the perpetrator, the institutional or workplace environment or culture that is generally accepted in the circumstances, and the complainant's perception of the conduct. The conduct does not have to be intentional to be of a sexual nature.

39. Furthermore, sexual harassment does not require that the alleged harasser was aware of the offending character of his or her behaviour and was put on notice, which would otherwise preclude a single incident from constituting sexual harassment.

71. Turning to the present case, the Tribunal finds that the Administration has established by clear and convincing evidence that the Applicant made unwelcome sexual advances towards his supervisee. Specifically, it has been established that (i) on 1 August 2020, the Applicant called his supervisee and asked her to come to his private bedroom in the middle of the night; he then asked her to come to his bed, whereupon he attempted to touch her without her consent; (ii) three days later, he invited her to join him for a "night cap" after 11 p.m.; and (iii) on 9 August 2021, he messaged her at around 3 a.m., stating that he would "surely be dreaming of [her]", that he wished she was sleeping next to him, that she should be "truthful to [her] feelings and act accordingly", that he was "holding back"; and he sent her pictures with the words, "I love you" and a video of a toddler sucking on the breast of a naked doll. All of the above actions constitute sexual advances that were unwelcomed by the Complainant, as evidenced by her repeated rejections.

72. Moreover, the evidence on record shows that the Applicant's conduct might reasonably be expected or be perceived to cause offence or humiliation to another under sec. 5.3 of the Policy. Indeed, with respect to the video sent by the Applicant, the Complainant found it "disturbing" and "really disgusting" because she "was feeling like a sexual object". In summing up her experience with the Applicant in Quetta, she explained that she did not feel like a woman, but like a "vagina" and felt "ashamed of [herself]". Also, considering the close working and living arrangements of the duty station and the fact that the Applicant was the Complainant's supervisor and OiC/Head of Office at all material times, his conduct

is offensive and humiliating not only to the Complainant but also to any reasonable person placed under the same circumstances.

73. Therefore, the Applicant's conduct constituted unwelcome sexual advances that were reasonably expected or perceived to cause offence or humiliation to another. As such, the Applicant engaged in sexual harassment in breach of the obligations under staff regulations 1.2(a) and (f), staff rule 1.2(f) and sec. 4.2 of the Policy. Accordingly, the Tribunal concludes that the established facts legally amount to misconduct.

*Whether the disciplinary measure applied was proportionate to the offence*

74. Regarding whether the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity imposed on the Applicant is proportionate to the offence, 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" (see *Portillo Moya* 2015-UNAT-523, para. 19).

75. However, "due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair" (see *Samandarov* 2018- UNAT-859, para. 24).

76. Staffrule 10.3(b) provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". In this regard, the Appeals Tribunal held that "[t]he 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" (see *Rajan* 2017-UNAT-781, para. 48).

77. In relation to sexual harassment cases, the Appeals Tribunal emphasised that “[s]exual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment” (see *Mbaigolmem* 2018-UNAT-819, para. 33).

78. An analysis of the Organization’s past practice on disciplinary matters also shows that the measures of dismissal or separation from service have been consistently imposed on staff members who engaged in sexual harassment.

79. Therefore, the Tribunal finds that the sanction applied in the present case is consistent with those applied in similar cases.

80. Moreover, the Tribunal is satisfied that in determining the appropriate sanction, the Administration duly considered aggravating and mitigating factors. In this regard, the Tribunal recalls that the Organization has “the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose” (see, e.g., *Nyawa* 2020-UNAT-1024, para. 89; *Ladu* 2019-UNAT-956, para. 40).

81. As aggravating factors, the Administration properly considered that:

- a. The Applicant’s conduct in sexually harassing the Complainant was repeated;
- b. At the time of the events, the Applicant held the most senior position in the UNHCR Quetta SO and was the Complainant’s supervisor, thus resulting in considerable disparity in power between him and the Complainant who was an IUNV;

c. The Applicant sexually harassed the Complainant when she was the only female international staff member at the duty station due to Covid-19 restrictions, leaving her with few avenues for relief; and

d. The Applicant's misconduct reflected negatively on UNHCR's image and reputation, as the Complainant was an IUNV, deployed by a sister organization.

82. As mitigating factors, the Administration duly considered that the Applicant had a long and satisfactory service record as a UNHCR staff member, including service in numerous hardship duty stations and that he apologised for sending the WhatsApp messages of 9 August 2020, and the Complainant accepted his apology. As such, the sanction at issue – separation from service – is not the harshest measure available under the Staff Regulations and Rules of the United Nations.

83. In this respect, the Tribunal wishes to highlight that despite being considered as a mitigating factor, a victim's acceptance of a sexual harasser's apology could not have rendered invalid the general principle that a sexual harasser could not remain on the job in line with the Organization's zero-tolerance policy (see, e.g., *Applicant* UNDT/2020/111, para. 64; see also *Mbaigolmem*, para. 33).

84. Accordingly, the Tribunal finds that the disciplinary measure at issue is consistent with prior precedent and proportionate to the offence in the present case, and thus there is no basis for it to interfere with the Administration's exercise of discretion in this matter.

*Whether the Applicant's due process rights were respected throughout the procedure*

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

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and had been

given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense;

(b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

86. The Tribunal is satisfied that the key elements of the Applicant's right to due process were met in the present case. Indeed, the evidence on record shows that the Applicant was fully informed of the charges against him, was given the opportunity to respond to those allegations, and was informed of the right to seek the assistance of counsel in his defence. Also, the Tribunal finds that the disciplinary measure imposed on him is proportionate to the nature and gravity of his misconduct and is consistent with those applied in similar cases.

87. Moreover, the Tribunal notes that the Applicant has not identified any procedural irregularity during the investigation and disciplinary proceedings that could have rendered the disciplinary sanction at issue unlawful. In this respect, the Tribunal recalls that the onus is on the Applicant to provide proof of the lack of due process, and how it negatively impacted the investigation and/or the disciplinary process (see *Pappachan* UNDT/2019/118 Corr.1, para 78).

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

89. In light of the above, the Tribunal upholds the disciplinary measure imposed on the Applicant.

*Whether the Applicant is entitled to any remedies*

90. In his application, the Applicant seeks rescission of the decision to separate him from service. In the alternative, he requested the Tribunal to order, *inter alia*, the payment of two years net salary as compensation, of salary for the remaining period of his fixed-term appointment, which would have expired in December 2022, and of full indemnities.

91. Having upheld the disciplinary measure, the Tribunal finds that the Applicant is not entitled to any remedies.

**Conclusion**

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

*(Signed)*

Judge Teresa Bravo

Dated this 23<sup>rd</sup> day of December 2022

Entered in the Register on this 23<sup>rd</sup> day of December 2022

*(Signed)*

René M. Vargas M., Registrar, Geneva