



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2023/009

Judgment No.: UNDT/2024/018

Date: 11 April 2024

Original: English

Before: Judge Sean Wallace

Registry: Nairobi

Registrar: René M. Vargas M., Officer-in-Charge

HATUNGIMANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Ron Mponda

Counsel for the Respondent:

Charlotte Servant-L'Heureux, UNHCR
Rebecca Britnell, UNHCR

Introduction

1. The Applicant is a former Administrative/Finance Officer working with the Office of the United Nations High Commissioner for Refugees (“UNHCR”), based in Gbadolite Sub-Office, in the Democratic Republic of the Congo (“DRC”). He filed an application on 17 January 2023 to contest the decision to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice, without termination indemnity pursuant to staff rule 10.2(a)(viii).

2. The Respondent filed his reply on 17 February 2023, arguing that the application is without merit and should be dismissed.

3. The Tribunal held a case management discussion (“CMD”) on 26 September 2023. At the CMD, the Applicant agreed that he is contesting the factual basis for the disciplinary sanction and its proportionality. He is not contesting that sexual harassment constitutes “misconduct” and only arguing due process to the extent that the investigation was not thorough enough and, thus, the Administration “got the facts wrong”.

4. The Tribunal held a hearing on the merits from 29 January to 1 February 2024 at which the testimony of eight witnesses, including the Applicant, was taken.

5. The parties filed their closing submission on 15 February 2024. Final resolution of the case was delayed awaiting translation of various documents from the administrative record. Those translations have now been received and the case is ripe for ruling.

Facts

6. On 27 July 2020, the Inspector General’s Office (“IGO”), UNHCR, received a report of suspected misconduct alleging that the Applicant had misappropriated fuel.

7. Upon receipt of the information, IGO conducted formal investigations commencing on 24 November 2020. On 15 December 2020, IGO received another report of possible misconduct alleging that the Applicant had failed to comply with procurement rules in the context of the rehabilitation of the sports hall at the UNHCR Gbadolite Sub-Office. On 16 December 2020, IGO received another report of possible misconduct implicating the Applicant, alleging that in 2020 he harassed and/or sexually harassed Ms. V, a former colleague in the Gbadolite Sub-Office.

8. On 15 February 2022, IGO issued its investigation report. In its findings, IGO determined that the available evidence did not support allegations of misappropriation of fuel and breach of procurement rules. However, with respect to allegations of harassment and sexual harassment of Ms. V, IGO concluded that there was sufficient evidence to establish that these allegations were true.

9. By a letter dated 2 March 2022, the Director, Division of Human Resources (“DDHR”), UNHCR, charged the Applicant with misconduct, specifically of harassment and sexual harassment. The allegations of misappropriating fuel and of non-compliance with procurement rules were not pursued.

10. The Applicant was allowed a period of one month to provide comments to the charges. He submitted his response to the allegations on 2 April 2022.

11. In a letter dated 26 October 2022 (“sanction letter”), the Director, DDHR, informed the Applicant that the High Commissioner, UNHCR, found that the facts alleged had been established to the applicable standard of proof, i.e., clear and convincing evidence, and that in 2020 the Applicant had sexually harassed a UNHCR staff member who worked under his supervision, Ms. V.

12. The sanction letter states that the High Commissioner found that the following facts had been established up to the applicable standard of clear and convincing evidence:

- a. On 7 May 2020, the Applicant made a comment of a sexual nature to Ms. V to the effect, among other things, that he would spend intimate time with her when she was in Kinshasa; and
- b. On 14 and 15 December 2020, the Applicant made a comment of a sexual nature to Ms. V again suggesting that while she was in Kinshasa, he would have sexual relations with her.

13. The sanction letter also stated that the High Commissioner was of the view that the following other alleged facts have been established on a balance of probabilities:

- a. On several occasions, including in May or June 2020, the Applicant disparaged Ms. V and her work, such as telling her that she “does nothing”, “represents nothing”, and that her presence “is useless”, and he intimidated her by claiming that the head of the Sub-Delegation, Ms. Moumouni, was not satisfied with her work. The Applicant also threatened to “cut” her job and accused her of speaking negatively about him to other colleagues;
- b. On or about 14 or 15 December 2020, the Applicant again accused Ms. V of trying to defeat his mandate and he told her that she was not doing her job well;
- c. On several occasions, including on or about 11 or 12 May and in October 2020, the Applicant threatened Ms. V that he was going to do everything he could to get her leave the Sub-Delegation;
- d. On at least one occasion, the Applicant unfairly accused Ms. V of not following the rules, i.e., altering the absences of colleagues in exchange for money;

e. On several occasions, the Applicant spoke against Ms. V and her work, including accusing her of committing malpractice to a colleague, Mr. Routour; and

f. In 2020, the Applicant made sexually suggestive comments to Mr. Routour about a co-worker's buttocks.

Consideration

Standard of review in disciplinary cases

14. According to art. 9.4 of the Tribunal's Statute as recently amended, in reviewing disciplinary cases,

the Dispute Tribunal shall consider the record assembled by the Secretary-General and may admit other evidence to make an assessment on whether the facts on which the disciplinary measure was based have been established by evidence; whether the established facts legally amount to misconduct; whether the applicant's due process rights were observed; and whether the disciplinary measure imposed was proportionate to the offence.

15. The Statute generally reflects the jurisprudence of the United Nations Appeals Tribunal ("UNAT"), see e.g., *AAC* 2023-UNAT-1370, para. 38; *Mizyed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024.

16. In *Sanwidi* 2010-UNAT-084, para. 40, UNAT clarified that:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.

17. In *Sanwidi*, UNAT, however, underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him", or otherwise "substitute its own

decision for that of the Secretary-General”. In this regard, “the Tribunal is not conducting a “merit-based review, but a judicial review”, explaining that a “judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision”.

Whether the facts on which the disciplinary measure was based were established by clear and convincing evidence

Basic jurisprudence on the evidentiary burden and how to assess evidence in sexual misconduct cases.

18. In disciplinary cases, “when termination is a possible outcome”, UNAT has held that the evidentiary standard is that the Administration must establish the alleged misconduct by “clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable” (*Negussie* 2020-UNAT-1033, para. 45). UNAT clarified that clear and convincing evidence can either be “direct evidence of events” or may “be of evidential inferences that can be properly drawn from other direct evidence”.

19. Regarding the examination of evidence of sexual misconduct, the Dispute Tribunal held in *Hallal* UNDT/2011/046, para. 55, affirmed by the Appeals Tribunal in *Hallal* 2012-UNAT-207, that:

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”, because “[i]t is not always the situation in sexual harassment cases that corroboration exists in the form of notebook entries, email communications, or other similar documentary evidence, and the absence of such documents should not automatically render a complaining victim’s version as being weak or meaningless.

20. In *Hallal*, the Dispute Tribunal also held that “[a]s is always the case, any witness testimony should be evaluated to determine whether it is believable and should be credited as establishing the true facts in a case”.

Making comments of sexual nature to Ms. V in May and December 2020

21. The Applicant's position is that the alleged incidents could not have happened because he was not at the scene at the given time. He thus contests the evidence upon which the disciplinary measure was based.

22. The background to the 7 May 2020 incident is that the Applicant allegedly made the comment on the day Ms. V took a test for her current job in Kinshasa. The Applicant denies making such a comment because he was not present at the scene. The Applicant had delegated Mr. Jimmy Routour to supervise Ms. V during the test. The Applicant explains that at the material time he was attending a meeting with the Head of Sub-Office discussing the closure of the Zongo Field Office and transfer of staff initially based in Zongo to Libenge, Bili and Gbadolite.

23. The Applicant also states that the alleged third witness to that incident, Mr. Gabriel Kalombo, could not possibly have been around to witness such incident as he was based in Bili.

Witnesses at the hearing on the merits

24. It is not disputed that the alleged victim, Ms. V worked for UNHCR in Gbadolite from 1 September until 21 December 2020. The Applicant joined the Gbadolite Sub-Office as an Administrative/Finance Officer from 7 February 2020 until December 2020. Thus, the Applicant supervised Ms. V from February to December 2020.

25. Ms. V testified that on 7 May 2020, she had taken a recruitment exam for a job in Kinshasa. As she was scanning the exam for submission, the Applicant said to her that she had a beautiful body that should belong to someone like him. He also said that, if she got the job in Kinshasa that would be great because he could take good care of her and that body. He said that women like her with such a beautiful body need to be taken care of by a man like him. If she went to Kinshasa, she would be his woman and he would take care of her.

26. Ms. V also testified that the intent of these comments was clear and that she was shocked, angered and hurt by the Applicant's comments and his lack of respect because he knew that she was a married woman. However, she did not react because the Applicant had previously threatened to "sack" her. Instead, she left the room in silence.

27. Ms. V said that the comments were witnessed by Mr. Jimmy Routour. However, she never mentioned the incident to anyone, nor did she file a complaint. This was primarily because she was afraid that if her husband heard about it, he would have called her home immediately, ending her United Nations career.

28. Ultimately, Ms. V got the job in Kinshasa and, in December 2020, was preparing to leave and take up her new post. According to her testimony, the Applicant said that he was happy that she was going because Kinshasa was a large city where people could move about freely. He said that he would find a house in Kinshasa where she could live and he could visit when he was on leave. This way he "could have me" there, as opposed to Gbadolite where everyone knew everyone else's business.

29. Ms. V testified that she realized that the Applicant's comments were a sexual innuendo since the Applicant had previously talked about getting a house where they could meet and be together.

30. This incident happened in Mr. Gabriel Kalombo's office, and Ms. V thought that Mr. Kalombo and Mr. Vinny Mputu must have heard it.

31. Ms. V felt humiliated by the Applicant's comments, especially since this was the second time that he had made such comments. However, this time she felt more free to respond because she was about to leave for Kinshasa. So, she told the Applicant that if he came to Kinshasa and tried to do anything, she would call the police. The Applicant responded that he would simply pay off the police with money.

32. Ms. V said that she did not mention this incident to anyone, except Ms. Mariam Tsimamba, who was a confidant and would support her.

33. Ms. V also testified about other non-sexual comments that the Applicant made to her over the months he was her supervisor. These comments were denigrating and discrediting to her. For example, he said that she was “good for nothing”, that “everything she did was wrong”, and that she “was no use at all for him”. He also accused her of spending her time talking about him behind his back. He said that he had reported all this and he would make sure that she was forced to leave her post.

34. Mr. Joseph Vinny Mputu and Mr. Gabriel Kalombo testified corroborating Ms. V’s testimony about the December 2020 incident. Mr. Mputu said that the Applicant told Ms. V that “Gbadolite is a small place and it is better in Kinshasa where I can consume you”. Mr. Mputu testified that he interpreted this as having sexual connotations, “that once Ms. [V] was in Kinshasa [the Applicant] would go out of his way and do his best to sleep with her”.

35. Mr. Kalombo testified that the Applicant told Ms. V: “I am so happy that you got the job. Kinshasa is such a large village, there, it will be possible to have an affair with you and nobody will know”. Mr. Kalombo also felt that this comment was inappropriate and that the Applicant “couldn’t say something like that about her”.

36. The Applicant called three witnesses to testify about the challenging conditions that he faced when he joined the Gbadolite Sub-Office in 2020: Mr. Solomon Tarkang said that he told the Applicant that “he would be landing on rocky ground”; Ms. Francine Binti Musole testified to the bad relationship between the Applicant and Mr. Mputu; and Mr. Tamba Kiisi Leno testified that “Gbadolite was very complicated” with several noted irregularities there.

37. However, none of these witnesses testified about the allegations giving rise to the contested disciplinary decision. Neither Mr. Tarkang nor Mr. Leno were present in Gbadolite in 2020, and they had no knowledge of the allegation of sexual harassment. Although Ms. Musole was present in Gbadolite during that period, she gave no testimony about the allegations.

38. The Applicant testified at length in his own defence. He spoke of being briefed about the challenges he would find in Gbadolite, the numerous irregularities that he discovered upon his arrival, and the changes in procedure that he implemented or recommended.

39. With respect to the allegations relating to Ms. V, the Applicant testified that on 7 May 2020 she was to take the test. However, he did not have time to administer it, so he had Mr. Jimmy Routour supervise the test. The Applicant said that he requested Mr. Routour to do so because “at that time I trusted him—I had just arrived”. He told Mr. Routour that once the test was completed, he should collect it and leave it in his office. At 12.30 p.m., the Applicant came back to scan and send the test documents.

40. The Applicant testified that the following day, Ms. V invited him to her birthday party. He was unable to attend but contributed USD100 towards the party expenses. He said that Ms. V came to tell him about the party the day after it took place. The Applicant said that Ms. V wanted him to be her friend and was disappointed that he did not attend her party.

41. The Applicant said that it is clear that the allegations related to non-sexual harassment in June 2020 were a lie because Ms. V was on sick leave from 8-16 June. He also said that he was traveling on 15 October when Ms. V alleges he harassed her again.

42. The Applicant testified that the gravamen of his defence is that the allegations are not possible because on each occasion he was not there. He claims that “everything that was said was a lie and invented to charge [him] for reasons that we will know in the future”. He also said that no Burundian would use the type of language that was allegedly used.

43. The Applicant said that he supervised Ms. V from February to December 2020 and never had any problems with her. He did one evaluation of her during this time and rated her as “successfully meets expectations”, with all positive comments.

44. The Applicant also said that he never made allegations about Ms. V helping others with fraud and was never aware of Ms. V mishandling money entrusted to her. When he pointed out that she had received daily subsistence allowance (“DSA”) advances for a 2019 mission trip that ultimately did not take place, she refunded the monies.

45. The Applicant further stated that Ms. V must have been paid to lodge these accusations, “otherwise I couldn’t understand why this was done because there was no other reason to accuse me.”.

46. The Applicant also testified that he asked IGO to interview Mr. Kalombo, who was his assistant at Gbadolite, saying “I presumed Gabriel could tell the truth”.

47. Interestingly, the Applicant said that he was still working on documents in the computer system after he left the Organization because he “had a month with access”. In one of those documents, the Applicant accused Mr. Kalombo of “faking” the Applicant’s signature.

48. Determining whether the Respondent has proven by clear and convincing evidence that the Applicant committed misconduct in this case essentially boils down to the credibility of the witnesses to the May and December 2020 incidents.

49. Preliminarily, the Tribunal observes that Gbadolite was “very complicated” and “rocky ground” as described by two witnesses. The record is filled with allegations and counter-allegations regarding a wide range of alleged misconduct. It is clear that some of the staff there had motives to lie about the Applicant, and many of the allegations made against him were not substantiated. Thus, those allegations were not the basis for his termination and therefore, not the focus of this case.

50. Ultimately, the issue before this Tribunal is whether the Organization was correct in terminating the Applicant for sexually harassing Ms. V on two occasions. On one hand, Ms. V says that the Applicant made inappropriate sexual comments to her. On the other hand, the Applicant denies it.

51. In analysing the credibility of the witnesses, the Tribunal finds Ms. V to be credible and the Applicant to be less than credible.¹

52. The testimony of Ms. V is consistent with her prior statements. The Applicant's testimony that "he wasn't there" is inconsistent with his other testimony and his prior statements where he admitted being present in his office (by 12.30 p.m.) after Ms. V took the test in May 2020.

53. During their testimony, the demeanours of Ms. V and the Applicant were markedly different. She testified in a calm and "matter of fact" manner, while the Applicant was rather forceful and angry during his testimony.

54. Ms. V's testimony was corroborated by both Mr. Mputu and Mr. Kalombo as to the December incident. The Applicant argues that neither of these corroborating witnesses is credible. He points to Mr. Mputu's testimony that the Applicant walked past Ms. V with his trousers down, showing his buttocks, in the presence of Mr. Kalombo and himself. This testimony seems rather incredible on its face and the Tribunal notes that neither Ms. V nor Mr. Kalombo mentioned what would certainly be memorable behaviour.

¹ This Tribunal is cognizant of the decision in *AAC* 2023-UNAT-1370 and has applied it in reaching this judgment. The *AAC* judicial panel acknowledged that "[w]e have digressed at length in this Judgment to make these remarks (obiter dicta) about the UNDT's practice of fact-finding" (*AAC* at para. 62). However, it does not indicate what parts are obiter dicta and what are ratio decidendi. This Tribunal has not expressly discussed in this judgment all of the various factors that were used in analysing the credibility of each witness since it views that discussion in *AAC* to be *obiter dicta*. However, to be clear for purposes of appellate review, the Tribunal did consider all of those factors (in *AAC* para. 47) and other related factors, such as: viii) whether the witness has a motive not to tell the truth; ix) whether the witness has an interest in the outcome of the case; x) whether the witness' testimony was consistent; xi) whether the witness' testimony was differed from statements made by the witness on any previous occasion; xii) the intelligence and apparent understanding of the witness; xiii) whether the witness appeared to understand the questions clearly and answer them directly; xiv) whether the witness had any relationship with the administration or the applicant. See generally, pattern jury instructions on witness consideration/credibility from the U.S. 3rd, 5th, 6th, 7th, and 11th Circuits and the states of Maryland, Virginia, Nevada, Washington, and North Carolina. See also, references to methodologies, procedures, and findings of national and other jurisdictions in (*AAC* at paras. 42 and 63, and p. 15, footnote 11).

55. The Tribunal also notes that there is other evidence in the record calling into question the credibility of Mr. Mputu.

56. However, the Applicant's arguments about Mr. Kalombo's lack of credibility are less persuasive. Indeed, the Applicant testified that he asked the investigators to interview Mr. Kalombo because "I presumed that Gabriel could tell the truth". However, having learned that Mr. Kalombo does not support his version, the Applicant now attacks his credibility. But those attacks are without merit.

57. Most importantly, the Tribunal finds that Ms. V has no motive to lie about the Applicant sexually harassing her. She was not implicated by the Applicant in any wrongdoing in Gbadolite. He evaluated her work performance as "meets expectations" with all positive comments. According to his testimony, the Applicant "never had any problems with Ms. [V]".

58. Ms. V also did not instigate this investigation. In fact, she was shocked when she learned that Mr. Jimmy Routour had reported what she felt to be "intimate matters" about her. She had not mentioned these incidents previously to anyone (except a personal confidant in another Sub-Office). Her primary reason for this was that she feared her career would be harmed if her husband learned that she was subjected to this harassment.

59. In his closing submission, the Applicant quotes at some length from a Sworn Declaration of Mr. Sébastien Godefroid, a Head of Unit, IGO, UNHCR (see Annex R/6). That declaration (para. 9) describes receiving new evidence at the end of December 2022, which resulted in an internal Investigation Note that opined that the new evidence:

casts a serious doubt on the credibility of the statements of Ms. [V], Mr. Mputu, Mr. Routour and Mr. Kalombo ... This new evidence does not prove the innocence of Mr. Hatungimana but these credibility issues are such that, had this information been available at the time the investigation ... against Mr. Hatungimana was completed, it is not likely that the IGO would have substantiated the case.

60. However, the Applicant fails to quote the very next paragraphs of the declaration, which say:

10. On 23 February 2023, I interviewed Ms. [V] to reassess the credibility of her allegations of sexual harassment against Mr. Hatungimana and give her an opportunity to respond to the integrity issues raised about her [in the new evidence. (footnote omitted).

11. Despite the abovementioned preliminary views expressed in the Investigation Note (para. 9 above), I found Ms. [V] credible. She responded clearly and consistently to my questions. The IGO believes that she truthfully reported the sexual harassment committed by Mr. Hatungimana. For example, she provided a consistent and credible reason for not reporting Mr. Hatungimana to the IGO when he first harassed her on 7 May 2020.

12. I also questioned her in relation to the integrity issue raised, i.e., her failure to report the medical insurance fraud committed by [a former staff member], her conduct in relation to the petty cash, guesthouse and canteen management, and alleged failure to record leave of colleagues. Ms. [V] provided clear and logical responses, and the IGO did not find evidence to substantiate any allegations against her.

13. Therefore, while the IGO maintains that there is some merit to Mr. Hatungimana's contention that Mr. Mputu harboured some animosity against him and intended to make him leave the Organization, it does not preclude that Mr. Hatungimana also engaged in sexual harassment. In light of Ms. [V's] additional credible testimony, in the form of her third interview, the IGO is of the view that Mr. Mputu did not invent a false accusation of sexual harassment; rather he took advantage of witnessing Mr. Hatungimana engaging in sexual harassment and of Mr. Routour reporting another incident of sexual harassment in his email of 15 December 2020—by reporting this to the IGO—to make him leave the Organization.

61. The Tribunal finds that, taken in context, the Declaration bolsters the credibility of Ms. V rather than impeaching it.² In fact, the Applicant's selective use of misleading quotations raises other credibility issues about him.

² As noted above, the Tribunal has already found Mr. Mputu to lack credibility.

62. Moreover, the “new evidence” that caused the preliminary concerns about Ms. V is contradicted by the Applicant’s own testimony to the Tribunal. The only reference to Ms. V in the new evidence was “that Mr. Hatungimana addressed numerous irregularities when he arrived in Gbadolite and alleged integrity issues against Ms.[sic] [V] that she had not mentioned to the IGO in her interview”.

63. However, as noted in para. 43 above, the Applicant said that he “never had any problems with [Ms. V].and that he was never aware of Ms. [V] mishandling money she was entrusted with”. Indeed, according to him, when he pointed out that she had received a DSA advance for a trip that was later cancelled, Ms. V promptly refunded the monies.

64. The Applicant also testified to his own speculation that Ms. V must have been paid to lodge these accusations “otherwise [he] couldn’t understand why this was done because there was no other reason to accuse [him]”. However, there is no evidence in the record of any such payment.

65. Thus, the Tribunal finds Ms. V to be a credible witness and finds, by clear and convincing evidence, that the Applicant sexually harassed her by making the above-referenced statements to her in May and December 2020.

Whether the established facts qualify as misconduct

66. The Applicant does not contest that sexual harassment constitutes misconduct.³ His position, however, is that the facts as claimed do not legally amount to misconduct.⁴

³ Applicant’s submissions during the CMD held on 26 September 2023.

⁴ Applicant’s response to Order No. 051 (NBI/2013), filed on 17 March 2023, p. 4.

67. Regarding the count of sexual harassment, the Respondent contends that the Applicant suggesting at the workplace that he and Ms. V, his supervisee, would share intimate moments together and that they could have a baby is irrefutably sexual in nature. Given that Ms. V and the Applicant did not share a relationship that extended beyond their work, and that Ms. V stated that she felt shame and that the Applicant disrespected her and explicitly, on one occasion, told the Applicant that if he touched a married woman (referring to herself), the authorities could arrest him, the advances were both undoubtedly unwelcome, and caused offence.

68. The Respondent further argues that there is no evidence that Ms. V reciprocated the Applicant's sexual advances or encouraged him to believe that his comments were welcomed, such that he may have misapprehended the situation.

69. On harassment, the Respondent submits that the Applicant's conduct towards Ms. V was annoying, demeaning, intimidating, belittling, humiliating, and caused an intimidating, hostile and offensive work environment for her and other colleagues who witnessed the behaviour, noting that the Applicant's conduct was a pattern of behaviour that occurred at the workplace.

70. The Respondent submits that; accordingly, the evidence supports a finding that the Applicant engaged in sexual harassment and harassment in breach of staff regulations 1.2(a) and (b), staff rule 1.2(e) and (f) and the Policy of UNHCR on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (UNHCR/HCP/2014/4).

71. It is self-evident that making sexual comments to a female coworker would amount to misconduct. Staff rule 1.2 defines sexual harassment as "any unwelcome conduct of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment".

72. The statements that the Applicant made to his supervisee, Ms. V (e.g., “you have a beautiful body that should belong to someone like me”; “in Kinshasa [you] would be [my] woman”; and that “he could have [her]”) certainly fall within this definition.

73. The Applicant argues that the allegations relate to his intentions “in the indeterminate future and at a specific location (Kinshasa)”, but that those intentions never materialized. But this argument is unpersuasive.

74. First, it is not necessary that his threats to take sexual advantage of Ms V never came to fruition. The comments alone are sexual harassment. If the Applicant had acted upon them, that would have constituted a separate and distinct act of sexual harassment.

75. Second, it does not matter if the Applicant intended to act upon the comments and threats. The mere making of them, particularly in the presence of others, would be expected to cause offense and humiliate Ms. V.

76. Third, the evidence demonstrates at least one reason that the threats did not materialize—Ms. V threatened to call the police if the Applicant tried to do anything.

77. Thus, the Tribunal finds that the sexual harassment did constitute misconduct.

Whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant

78. The Applicant contends that he was not given full due process. No weight was given to credible explanation he gave in his reply to the charges. He maintains that the Respondent ignored or unduly dismissed his arguments and evidence. The Applicant argues that he made complaints against Ms. V, and Messrs. Routour, Kalombo and Mputu, but the investigators and the Administration did not verify the veracity of his submissions.

79. The Respondent's position is that the investigative process fully complied with the formal requirements set out in the applicable texts, particularly UNHCR/AI/2019/15 (Administrative Instruction on conducting investigations in UNHCR).

80. Regarding the Applicant's contention that his evidence was ignored, the Respondent submits that none of the Applicant's evidence was ignored, nor were his arguments dismissed. Both IGO and the High Commissioner critically assessed the Applicant and the three witnesses' account of the incidents in light of the totality of the evidence on record and relied upon the Applicant's interview as well as his responses to the charge letter to verify the facts.

81. The Respondent also says that while the Applicant contends that he made complaints against Ms. V and the three other named individuals, he provides insufficient particulars in support of this assertion. Based on the minimal facts transmitted in the Application, the Respondent has been unable to verify the veracity of these submissions. Certainly, IGO never received any official complaint from the Applicant and no complaint has ever been made by any person (named or anonymous) to IGO alleging misconduct on the part of either Ms. V or Mr. Kalombo.

82. The Respondent also agrees that the Applicant did make a complaint to the Respondent's Department of Human Resources, on 6 June 2022, against Mr. Mputu alleging that he had, on a separate occasion, conspired to make false allegations of misconduct against the Applicant. This information was duly referred to IGO for further consideration and investigation.

83. Additionally, the Respondent agrees that IGO received complaints against Mr. Routour on 25 August and 14 December 2020, which had in parallel been reported to the Applicant. Mr. Routour was investigated and since he was a United Nations Volunteer ("UNV") the matter was referred to UNV for further decision and action deemed appropriate. The Respondent notes that Mr. Routour left the Organization on the expiration of his contract effective 1 January 2021.

84. The essence of the Applicant's due process claim is that the Organization took the complainant's "say-so" as the truth and/or believed other witnesses and not him. In other words, the Organization "got it wrong". The record clearly contradicts this claim.

85. The complainant in this case initially alleged that the Applicant misappropriated UNHCR fuel. The Organization did not accept this allegation as true. It investigated and cleared the Applicant of the charge. Then the complainant alleged that the Applicant had violated procurement procedures. Again, the Organization investigated and cleared the Applicant.

86. Finally, the complainant (who was not Ms. V) alleged that the Applicant had harassed Ms. V sexually and in other ways. Like the other allegations, this claim was not merely accepted as true. It was investigated with the ultimate findings set forth in the sanction letter (sexual harassment proven by clear and convincing evidence and harassment proven on the balance of probabilities). There was no blind acceptance of the complainant's "say-so" as true.

87. Similarly, the record clearly shows that the Organization fairly appraised the veracity of all the witnesses. Some statements they found to be credible and some not from the Applicant and nearly all the witnesses. Having done so independently itself, the Tribunal found that the Organization "got it right" and not wrong.

88. The Applicant also claims that the Organization was in dereliction of its duty of care towards the Applicant and "should have rescinded its decision *aeo ipso* [sic] the moment Annex R/6 was produced".

89. As noted above, the Applicant has cherry-picked from Annex R/6, citing only the preliminary questions raised by the new evidence and not the ultimate conclusions reached after probing that new evidence. Thus, it seems that the Applicant's argument is that the Organization should have accepted the truth of this new evidence and not tested its veracity.

90. The fallacy of the Applicant’s argument is clear. Certainly, the Applicant would not suggest that the moment the initial complaint was produced, *eo ipso* the Organization should have decided on the merits of the allegation without investigation. The Organization has an obligation to investigate all allegations (see *Nadeau* 2017-UNAT-733 Corr.1, para.33; *Benfield-Laporte* 2015-UNAT-505). The investigation helped the Applicant regarding most of the allegations raised against him but hurt him as to the allegations now at issue. However, by investigating all of the various allegations, the Organization did not violate any duty to the Applicant or any of his rights.

Whether the sanction is proportionate to the offence.

91. The Applicant submits that the sanction is disproportionate. He opines that, given “the vague nature and quality of the bare allegations and their severity”, separation was “patently harsh”. He also argues that the facts of this case are distinguishable from those in *Mbaigolmen* 2018-UNAT-819, which resulted in separation.

92. The Respondent argues that “since 2017, the High Commissioner has imposed the measures of dismissal or separation from service on all 13 staff members who engaged in sexual harassment and the Secretary-General has imposed the same measures on multiple staff members who engaged in sexual harassment”. He further points out that, with one exception, the Tribunals have upheld the sanction of separation from service for cases involving sexual misconduct.

93. In *Samandarov* 2018-UNAT-859 (para. 23), the Appeals Tribunal held that:

[t]he proportionality principle limits discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the Administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability (footnote omitted).

94. The Organization has a wide degree of discretion in determining the appropriate disciplinary measure. The Tribunal will only overturn a measure as disproportionate if it finds it to be excessive or unreasonable (*Portillo Moya* 2015-UNAT-523), or “in cases of obvious absurdity or flagrant arbitrariness” (*Aqel* 2010-UNAT-040, para. 35).

95. This Tribunal finds that the sanction imposed was not absurd, arbitrary, excessive or unreasonable. Contrary to the Applicant’s claim, the proven facts are not vague at all, but are clear, convincing and very serious.

96. Moreover, although every case has its own facts, for many years now the Respondent has been consistent in imposing separation from service in instances of sexual harassment. This is in line with the Organization’s “zero tolerance” policy and it is not the role of this Tribunal to second-guess the application of that policy.

97. Finally, the sanction letter itself shows that the Respondent determined the sanction after considering past practices in other cases, along with both the mitigating and aggravating circumstances of this case. Such consideration is the model of proportionality.

98. Accordingly, the sanction imposed in this case was proportionate.

Conclusion

99. In light of the foregoing, the Tribunal DECIDES to deny the application in its entirety.

(Signed)

Judge Sean Wallace

Dated this 11th day of April 2024

Entered in the Register on this 11th day of April 2024

(Signed)

René M. Vargas M., Officer-in-Charge, Nairobi