UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2022/007
Judgment No.: UNDT/2023/063
Date: 23 June 2023
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

SOOBRAYAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, UNICEF

Introduction

1. The Applicant, who is self-represented and a former Regional Adviser, Education, Europe and Central Asia Regional Office ("ECARO"), United Nations Children's Fund ("UNICEF"), is contesting the decision of the Deputy Executive Director, UNICEF, to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity.

Facts

2. On 2 December 2020, the Office of Internal Audit and Investigations ("OIAI"), UNICEF, received a complaint of possible misconduct involving the Applicant. Namely, it was reported that between November 2018 and May 2020, the Applicant, *inter alia*, made unwelcome comments, statements, suggestions of sexual nature, and unwelcome physical contact and attempts of physical contact towards V01.

3. On 11 February 2021, OIAI informed the Applicant about the complaint and, on 16 February 2021, interviewed him.

4. On 2 August 2021, OIAI completed its investigation and transmitted the Investigation Report to the Deputy Executive Director, Management ("DED/M"), UNICEF, for appropriate action.

5. On 31 August 2021, the DED/M issued a Charge Letter including allegations of misconduct against the Applicant.

6. On 21 October 2021, the Applicant submitted his response to the Charge Letter.

7. On 10 November 2021, the Applicant was informed that the misconduct was established, and that it had been decided to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity, in accordance with staff rule 10.2(a)(viii).

8. On 14 February 2022, the Applicant filed the instant application.

9. On 28 March 2022, the Respondent filed his reply.

10. By Order No. 7 (GVA/2023) of 13 February 2023, the Tribunal called the parties to a case management discussion ("CMD"), which took place on 22 February 2023.

11. By Order No. 11 (GVA/2023) of 23 February 2023, the Tribunal instructed the parties to identify in writing whether an oral hearing was needed and, if so, to provide a list of potential witnesses, explaining the relevance of each testimony for the determination of the issues in dispute. In addition, the Tribunal instructed the Respondent to provide written submissions on the issue of the alleged retaliatory motive behind V01's complaint, explaining, particularly, how said allegation was treated by the investigation.

12. On 6 March 2023, the parties filed their submissions in compliance with Order No. 11 (GVA/2023).

13. By Order No. 24 (GVA/2023) of 16 March 2023, the Tribunal scheduled a hearing on the merits to identify, clarify, and examine the evidence on how the Applicant's allegations of malicious motivation of the complaint were investigated and/or considered.

14. On 31 March 2023, the Applicant filed a motion seeking leave to file additional evidence.

15. On 3 April 2023, the Tribunal advised the parties that it would decide on the Applicant's motion at the hearing as a preliminary matter.

16. Between 4 and 5 April 2023, the parties attended the hearing. At the hearing, the undersigned Judge ruled on the Applicant's motion dated 31 March 2023, accepting the additional evidence into the case record.

17. By Order No. 32 (GVA/2023) of 12 April 2023, the Tribunal instructed the parties to file their closing submissions, which they did on 24 April 2023.

Consideration

Scope of judicial review in disciplinary proceedings

18. The Applicant contests the decision of the Deputy Executive Director, UNICEF, to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity.

19. It is well-settled case law of the Appeals Tribunal (*Haniya* 2010-UNAT-024, para. 31, *Abu Hamda* 2010-UNAT-022, para. 25, *Portillo Moya* 2015-UNAT-523, para. 17, *Wishah* 2015-UNAT-537, para. 20, *Turkey* 2019-UNAT-955, para. 32, *Ladu* 2019-UNAT-956, para. 15, and *Nyawa* 2020-UNAT-1024, para. 48) that the standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain:

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; and

c. Whether the disciplinary measure applied was proportionate to the offence.

Whether the facts have been established

20. When termination is a possible outcome, such as in the case at hand, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (*Molari* 2011-UNAT-164, para. 30, and *Ibrahim* 2017-UNAT-776, para. 34).

21. For any other disciplinary measure, the applicable standard of proof under sec. 9.1(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), is that of preponderance of the evidence, which means that, more likely than not, the facts and circumstances underlying the misconduct exist or have occurred.

22. In the case at hand, the 31 August 2021 Charge Letter informed the Applicant of the following:

> 39. On the basis of the OIAI Investigation Report and supporting documentation, and pursuant to DHR/POLICY/2020/001 UNICEF Policy on the Disciplinary Process and Measures, you are charged with misconduct. In particular, it is alleged that:
>
> a) In November 2018, while within the ECARO offices in Geneva, you made a comment regarding the appearance of [V01's] legs;
>
> b) In February 2019, while within the ECARO offices in Geneva you told [V01] that [he] had "feelings for [her]";
>
> c) On 11 September 2019, while on mission to Ashgabat, Turkmenistan, you entered [V01's] hotel room while she was sleeping, touched her, and stood over her when she woke up;
>
> d) On 12 September 2019, while on the same mission, you entered [V01's] hotel room, wearing a bathrobe, made a comment on the appearance of [V01's] legs, and sat on her bed, in a reclined position;
>
> e) On 14 November 2019, while on a mission to Paris, France, you stated to [V01] that you were unable to take a nap as you "preferred to sleep completely naked";
>
> f) On 27 and 28 January 2019, you made complaints to Human Resources about [V01], over disagreements over working practices;
>
> g) In March 2020, while within the ECARO offices in Geneva, you gave a neck massage to [V01], without asking for her permission;
>
> h) On 18 May 2020, while on a videoconference call with [V01], you told [V01] to move the camera to show her legs; and
>
> i) On various occasions, from the summer of 2019 onwards, you repeatedly asked [V01] for pictures of herself in a bathing suit.

23. As a result, the Applicant's conduct was considered to be in violation of staff regulation 1.2(a) and staff rule 1.2(f) and, thus, to constitute misconduct.

24. The Respondent submitted that all the facts were established up to the clear and convincing evidence standard, while the Applicant submits that the investigation ignored his countervailing evidence, did not properly investigate all of the facts and, by doing so, illegitimately found V01's testimony more credible than his.

25. The Tribunal has carefully assessed all the evidence on file and held a hearing on the merits in which the Applicant and two witnesses were heard. The hearing was limited in scope to identify, clarify, and examine the evidence on how the Applicant's allegations against V01 were investigated and/or considered by the investigators.

26. In this regard, the UNDT is mindful of the fact that it cannot hold a *de novo* investigation. Instead, the Tribunal performs a judicial review of the disciplinary case, which requires consideration of the evidence adduced and the procedures utilized during the investigation by the Administration (*Timothy Kennedy* 2021-UNAT-1184, par. 47).

27. In *Timothy Kennedy*, the Appeals tribunal clarified that:

> 48. The "Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred". "[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable". Clear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards: clear requires that the evidence of misconduct must be unequivocal and manifest and convincing requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. 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.

28. The Tribunal has assessed the evidence gathered by the investigators in relation to each incident and has concluded that, in most instances, there is no direct or corroboratory evidence of sexual harassment, and the investigators based their conclusions solely on V01's narrative.

29. Ergo, since almost all the evidence in support of the finding of misconduct comes from V01's testimony, in opposition to that of the Applicant, this can only mean that the investigators deemed V01 a more credible witness than the Applicant. In this context, establishing V01's credibility is an essential exercise for a proper adjudication of the case.

30. Therefore, the Tribunal will examine each of the alleged incidents to determine whether they have been established by clear and convincing evidence.

Incident of November 2018

31. The Applicant was accused of commenting on V01's legs while within the office of ECARO. The Applicant strongly denies the above, and there are no witnesses to this incident.

Incident of February 2019

32. According to the investigation report, the Applicant confessed to V01 that "he had feelings for her" during a conversation in the ECARO cafeteria.

33. The Tribunal notes that the investigators determined this fact based on the testimony of V01 and that of Ms. L.H, a personal friend of V01 who testified having heard from V01 that she found herself in some uncomfortable situation with her boss.

34. In addition, the Sanction Letter refers to a diary entry as corroboratory evidence of this incident. According to the Sanction Letter, "there is no date written on the diary entry, and the content of the entry does not describe [the Applicant's] actions in detail. However, it is implausible that V01 would fabricate an entire page of diary entries, including matters that are irrelevant to this case, but she would not fabricate a more detailed account of [the Applicant's] conduct. I [(the

decision-maker)] am therefore satisfied that this diary entry provides support, at the very least, for [the Applicant] engaging in conduct that caused V01 to be shocked".

35. Having reviewed the evidence on record though, the Tribunal notes that the witness neither specified what the uncomfortable situation between the Applicant and V01 was, nor what it was related to. In fact, she never said that V01 told her that the Applicant "confessed having feelings" for her. In addition, while the Tribunal agrees that it is unlikely that V01 fabricated the diary entry, it also notes that such an undated entry could be referring to any situation between the Applicant and V01 that might have caused her to feel "shocked", including anything related to the deteriorating professional relationship between the two.

36. Since neither the witness testimony nor the diary entry mention anything connected to the possibility of the Applicant having declared romantic feelings for V01, they are not probative of said incident. In fact, they are only probative of the existence of issues between the Applicant and V01.

Incident of 11 September 2019

37. V01 complained that, during a business trip to Turkmenistan, the Applicant entered her hotel room, touched her, and stood over her when she woke up, scaring her and invading her "personal space".

38. The Applicant accepted that he entered V01's hotel room on said occasion but submitted that the door had been left open, which V01 acknowledged, and that he was only trying to check up on her. Upon realizing that she was asleep, he woke her up as she was late for their dinner plans. This incident was corroborated by the testimony of an indirect witness, who was waiting for the Applicant and V01 in the hotel lobby and heard about it from both parties immediately after the incident happened.

39. According to the witness, the Applicant acknowledged entering V01's hotel room because "the door was open" and he "thought that something happened to [her]". When he was asked to explain what had happened, he replied laughing that "she just decided to sleep".

40. The witness also said that V01 appeared lost and nervous, and that she told her that the Applicant had appeared suddenly by her bed and that she was very scared.

41. It is uncontroversial that the Applicant entered V01's hotel room unannounced. The controversy lies on whether he "stood over her" and "touched her", and whether his action could be reasonably perceived as sexual harassment.

42. Considering the two contradictory versions of the incident and the testimony of the indirect witness, the Tribunal cannot make a finding in relation to the details of the incident, thus leaving doubt as to the extent of what really happened that day.

Incident of 12 September 2019

43. V01 accused the Applicant of entering her hotel room wearing a bathrobe, making "inappropriate comments", and sitting on her bed in a "reclined position". She claims that he left the room soon after laying on her bed to take a personal call.

44. There are no witnesses, and the Applicant denies this incident.

Incident of 14 November 2019

45. During a business trip to Paris, the Applicant and V01 worked for a couple of hours in the apartment of V01's son, at her invitation.

46. During that stay, the Applicant allegedly mentioned that he was tired and when V01 suggested that he take a nap on the couch, he replied that he could not because "he liked sleeping naked".

47. There are no witnesses, and the Applicant denies having said the above.

Multiple incidents during 2019

48. According to V01, the Applicant repeatedly requested her to send him pictures in a bathing suit. There is no witness or documentary evidence of this fact, and the Applicant denies it. Instead, the Applicant argues that it was V01 herself that, unprompted, showed him a photo of her in a bathing suit in her own phone.

Incident of 27 and 28 January 2020

49. In her complaint, V01 claimed that the Applicant became angry with her during a disagreement over a document. The Applicant denies the fact and claims the opposite, namely that it was V01 who screamed at him instead.

50. After the disagreement, the Applicant sent an email to the Regional Chief of Human Resources ("HR"), ECARO, describing various work-related disagreements with V01 and requesting formal mediation to deal with her alleged insubordination. HR responded that the problem sounded "technical", to which the Applicant disagreed. V01 later sent an email to both the Applicant and HR stating she had reflected on the matter and agreed to use the terminology proposed by the Applicant.

51. According to the Sanction Letter, the Applicant's complaint was related to a personal dispute regarding his supervisory role, and by making said complaint the Applicant allegedly engaged in "'improper and unwelcome conduct that has [caused] or might reasonably be expected or be perceived to cause offence or humiliation to another person' within the meaning of sec. 1.1(b) of CF/EXD/2012-007 (harassment)".

52. However, the Tribunal is of the view that there is no evidence that the Applicant behaved inappropriately towards V01 in this context, and that the substantiated complaint to HR, read alongside the documentary evidence where V01 acknowledged her part in the disagreement, cannot be perceived as a form of harassment.

53. It is clear from the record that the Applicant and V01 had several work-related disagreements, and the request for formal mediation to HR to help deal with them is not probative of harassment. At the very least, it is evidence in support of the Applicant's narrative that he had been trying to deal with work-related issues with V01 for almost one year before the complaint.

Incident of March 2020

54. In her complaint, V01 stated that the Applicant gave her an unsolicited neck massage during a conversation in her office and in front of another colleague, which made her feel uncomfortable.

55. This episode is corroborated by the testimony of a direct witness, who confirmed seeing the Applicant giving V01 a "neck massage". The witness added that she had no reaction when seeing this, that she heard the Applicant explaining that the massage was for tension in the back, and that she thought she heard "some discussion around aches" between them. She further testified not noticing any reaction from V01 to the "neck massage", that the incident "[did not] stand out to her but was also [something] not typical", and that she was in the office for the entire duration of it.

56. In his defence, the Applicant argues that he often gave colleagues advice in relation to their postures, and that V01 had complained to him a few times about some "back pain". He denies giving V01 a "neck massage" but conceded to having had conversations with her around the subject of massages and back pain.

57. Since the Applicant's allegation is in direct contradiction with the testimony of an impartial witness, the Tribunal finds that this incident did indeed occur, i.e., that the Applicant gave V01 a "neck massage".

58. However, it is not possible to establish any sexual connotation related to this incident, especially because the context described by the witness does not corroborate such connotation.

Incident of 18 May 2020

59. Another accusation held against the Applicant relates to an alleged request he made, during a conference call with V01, to "show him her legs". The Applicant vehemently denies it and there is no other evidence than the account of events made by V01.

Lack of consideration of relevant facts by OIAI

60. The Applicant submits that the investigators failed to investigate the "retaliatory nature" of V01's complaint. He argues that the investigators ignored the countervailing evidence he presented, and did not properly investigate all the facts, in particular the evidence relating to the issues the Applicant and V01 were having concerning the LearnIn project during the year 2020.

61. The Applicant's evidence shows that V01 had a motive to fabricate or exaggerate her allegations against him, which puts into question her credibility. Furthermore, the timeline of events leading to V01's complaint also supports the Applicant's narrative, especially when considering the speedily deteriorating work relationship between the Applicant and V01 as a result of their disagreement over the LearnIn project, which started between the last alleged incident (18 May 2020) and V01's complaint (2 December 2020).

Timeline of events

62. The facts of the case show that, on 2 December 2020, OIAI received a complaint of possible misconduct involving the Applicant in various incidents between November 2018 and May 2020.

63. The evidence on file also demonstrates that, between 27 January 2020 and 19 November 2020, there were numerous email exchanges and meetings between the Applicant, V01, the Applicant's First Reporting Officer ("FRO"), and a representative of HR, in which serious work-related disagreements between the Applicant and V01 are clearly established.

64. The documented issues between the Applicant and V01 started on 27 January 2020, when the Applicant wrote in an email addressed to HR:

> I write to request HR mediation in an apparent dispute over my supervisory role with [V01]. We appear to be encountering numerous misunderstandings in the use of certain terminology … these disagreements are making it difficult for me to exercise my supervisory powers.

65. On 30 June 2020, the Applicant sent an email to his FRO to request intervention to solve professional issues with V01 in relation to the LearnIn project. These concerns are reiterated in several other emails.

66. On 13 August 2020, the Applicant had a meeting with V01 and his FRO, in the presence of the HR representative, to discuss the issues around the development of the LearnIn project and the working relationship problems between them.

67. The Applicant questioned the fact that V01 was sending updates on the project to the Applicant's FRO without going through the Applicant first, and that V01 was insubordinate, bypassed him several times, and made decisions that were in contradiction with the Applicant's instructions. The Applicant also highlighted that he suspected dishonest conduct by V01 regarding a possible implementing partner to LearnIn, i.e., the Alpha Foundation.

68. Between 14 and 18 August 2020, there were various email exchanges between the Applicant and V01, in which the Applicant alleged a potential reputational damage to UNICEF as a result of the issues with LearnIn, and stated that he was going to submit a formal complaint on the matter.

69. On 18 August 2020, the Applicant had a call with the HR representative to clarify that the issues he was having with V01 were not about disregard for hierarchy, reporting lines or management style, but rather about V01's disregard for his instructions as supervisor and leader of the LearnIn project. In this opportunity, the Applicant informed of his interest in resolving the issues amicably.

70. On 8 September 2020, the representative of HR wrote to the Applicant and V01 stating that he believed the issues between them were related to performance management and providing recommendations. The Applicant replied strongly disagreeing with HR's conclusion that the issues were performance related, stating that, instead, he "flagged serious concerns about the violation of internal controls".

71. On 19 November 2020, the Applicant wrote to the external partner of LearnIn allegedly involved with the Alpha Foundation, with V01 in copy, stating that he was going to take action and file a formal complaint with UNICEF.

72. On 2 December 2020, V01 filed her complaint of harassment and sexual harassment against the Applicant, indicating several incidents ranging between November 2018 and May 2020.

73. The Tribunal is of the view that the documentary evidence on file supports the Applicant's allegation that he was dealing with a very difficult professional relationship with V01 prior to the complaint, and that there is a possibility that V01 might have had an ulterior motive to file the complaint against him. The timeline of events shows, at the very least, that his narrative was worth investigating. It demonstrates a potential ulterior motive and bias against the Applicant, which puts into question the reliability of V01's allegations.

74. All these exchanges were provided to OIAI and discussed with the Applicant during his interview. Therefore, the investigators knew V01 might, indeed, have been biased and had an ulterior motive against the Applicant due to the circumstances surrounding the LearnIn project and the Applicant's warning that he was going to report her for misconduct.

75. While the Tribunal agrees with the Respondent that it is unlikely that V01 fabricated all the reported incidents and manipulated the testimony of the witnesses, it is also not absurd to consider that those incidents might have been exaggerated due to bias or ulterior motives.

76. This is precisely why investigating the Applicant's allegations was of critical importance as, at the very least, they were key to establishing the reliability of the evidence.

77. However, the investigators did not look into any possible motivation behind V01's complaint, did not consider the documentary evidence brought forth by the Applicant, and, nonetheless, concluded that the events that immediately preceded V01's complaint were irrelevant for the determination of the facts under dispute.

78. In fact, it is clearly established from the testimony of the investigators at the hearing, that they purportedly decided not to investigate the Applicant's allegations and disregarded them as "irrelevant", without ever investigating or processing any of the evidence provided.

79. The Tribunal also notes that after an OIAI Quality-Assurance Specialist flagged the lack of reference to the Applicant's allegations in the investigation report during the review process in July 2021, OIAI management "determined that the information provided about the described disagreements between [the Applicant] and [V01] was not directly relevant to the allegations of sexual harassment or to [V01's] reliability as a witness". This information was provided in response to the Tribunal's Order No. 11 (GVA/2023) of 23 February 2023, and is contained in a Note for the Record dated 3 March 2023.

80. However, this evidence was produced after the disciplinary sanction had been imposed, and, therefore, was not discussed in the investigation report, the Charge Letter, or the Sanction Letter.

81. It is well-settled jurisprudence that the role of the investigators is to investigate the facts impartially and objectively and to take into consideration all the relevant elements of the case. This implies, of course, exploring and assessing the relevance of the arguments and evidence presented by any of the parties involved.

82. Investigators are, therefore, not allowed, from an ethical and legal point of view, to ignore countervailing evidence.

83. In this case, it was incumbent on OIAI to explore the allegations made by the Applicant and take into consideration the timeline of events preceding the complaint to determine if the alleged "retaliatory nature" of V01's complaint merited further consideration or if it was indeed irrelevant.

84. By not doing this, the investigators seriously breached the Applicant's due process rights, failed to clearly demonstrate the relevance or irrelevance of the evidence, and failed to properly establish the reliability of V01's testimony, tainting the whole investigation process as a result.

85. In other words, the investigation relied exclusively on V01's testimony without first properly establishing her credibility as a reliable witness. The question remained unanswered of whether V01 was retaliating against the Applicant because of previous professional disagreements and the fact that the Applicant told her he would make a formal complaint against her for misconduct.

86. In fact, it is worth mentioning that there is evidence on record that the Applicant was discouraged by his FRO and the HR representative to pursue the matter against V01 formally, which explains why he refrained from doing so.

87. In this regard, the Appeals Tribunal has recently clarified that corroborative evidence is always needed in cases where the probative value depends largely on the victims account (*Appellant* 2022-UNAT-1187, para. 73):

> Nonetheless, it must be emphasized, hearsay evidence is intrinsically unreliable and of little weight, unless substantially corroborated, because its probative value depends largely on the credibility of a person (the complainants) other than the person giving such evidence (in this case the OIOS investigator, the interpreter and the person(s) responsible for the synopses—had they testified or verified the authenticity of the recordings and the accuracy of their translation). Hearsay must be received with caution as the maker of the statement (in this case those alleging sexual harassment) might have deliberately lied; been mistaken owing to the deficiencies of memory or observation in relation to the contested events; or may have narrated the facts to the investigator in a misleading fashion.

88. Since investigators are under a duty to act impartially and independently and should collect both inculpatory and exculpatory evidence, the fact that they have failed to do so renders the entire investigation flawed.

89. Consequently, the Tribunal considers that the facts on which the disciplinary measure was based have not been established through clear and convincing evidence except for the incidents of 11 September 2019, when the Applicant entered V01's hotel room, and March 2020, when the Applicant gave V01 a "neck massage".

Whether the established facts legally amount to misconduct

90. The Tribunal will now assess whether the established facts legally amount to misconduct. To that effect, the applicable legal framework and the most recent jurisprudence from UNAT will be considered.

91. Section 1.3 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) defines sexual harassment as follows:

> 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, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

92. In *Appellant* 2022-UNAT-1210, the Appeals Tribunal clarified the threshold of evidence needed to establish a finding of sexual harassment:

> 35. Hence, before concluding that there has been sexual harassment, 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. In addition, the advance, request, conduct or gesture must be shown to have been unwelcome; might reasonably have been perceived to cause offence or humiliation to another; or have caused a hostile work environment.

93. UNAT has also underlined that a finding of sexual harassment is a serious matter holding in *Appellant* 2022-UNAT-1187, para. 50, and in *Appellant* 2022-UNAT-1210, para. 37 that:

> Such a finding will have grave implications for the staff member's reputation, standing and future employment prospects. For that reason, the UNDT may only reach a finding of sexual misconduct on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that the elements of sexual exploitation and abuse have been established in accordance with the standard of clear and convincing evidence. In other words, the sexual misconduct must be shown by the evidence to have been highly probable.

94. In the case at hand, only two incidents are established and require an assessment of whether they legally amount to sexual harassment and, thus, misconduct:

a. Concerning the incident of 11 September 2019, the alleged witness did not directly see the event. She heard a brief version of what had happened from the Applicant and V01 and did not identify the incident as sexual harassment. When discussing the incident with the witness after the fact, V01 also did not describe or suggest the incident as sexual harassment. While the Tribunal agrees that the Applicant exercised poor judgment in entering V01's hotel room to allegedly call her for dinner, it cannot reasonably interpret this action as a "sexual advance", gesture or conduct of "a sexual nature" within the meaning of sexual harassment mentioned above;

b. With respect to the "neck massage", there is a direct witness who confirmed the event but refrained from considering it of a "sexual nature". According to the witness, the Applicant and V01 were having a conversation about "tension" and "aches", during which the Applicant briefly "massaged" V01's neck. The witness recalled that there was no reaction from either party following this exchange, including from her. Once more, the Applicant demonstrated poor judgment and behaved in an unprofessional way but, in context, this action cannot be interpreted as having a "sexual connotation".

95. The Tribunal is of the view that, indeed, the personal relationship between V01 and the Applicant was somehow "ambiguous", and that the Applicant behaved in an unprofessional manner a few times. However, the evidence gathered by OIAI does not meet the threshold to legally amount to sexual harassment.

96. The Appeals Tribunal held in *Appellant* 2022-UNAT-1187, that:

> 64. The standard of clear and convincing evidence is a finding of higher probability. There must be very solid support for the finding; significantly more evidence supports the finding and there is limited information suggesting the contrary. This is the standard that the Secretary-General must meet in disciplinary cases when termination is a possible outcome. It requires much more than a finding of probable cause by OIOS, which perforce of its limited investigative methodology is ordinarily restricted to making such a lesser finding.

97. Consequently, the Tribunal finds that the evidence on record does not support the charges made against the Applicant, as the established facts do not reach the threshold of sexual harassment. As a result, the Applicant did not engage in misconduct and the disciplinary sanction is unlawful.

Remedies

Compensation in lieu

98. The sanction imposed on the Applicant was separation from service, with compensation in lieu of notice, and without termination indemnity.

99. The Tribunal considers that not all misconduct must result in termination, and that an assessment of the possible measures should be undertaken on a case-by-case basis.

100. In addition, UNAT has consistently held that the choice of the sanction to impose in a case must be guided by the general principle of proportionality in disciplinary matters and set forth in staff rule 10.3(b), which 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 determining the appropriate measure, each case is decided on its own merits, taking into account the particulars of the case, including aggravating and mitigating circumstances.

101. In the case at hand, the Tribunal found that most of the facts on which the disciplinary measure was based have not been established through clear and convincing evidence, except for two of them, and that the facts that are established do not legally amount to misconduct. Consequently, it also finds the disciplinary sanction unlawful.

102. Accordingly, the sanction imposed is rescinded and the Applicant's reinstatement ordered, with the benefits and entitlements at the level he had before being separated from service.

103. Pursuant to art. 10.5(a) of the Tribunal's Statute, the Respondent may elect to pay compensation as an alternative to the rescission of the contested decision. It is clear from art. 10.5(a) of the Tribunal's Statute, as consistently interpreted by the Appeals Tribunal, that compensation in lieu is not equivalent to compensatory damages based on economic loss. The former is the amount that the Administration may decide to pay as an alternative to rescinding the contested decision or execution of the specific performance ordered.

104. The Tribunal finds that the unlawful disciplinary sanction has negatively impacted the Applicant's career and adversely affected his reputation. For this reason, the Applicant is entitled to the maximum amount of compensation in lieu.

105. The above notwithstanding, the Tribunal notices that the Applicant's fixed-term appointment was due to expire on 31 October 2022, when he would have reached the maximum age of retirement of 65. That means that he could only have worked with the Organization for another 11.5 months from the time of his separation on 15 November 2021.

106. Accordingly, compensation in lieu is set at 11.5 months of net-base salary, which is what the Applicant was entitled to receive had he not been separated.

107. In line with the above, the Applicant's name shall also be deleted from the United Nations wide screening database on sexual misconduct.

Moral damages

108. The Applicant requests USD10,000 as moral damages for violation of his due process rights, presumption of innocence and the effect the sanction had on his health.

109. Pursuant to art. 10.5(b) of the Tribunal's Statute, compensation for harm needs to be supported by evidence.

110. In addition, as decided in *Kallon* 2017-UNAT-742, a mere procedural breach is not ground for compensation for harm, and a staff member's testimony alone is not sufficient to present evidence supporting harm under art. 10.5(b) of the Tribunal's Statute. Hence, "the testimony of an applicant needs corroboration of independent evidence to support the contention that harm has occurred" (*Langue* 2018-UNAT-858, para. 17). There must be evidence to support the existence of harm, an illegality, and a nexus between the two (*Kebede* 2018-UNAT-874, para. 20).

111. Accordingly, "the claimant bears the burden of establishing the negative consequences resulting from the illegality, namely that there is a "cause-effect" nexus between the illegality of the contested administrative decision and the harm itself" (*Kilauri* 2022-UNAT-1304, para. 38), and

> It is established jurisprudence that the Dispute Tribunal has authority to order compensation to a staff member for violation of the staff member's legal rights under Article 10(5)(b) of the Statute. Compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury. However, not every violation of a staff member's legal rights or due process rights will necessarily lead to an award of compensation. Where the staff member does not show the procedural defect "had any impact on him, his circumstances or his entitlements, and that he suffered no adverse consequences" or harm from the procedural defect, compensation should not be awarded. (*Coleman* 2022-UNAT-1228, para. 37)

112. In the case at hand, the Applicant did not provide any evidence of harm directly linked to the contested decision apart from his own testimony.

113. As a result, he is not entitled to moral damages.

Conclusion

114. In view of the foregoing, the Tribunal DECIDES:

a. The disciplinary sanction is rescinded;

b. The Applicant is to be reinstated, with all his benefits and entitlements, from the date of separation, at the level he held before being separated. Any actuarial cost linked to the recalculation of the Applicant's pension benefit arising from his reinstatement shall be borne by the Organization;

c. Should the Respondent elect to pay compensation in lieu of reinstating the Applicant, the Applicant shall be paid a sum equivalent to 11.5 months of net-base salary at the same grade and level he held at the time of his separation;

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

e. The Applicant's name shall be deleted from the UN wide database on sexual misconduct; and

f. All other claims are rejected.

(*Signed*)
Judge Teresa Bravo
Dated this 23rd day of June 2023

Entered in the Register on this 23rd day of June 2023
(*Signed*)
René M. Vargas M., Registrar, Geneva