UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2022/016/T
Judgment No.: UNDT/2023/111
Date: 4 October 2023
Original: English

Before: Judge Margaret Tibulya

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Miryoung An, DAS/ALD/OHR, UN Secretariat
Nicola Caon, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations Secretariat, contests the decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice, and with termination indemnity in accordance with staff rule 10.2(a)(viii).

2. For the reasons set forth below, the Tribunal rescinds the disciplinary sanction and instructs the Respondent to expunge the Applicant's name from the relevant register of sexual harassers into which it may have been entered.

Facts and procedural history

3. In 2012, the Applicant joined the Organization as an Information Systems Officer at the P-4 level. Prior to his separation in March 2019, he held a fixed-term appointment at the P-5 level.

4. It was alleged that, on 8 November 2017, during a farewell party for a colleague at the offices of Enterprise Resource Planning ("ERP")-Umoja Project at the United Nations Headquarters in New York, the Applicant sexually harassed three female colleagues, referred to as AA (also referred to as "V01"), BB (also referred to as "V02") and CC (also referred to as "V03"). The six specific allegations against him were:

> i. He grabbed AA's face, held her closely, leaned forward, and attempted to kiss her;
>
> ii. When AA resisted the Applicant kissing her, he forced her head down and kissed her on the forehead;
>
> iii. He grabbed BB's face, held her closely, leaned forward and attempted to kiss her;
>
> iv. He tried to move physically close to AA and BB while dancing, despite their attempts to keep him at a distance;

v. He attempted to grab CC's face; when she blocked her face with her hands, he grabbed her hands and tried to pull them apart, and when she resisted, he fell on her forcefully; and

vi. He took and pulled CC's hands to try to get her to dance, despite her resistance.

5. On 15 November 2017, CC reported the alleged harassment to the ERP-Umoja Project Director, who referred the matter to the Office of Internal Oversight Services ("OIOS"), which then initiated an investigation of the complaint.

6. On 29 June 2018, OIOS concluded its investigation.

7. On 25 October 2018, following a review of the investigation report, the Office of Human Resources Management issued a memorandum to the Applicant detailing allegations of misconduct levelled against him (hereafter "the allegations memorandum").

8. On 13 December 2018, the Applicant provided his comments on the allegations of misconduct. He admitted that he had danced with the three complainants/victims and had kissed AA on the forehead after dancing with her. He denied kissing or attempting to kiss BB and CC, and denied completely the allegations of sexual harassment.

9. On 29 March 2019, the Assistant Secretary-General for Human Resources informed the Applicant that the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/DMSPC") had decided that the allegations against him had been substantiated by clear and convincing evidence and to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity.

10. On 26 June 2019, the Applicant filed the application mentioned in para. 1 above, requesting that the contested decision be rescinded. The application was registered at the New York Registry of the Tribunal under Case No. UNDT/NY/2019/047.

11. The Tribunal issued Order No. 138 (NY/2020) of 15 September 2020 to request the Applicant to state the identity of the witnesses that he wished to call, and to set out the disputed facts to which these witnesses would testify.

12. During the original proceedings, the Tribunal declined to hear the evidence of AA, and two other eyewitnesses proposed by the Applicant. Only CC testified and BB declined to participate in the proceedings. The Secretary-General did not call any other witnesses.

13. On 3 February 2021, the Tribunal issued judgment *Applicant* UNDT/2021/007 rejecting the application referred to in para.1 above. The Applicant subsequently appealed this Judgment with the United Nations Appeals Tribunal ("Appeals Tribunal").

14. By Judgment *Appellant* 2022-UNAT-1210, dated 18 March 2022, the Appeals Tribunal upheld the appeal and remanded the matter to this Tribunal for the application to be re-heard and determined by a different Judge.

15. On 23 May 2022, the remanded case, which had been registered under Case No. UNDT/NY/2019/047/R1, was transferred from the New York Registry to the Geneva Registry and was registered under Case No. UNDT/GVA/2022/016/T. The latter case was assigned to the undersigned Judge on 25 May 2023.

16. By Order No. 57 (GVA/2023) of 8 June 2023, the Tribunal convoked the parties to a case management discussion ("CMD").

17. On 13 June 2023, a virtual CMD, closed to the public, took place, as scheduled, through Microsoft Teams, with the presence of Counsel for each party and the Applicant. During the CMD, the Applicant stated through his Counsel that whether he would appear before the Tribunal or not would depend upon the

presence of other witnesses, and he indicated a desire to be able to testify at least about the issues of damages.

18. By Order No. 59 (GVA/2023) of 14 June 2023, the Tribunal instructed the parties, *inter alia*, to file their respective list of witnesses.

19. On 20 June 2023, the Respondent filed his list of witnesses. At the same time, he filed a motion to admit in the record CC's testimony given during the original proceedings, and a motion for accommodations in rehearing CC's testimony.

20. On the same day, the Applicant filed his submissions pursuant to Order No. 59 (GVA/2023). In the same submissions, he indicated that he did not object to the Respondent's motion to admit CC's prior testimony but requested that his Counsel be permitted to cross-examine CC in person.

21. By Order No. 62 (GVA/2023) of 22 June 2023, the Tribunal granted the Respondent's motion to admit CC's prior testimony into the case record, instructed the Applicant to file his comments on the Respondent's motion for accommodations in rehearing CC's testimony by 27 June 2023, and ordered the parties to inform the Tribunal, by 28 June 2023, about their witnesses' availability for a hearing tentatively scheduled from 19 July 2023 to 21 July 2023.

22. On 26 June 2023, the Applicant filed his comments pursuant to Order No. 62 (GVA/2023). On the same day, the Applicant confirmed that his proposed witnesses had indicated their availability on the newly proposed dates.

23. On 27 June 2023, the Respondent filed, *inter alia*, a motion for leave to respond to the Applicant's submission regarding the Respondent's motion requesting accommodations for CC's testimony and his submissions pursuant to Order No. 62 (GVA/2023).

24. By Order No. 68 (GVA/2023) of 4 July 2023, the Tribunal granted the Respondent's motion for leave to respond to the Applicant's submission of 26 June 2023, ordered the Applicant to remain silent and not visible during CC's oral testimony in the present proceedings but rejected other aspects of the Respondent's motion for accommodations in rehearing CC's testimony.

25. By Order No. 70 (GVA/2023) of 5 July 2023, the Tribunal ordered Mr. M. N. to appear to give evidence at the hearing and pronounced the tentative schedule of appearances at the hearing including the Applicant's.

26. On 6 July 2023, the Applicant filed a motion for variation of Order No. 70 (GVA/2023), requesting that reference to his examination be deleted on grounds that he did not request to testify, and notifying the Tribunal that contrary to his original indication, Mr. G. R. was no longer available to testify and had separated from service.

27. Further to the Tribunal's instruction, by email of 10 July 2023, the Respondent filed his comments on the Applicant's request of 6 July 2023, in which he submitted that he had no objection to the Applicant not testifying in the oral hearing.

28. By Order No. 75 (GVA/2023) of 11 July 2023, the Tribunal reserved its decision on whether to hear the Applicant or not until having heard other witnesses, and modified the tentative schedule of appearances at the hearing.

29. The hearing on the merits was held from 19 to 20 July 2023 via Microsoft Teams. Given the nature of certain allegations at issue, the hearing was closed to the public.

30. On 19 July 2023, the Tribunal heard CC's testimony.

31. On 20 July 2023, the Tribunal heard testimony of three witnesses in the following order:

a. Ms. P. M.;

b. Mr. S. R.; and

c. Mr. M. N.

32. At the end of the hearing, the Applicant maintained his position not to testify before the Tribunal on the ground that he had clearly expressed himself during the investigation and disciplinary proceedings. The Respondent had no objection to the Applicant not testifying before the Tribunal subject to the claim of damages the Applicant's Counsel raised during the CMD. The Tribunal notes that the issue of damages was not addressed by the Applicant during the hearing, nor was it raised in the original proceedings.

33. The Tribunal further instructed the parties to file their respective closing submission, which they did on 28 July 2023. The Applicant did not claim damages in his closing submission either.

Consideration

Preliminary issue: anonymity

34. This case concerns the disciplinary measure of separation from service, with compensation in lieu of notice, and with termination indemnity, imposed on a former staff member for alleged sexual harassment.

35. 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."

36. It is well-settled law that "the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality" (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).

37. During the original proceedings, various confidential documents, and by implication even the names of some witnesses, had been disclosed on a private blog unaffiliated with the United Nations (see *Applicant* UNDT/2021/007, para. 67). As such, there is a need to protect the victims of the alleged misconduct, as well as the identity of witnesses and the confidentiality of the disciplinary records of the Administration (see *Applicant* UNDT/2021/007, para. 69). Such need, together with the sensitive nature of the sexual harassment allegations in the present case, constitutes exceptional circumstances that warrant granting anonymity.

38. Moreover, the Appeals Tribunal held in *AAE* 2023-UNAT-1332, at para. 155, that:

> there continues to be concerns raised regarding the privacy of individuals contained in judgments which are increasingly published and accessible online. In our digital age, such publication ensures that individuals' personal details are available online, worldwide, and in perpetuity. There are increasing calls for the privacy of individuals and parties to be protected in judgments.

39. Accordingly, the Tribunal decides to anonymize the names of all individuals involved including the Applicant and the victims in this case.

Standard and scope of judicial review

40. 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.

41. 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). 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).

42. The facts on which the disciplinary measure is based are that the Applicant sexually harassed AA, BB and CC. The Appeals Tribunal in *Appellant* 2022- UNAT-1210 explicitly held that:

> 35. [B]efore 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.

43. For the reasons set forth below, the Tribunal finds that the Respondent failed to prove the above facts by clear and convincing evidence. Consequently, in the interest of judicial economy, the Tribunal does not consider it necessary to address the issues of whether the established facts legally amount to misconduct, the proportionality of the sanction, and the due process rights.

44. Consequently, the issues for determination in this case are as follows:

a. Whether the standards set forth by the Appeals Tribunal have been met;

b. Whether the facts have been established by clear and convincing proof as highly probable; and

c. Whether the Applicant is entitled to any remedies.

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

Whether the standards set forth by the Appeals Tribunal have been met

46. The Appeals Tribunal found that the Tribunal, in its original proceedings, appeared "to have relied almost exclusively on the hearsay evidence in the OIOS investigation report, despite the existence of other better evidence which it declined to hear for unacceptable reasons" (see *Appellant*, paras. 36, 40-42). It further held in *Appellant*, at para. 57, that:

> An OIOS investigation report, given its limited fact-finding methodology, usually will provide no more than reasonable grounds to conclude that misconduct occurred, amounting to **proof that is appreciably less than clear and convincing**. If it were accepted that an OIOS investigation report, based solely on a written record of interviews not observed or cross-examined by the Appellant, is adequate to determine whether sexual harassment occurred, then there would be little role for the UNDT. An investigative report, while useful, is no substitute for a judicial determination. (emphasis added)

47. Upon remand of the case, the Tribunal was required to "at the very least hear the evidence of the complainants, any eyewitnesses to the incidents, the persons to whom the first report was made, and the three witnesses identified by the Appellant", and "to determine on the available evidence whether the allegations of sexual harassment have been proven by the Secretary-General on evidence that attains the standard of highly probable", should "some of the witnesses no longer be available" (see *Appellant*, para. 60).

48. In this respect, the Tribunal notes that the Secretary-General bears the onus of adducing clear and convincing evidence to prove that the misconduct was highly probable. There is no overall onus on the staff member to prove his innocence. (see *Appellant*, para. 57).

49. Moreover, the Appeals Tribunal observed that:

> it was incumbent on the Secretary-General … to lead the evidence of the complainants, other eyewitnesses who witnessed the alleged misconduct and the persons to whom the complainants made their first report, all of whom the [Applicant] in terms of Article 17 of the UNDT Rules of Procedure might have cross-examined (see *Appellant*, para. 58).

50. The Appeals Tribunal also guided that:

> [i]n admitting hearsay in the interests of justice, the UNDT should always have regard to the reason why the original evidence is not given by the person upon whose credibility the probative value of such evidence depends - in this case the three [victims] and any other eyewitnesses to the alleged conduct. If those witnesses are available to testify, there should be compelling reasons before disallowing such evidence and substituting it with the less cogent and inherently unreliable hearsay in the OIOS investigation report (see *Appellant*, para. 42).

51. Having reviewed the parties' submissions to date and the evidence on record, the Tribunal finds no merit in the Respondent's submission that during the proceedings in this case, the procedural error has been corrected, i.e., all available witnesses, including those proposed by the Applicant have been heard by the

Tribunal. Indeed, the standards set forth by the Appeals Tribunal have not been met for the following reasons.

The non-appearance of AA and BB as witnesses at the remanded hearing

52. The Respondent once again failed to secure the attendance of two victims, i.e., AA and BB, at the remanded hearing.

53. In relation to AA, the Respondent submits that her unavailability to appear as a witness before the Tribunal has no prejudice on the Applicant's right because he did not propose AA as his witness although he had done so in the previous proceedings. The Tribunal finds no merit in the Respondent's submissions in this regard. There is no overall onus on the accused staff member to prove his innocence. It is the Administration that bears the burden to prove its case with clear and convincing evidence (see *Appellant*, para. 57). The Respondent was responsible for ensuring his witness' (AA) participation and leading the hearing of her in direct evidence. However, AA did not appear before the Tribunal.

54. Turning to BB's non-appearance before the Tribunal, the Respondent submits that unlike in the previous proceedings, she did not ignore the request for voluntary cooperation, but provided her reasons for not being able to participate any further. To support his submission, the Respondent filed an email from BB, stating in its relevant part as follows:

> In regards to this situation, I wish to no longer be contacted. This incident took place well over five years ago and the fact that there is still no resolution from this matter is beyond me. The interview that was conducted by the UN investigating body at that point in time was beyond painful and the damage caused by this situation is one I wish to no longer continue revisiting.

55. Referring to *Applicant* 2013-UNAT-302, the Respondent argues that the serious mental trauma that BB was exposed to serves as a legitimate reason for her not testifying.

56. The Tribunal recalls that any judicial determination "must weigh the competing interests of the parties, the exigencies of the case, and notions of due process and fair trial" (see *Morin* UNDT/2011/069, para. 33). As a general principle, the importance of confrontation, and cross-examination of witnesses is well-established (see *Applicant* 2013-UNAT-302, para. 33). While the Appeals Tribunal acknowledges that cross-examination is not an absolute right, it outlines strict conditions for any deviation from the general principle, including being "in certain exceptional circumstances" such as the need for "precautionary measures to protect witnesses likely to be suborned or subjected to threats and physical harm" (see *Applicant* 2013-UNAT-302, para. 36).

57. While the Tribunal regrets that the incident in issue negatively impacted on BB's well-being, it presents no such exceptional circumstances that would outweigh the right of the accused staff member to cross-examine her. Indeed, the evidence on record shows that in determining whether other actions should be taken to ensure a conducive work environment right after the incident at issue, both BB and CC made it very clear to the Administration that "they did not fear a hostile environment in the office or any threat from the concerned staff member after the event". The interview record of BB shows that she had increased work-related interaction with the Applicant after the party entirely without incident.

The testimonies of other witnesses

58. Four witnesses testified before the Tribunal, including only one victim (CC). The hearing shed light on the context in which the allegations arose. The setting was a farewell party held on 8 November 2017 for a colleague in an office space with eating and drinking from late afternoon until midnight. The party was crowded, festive, and animated with people engaging in conversation over food and drinks, music playing, and some people dancing as couples or in groups in a 10 by 15-foot area in the middle of the room.

59. CC joined the party at around 9.20 p.m. and left at around 10.10 p.m. on the same night. While the evidence of Ms. P. M., Mr. S. R., and Mr. M. N. was adduced, it does not represent an adequate response to the concerns raised by the Appeals Tribunal as is demonstrated below.

60. Ms. P. M., who was at the farewell party from around 6 p.m. to between 9 p.m. and 10 p.m., testified that she did not observe any interactions between the Applicant and CC during her presence. She recalls that the Applicant invited someone to dance who did not want to, but she does not remember the person. There were many people, and everyone was pulling another to dance. It was not unusual for the Applicant to invite someone to dance. All people in the centre were inviting others to dance. The dance was a Latino dance known as Salsa. She recalled that the Applicant invited a lot of other people to dance. She did not see him doing anything improper and no incident involving him caused her concern. She did not observe any improper behaviour or any act of sexual harassment. It is noteworthy that Ms. P. M.'s evidence which is exculpatory is devoid of any corroborative value.

61. Mr. S. R., who attended the party from about 4 p.m. to midnight, testified that he does not recall CC running from the dancing area looking panic stricken as alleged by the Respondent. He does not remember speaking to her or telling her that she looked traumatized. He does not recall any incident involving the Applicant that caused him concern. He spoke to BB but she did not express any concern about the Applicant. Mr. S. R.'s evidence also lacks any corroborative value.

62. BB went to Mr. M. N. and spent some time with him at around 8.30 p.m. She told him that she was disappointed with the conversation she had had with the Applicant, but she did not tell him why she was disappointed with it. From that moment until 10 p.m., when Mr. M. N. left the party, he became more attentive to what was happening on the dance floor and to the Applicant. He told OIOS that he did not think that the Applicant did anything wrong at the party. He did not observe the Applicant at any time with CC and did not observe him falling or leaning on her. When he spoke with AA, she did not complain to him about the Applicant. He did not see the Applicant kissing AA or BB. He observed him asking other people to dance. He did not have any conversation or interaction with CC. His assertion

that the Applicant did not do anything wrong is based on what he observed that evening. He was not aware of the allegations against the Applicant when he made that statement. He maintained the same version of testimony before the Tribunal.

63. None of the above testimonies corroborates the charges as laid. On the contrary, they are exculpatory in so far as all three witnesses testify that they did not see the Applicant doing anything improper at the party.

64. Accordingly, the Tribunal finds that there is no effective response to the concerns that formed the basis for the Appeals Tribunals' decision to remand the case for a fresh hearing.

Whether the facts have been established overall by clear and convincing proof as highly probable

65. The Appeals Tribunal allowed the Tribunal to review and determine the case based on "the available evidence", should some of the witnesses no longer be available to testify before it.

66. The Tribunal is required to "keep the standard of proof uppermost in its mind". In other words, the Secretary-General bears the onus to adduce clear and convincing evidence to prove that the misconduct was highly probable (see *Appellant*, para. 57).

67. 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).

68. In this case, the Applicant was sanctioned for having sexually harassed AA, BB and CC. Specifically, the Administration found that, on one or more occasions:

a. The Applicant grabbed AA's face, held her closely, leaned forward, and attempted to kiss her;

b. When AA resisted the Applicant kissing her, he forced her head down and kissed her on the forehead;

c. He grabbed BB's face, held her closely, leaned forward, and attempted to kiss her;

d. He tried to move physically close to AA and BB while dancing, despite their attempts to keep him at a distance;

e. He attempted to grab CC's face; when she blocked her face with her hands, he grabbed her hands and tried to pull them apart, and when she resisted, he fell on her forcefully; and

f. He took and pulled CC's hands to try to get her to dance, despite her resistance.

69. The Applicant submits that the Respondent erroneously continues to insist that there were three cases of sexual harassment, even in the absence of any such claim by two of the individuals, who described to OIOS what they perceived as awkward social behaviour. He adds that the case relied entirely on CC's misinterpretation of what she considered sexual assault.

70. The Respondent argues that the facts underlying the disciplinary measure have been established by clear and convincing evidence.

71. The Tribunal recalls that before concluding that there has been sexual harassment, there has to be sufficient, credible, and reliable evidence proving a high probability that the perpetrator committed a conduct of a sexual nature (see *Appellant*, para. 35).

72. Regrettably, neither the allegations memorandum nor the sanction letter elaborated upon the "sexual nature" of the alleged offence. Consequently, the Administration failed to prove by clear and convincing evidence, a key element of

sexual harassment under sec. 1.3 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) that the verbal or physical conduct, gesture or any other behaviour was of "a sexual nature" (see, e.g., *Bagot* 2017-UNAT-718, para. 62; *Applicant* 2013-UNAT-280, para. 63).

73. Notwithstanding the above, the Tribunal will examine below whether the facts in relation to AA, BB, and CC have been respectively proven by clear and convincing evidence.

Incidents involving AA

74. AA's unavailability to testify before the Tribunal compels it to rely exclusively on her interview records. The evidence on record shows that AA considered the Applicant's conduct towards her as not warranting a formal complaint and that she did not regard the Applicant to have sexually harassed her. CC's testimony before this Tribunal that she saw the Applicant "do the exact thing to [AA]" does not contradict the evidence that AA did not consider herself as a victim of sexual harassment.

75. In this respect, the Appeals Tribunal held in *Ramos* 2022-UNAT-1256, at para. 38 (footnotes omitted), that

> 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.

76. In the Tribunal's view, AA's statement to OIOS that she did not consider the Applicant's conduct, taken in context of a party atmosphere, to have had sexual motivations, nor that it did cause her offence or humiliation, is exculpatory and has not been contradicted (see *Appellant*, para. 45). As pointed out by the Appeals Tribunal, "[a]n unwelcome kiss, without sexual motivation, and which causes no offence, is not sexual harassment" (see *Appellant*, para. 47).

77. Accordingly, the Tribunal finds that the available evidence does not attain the standard of clear and convincing evidence establishing that the Applicant sexually harassed AA.

Incidents involving BB

78. The Administration found that the Applicant (i) grabbed BB's face, held her closely, leaned forward and attempted to kiss her; and (ii) tried to move physically close to BB while dancing, despite her attempt to keep him at a distance.

79. Before the investigation panel, the Applicant admitted that he had danced with BB in a style of "Latino Americano, this kind of Caribbean dancing" and that BB "may have" pushed him away while they were dancing together.

80. Noting that "in many Latin American inspired dances, the dancing partners will typically dance physically very close to each other, which was also what the Applicant attempted to do with BB" (see *Applicant* UNDT/2021/007, para. 41), the Tribunal considers that for the Respondent to make his case, there must be a highly probable basis that the Applicant's conduct towards BB was sexual (see *Appellant*, para. 52).

81. The Applicant denies the incident of grabbing BB's face to kiss her on the face. In contrast, BB stated to OIOS that "[the Applicant] came and grabbed [her] face in front of everyone and he basically put his two hands right on [her] cheeks and he was holding [her] as if he was going to kiss [her] in front of everyone".

82. As per the Appeals Tribunal, "[i]n order to come to a conclusion on the disputed issues, it was necessary for the [Tribunal] to satisfy itself on the credibility and reliability of the various witnesses to the alleged incidents of misconduct and to properly determine the probabilities" (see *Appellant*, para. 56). This requires the Tribunal to assess: "i) the candour and demeanour of the witnesses; ii) any latent and blatant bias against the [Applicant]; iii) contradictions in their evidence; iv) the calibre and cogency of the performance of each witness when compared to that of other witnesses testifying in relation to the same incident; v) the opportunities the witnesses had to experience or observe the events in question; and vi) the quality,

integrity and independence of the witnesses' recall of the events" (see *Appellant*, para. 56).

83. Regrettably, despite the Tribunals' guidance, BB once again declined to testify before the Tribunal. The only corroboration of her version before OIOS is the hearsay of Mr. A. J. who also did not testify before the Tribunal. In contrast, Mr. S. R. testified before the Tribunal that he spoke to BB, but she did not express any concern about the Applicant. Mr. M. N. did not see the Applicant kissing BB.

84. In the Tribunal's view, that BB declined to testify against the Applicant is instructive. This once again deprives the Tribunal of a "proper opportunity to make an analysis and evaluation of the probability or improbability of the different versions on each of the disputed issues" (see *Appellant*, para. 56). The Tribunal cannot but recall the Appeals Tribunal's ruling that "[t]o the extent that BB was a witness adverse to the [Applicant], the failure of the Secretary-General to secure her attendance before the UNDT permits an adverse inference detracting considerably from the credibility and reliability of her allegations in the OIOS investigation report" (see *Appellant*, para. 49).

85. Since there is no evidence beyond what formed the basis for the impugned judgment, based on the Appeals Tribunal's guidance, the Tribunal finds that the available evidence does not attain the standard of clear and convincing evidence establishing that the Applicant sexually harassed BB.

Incidents involving CC

86. The Administration determined that Applicant (i) attempted to grab CC's face; when she blocked it with her hands, he grabbed her hands and tried to pull them apart, and when she resisted, he fell on her forcefully; and (ii) took and pulled her hands to try to get her to dance, despite her resistance.

87. The Applicant submits that the two allegations of the sole complainant CC have not been evaluated and determined satisfactorily. In his view, the totality of the evidence does not support CC's allegation of sexual harassment. Specifically, he argues that being asked to dance by the wrong person can be awkward, but it is not sexual harassment; and that he never fell on her forcefully.

88. The Respondent contends that the Applicant's conduct towards CC has been proven by clear and convincing evidence. He further argues that CC provided compelling testimony during the hearing held on 19 July 2023, all of which was consistent with her OIOS interview of 29 January 2018 and her previous testimony before the Tribunal of 3 November 2020.

89. The Tribunal recalls that where key facts are disputed, it is required to "make explicit findings pertaining to the credibility and reliability of the evidence and provide a clear indication of which disputed version it prefers and explain why" (see *AAC* 2023-UNAT-1370, para. 47). In this respect, the Appeals Tribunal in *AAO* 2023-UNAT-1361, at para. 64, held that:

> The finding that the statements of the complainant deserved more substantial weight on the basis of her keeping "the same narrative throughout the course of the investigation" fails to appreciate that in terms of the law of evidence previous consistent statements are normally irrelevant and inadmissible as self-corroboration…The principal reason for the rule is that a witness' previous consistent statements are insufficiently relevant and have no probative value. It does not ordinarily add anything to the value of a witness' evidence to be told that she had always adhered to the same view. It would be surprising if it were otherwise.

90. Moreover, "[v]ictims of possible abuse must be given every consideration; but that does not mean that their version must be received as more credible and reliable without due appreciation of the totality of the evidence and the circumstances of the case" (see *AAO*, para. 71).

91. Applying the above-mentioned standards, the Tribunal will proceed to review the two incidents involving CC.

The alleged attempt to grab CC's face, grabbing her hands and trying to pull them apart, and forcefully falling on her

92. The Applicant admitted that he touched CC's hands while inviting her to join a communal dance. But he denied in his interview with OIOS that he forcefully fell on her.

93. While CC was largely consistent in her testimony relating to the above allegation, the Tribunal deems it unsafe to ground an adverse finding on her evidence.

94. First, it is evident that the fresh hearing presented an unfair advantage to the Respondent in filling gaps in key aspects of CC's earlier testimony. In her earlier testimony, CC could not explain why none of the about 10 to 15 people, who she stated were on the dance floor at the time of the first incident, noticed when the Applicant attempted to grab her face and when she blocked it with her hands, he grabbed her hands and tried to pull them apart, and when she resisted, he fell on her forcefully. At the second hearing, she offered explanations, including that the 25 people who were at the party were not concentrated in that particular area where the incident took place. The dance area was partially enclosed with cubicle desks separating neighbouring workspaces by partitions that blocked the direct line of sight to the desk. The party decorations, e.g., flags, and the pillar next to the desk on which she leaned further blocked the sight. She stated that the party area was dimly lit at the time.

95. The explanation that there were balloons and decorations obscuring the view was challenged by the Applicant on the basis that photographs of the event do not support CC's narrative. The Tribunal is however not able to resolve this issue based on photographs that were not taken for purposes of capturing obstructive features at the scene.

96. The fact, however, that CC only offered an elaborate explanation during a remanded hearing points to a rethinking of her earlier testimony and deliberate efforts to fill gaps in key aspects of that evidence. Regardless of whether CC's explanations are credible, the fact that the Respondent took advantage of the

opportunity for the fresh hearing to fill existing gaps in her evidence, which was not the purpose of the remand, poses the risk of the Tribunal basing its conclusions on rehearsed evidence.

97. Moreover, even with CC's explanations, it is still strange that at a party attended by a considerable number of people in a relatively small space and at which people were not stationary, no one saw the Applicant falling on/leaning on CC. This is compounded by the fact that Mr. S. R., who CC references as having interacted with and talked to her when she was in a distressed state, does not recall CC running from the dancing area looking panic-stricken or speaking to her, and him telling her that she looked traumatized. He does not recall any incident involving the Applicant that caused him concern. Ms. P. M. and Mr. M. N., who were at the party, did not witness any of the incidents that CC alludes to. Notably, as demonstrated in para. 62 above, Mr. M. N. had been paying close attention to the Applicant during the relevant time. This evidence affected CC's credibility and reliability as a witness.

98. Finally, considering the physical difference between the Applicant and CC, which CC revealed during her testimony, the Tribunal does not find it scientifically plausible that when the Applicant fell forcefully on her "from top to bottom", she simply leaned back on the desk. This again casts doubt on CC's credibility and reliability as a witness.

99. Based on the foregoing, the Tribunal considers it unsafe to make an adverse finding based only on CC's evidence that the Applicant attempted to grab her face, that he grabbed her hands and tried to pull them apart, and that he forcefully fell on her.

The allegation that the Applicant took and pulled CC's hands to try to get her to dance despite her resistance

100. In his OIOS interview, the Applicant admits that he might have taken CC's hand and asked her to join the line for an Italian dance. However, he denied that he acted with sexual motives in relation to CC or that his conduct could reasonably be perceived as offensive.

101. In the Tribunal's view, the Applicant rightly argues that given the festive context of what was going on, it is difficult to apply the definition of sexual harassment that is "reasonably perceived to cause offence or humiliation" let alone to give any sexual connotation to the contact. He maintains that while his intentions in this one instance may have been unwelcome, there is no evidence that they were sexually motivated. Indeed, it is difficult to assign any ill motive to the Applicant's act of taking and pulling CC's hands to try to get her to dance despite her resistance in the context of a dance party.

102. Given the circumstances of the case, the Tribunal finds that while the Applicant's act of taking and pulling CC's hands to try to get her to dance may have been unwelcome, there is no evidence that it was sexual in nature.

103. The Respondent who bears the onus to adduce clear and convincing evidence proving that the misconduct was highly probable failed to do so. The available evidence falls far short of the required standard.

104. Considering the above, the Tribunal finds that the facts underlying the disciplinary measure have not been established by clear and convincing evidence. There is no sufficient, cogent, relevant, and admissible evidence permitting the Tribunal to reach a finding of sexual harassment or a legal conclusion that all the elements of sexual harassment have been established. As such, the Tribunal concludes that the contested decision is unlawful.

Whether the Applicant is entitled to any remedies

105. In his closing submission, the Applicant seeks rescission of the disciplinary measure of separation from service. He further requests the Tribunal to order the removal of his name from the ClearCheck database system of the United Nations, and to inform him when this is executed.

106. The Tribunal recalls that the remedies it may award are outlined in art. 10.5 of its Statute as follows:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:

> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

Rescission of the contested decision and specific performance

107. Having found that the contested decision is unlawful, the Tribunal is of the view that there has been a miscarriage of justice in the present case. As such, the contested decision must be rescinded, and the disciplinary measure of separating the Applicant from service must be set aside. This implies the reinstatement of the Applicant on his post and under the same kind of contract he held at the time of his separation.

108. Moreover, the Tribunal recalls that a finding of sexual harassment against a staff member of the Organization will have grave implications for the staff member's reputation, standing and future employment prospects (see *Appellant*, para. 37). Accordingly, the Tribunal finds it appropriate to direct the Secretary-General to expunge the Applicant's name from the relevant register of sexual harassers into which it may have been entered, and to inform the Applicant when this is executed.

Compensation in lieu

109. The contested decision constitutes an administrative decision that concerns termination within the scope of art. 10.5(a) of the Tribunal's Statute. Therefore, the Tribunal must set an amount that the Respondent can choose to pay as an alternative to the rescission of the contested administrative decision and the reinstatement of the Applicant pursuant to art. 10.5(a).

110. The very purpose of compensation in lieu is "to place the staff member in the same position in which he or she would have been, had the Organization complied with its contractual obligations" (see *Laasri* 2021-UNAT-1122, para. 63). In this respect, the Appeals Tribunal has consistently held that:

> In-lieu compensation under Article 10(5) of the UNDT Statute shall be an economic equivalent for the loss of rescission or specific performance the Tribunal has ordered in favor of the staff member. When the Secretary-General chooses not to accept this order, he must pay compensation as an alternative to replace (in-lieu) such rescission or specific performance. Hence, the most important factor to consider in this context is the pecuniary value of such rescission or specific performance for the staff member in question[.]
>
> The nature and degree of the irregularities committed by the Administration, on the other hand, are of no legal relevance for the pecuniary value of the ordered rescission or specific performance. On the contrary, as the UNDT may not award punitive damages according to Article 10(7) of the UNDT Statute, we find the UNDT is not allowed to consider these factors when deciding on the amount of in-lieu compensation (see, e.g., *El-Awar* 2022-UNAT-1265, paras. 73, 74; *Yavuz* 2022-UNAT-1266, paras. 26, 27).

111. It follows from the above that in determining the amount of compensation in lieu, the Tribunal must consider "the specific circumstances of the case, and in particular the type and duration of the contract held by the staff member, the length of his/her service, and the issues at the base of the dispute" (see *Quatrini* UNDT/2020/053, para. 14; see also *Laasri*, para. 64). Moreover, the Tribunal must take into account that the two-year limit imposed by art. 10.5(b) of is Statute "constitutes a maximum, as a general rule, albeit with exceptions" (see *Laasri*, para. 64; see also *Mushema* 2012- UNAT-247 para. 28).

112. In light of the above and considering the circumstances of the present case, the Tribunal finds it appropriate to set the in-lieu compensation at the equivalent of two years' net base salary. This award is consistent with awards made in cases of similar nature (see, e.g., *AAC*, para. 71).

Conclusion

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

a. The application succeeds;

b. The disciplinary measure of separation of from service is rescinded in its entirety;

c. As compensation in lieu under art. 10.5 of the Tribunal's Statute, the Applicant is awarded an amount equivalent to two years of his net base salary;

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

e. The Secretary-General is directed to expunge the Applicant's name from the relevant register of sexual harassers into which it may have been entered, and to inform the Applicant when this is executed.

(*Signed*)
Judge Margaret Tibulya
Dated this 4th day of October 2023

Entered in the Register on this 4th day of October 2023
(*Signed*)
René M. Vargas M., Registrar, Geneva