UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2023/024
Judgment No.:	UNDT/2024/056
Date:	4 September 2024
Original:	English

Before: Judge Margaret Tibulya

Registry: New York

Registrar: Isaac Endeley

HUNT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Steven Dietrich, DAS/ALD/OHR UN Secretariat
Miryoung An, DAS/ALD/OHR, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 21 July 2023, the Applicant, a former Senior Investment Officer with the Office of Investment Management ("OIM") of the United Nations Joint Staff Pension Fund ("UNJSPF"), filed an application in which he challenged the decision to impose upon him "the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity". As grounds for imposing the sanction, the Applicant had been found to have (a) engaged in prohibited conduct amounting to harassment and abuse of authority of the Complainant (name redacted for privacy reasons), (b) disclosed confidential and commercially sensitive information to the media, and (c) engaged in unauthorized outside activities.

2. On 23 August 2023, the Respondent filed a reply in which he contended that the application is without merit.

3. On 1 April 2024, the case was assigned the undersigned Judge.

4. From 24 to 26 June and on 8 July 2024, a hearing was held via MS Teams, where the following witnesses gave testimony (all names redacted for privacy reasons): the Applicant, MS (a former colleague of the Applicant), AR (a former colleague of the Applicant), MR (a former staff representative at UNJSPF), PG (the current Under-Secretary-General and Representative of the Secretary-General for the investment of the assets of UNJSPF, hereinafter referred to as "the new RSG"), and the Complainant.

5. For the reasons set out below, the application is rejected.

Facts

6. According to the Appeals Tribunal, if the parties agree to certain facts, then the Dispute Tribunal is not to further review these facts but accept them as settled (see *Ogorodnikov* 2015-UNAT-549, para. 28). In the present case, in response to the Duty Judge's Order No. 109 dated 19 October 2023, the parties submitted a

consolidated list of agreed facts in which they presented the following chronology (footnotes references from the original omitted):

> … Harassment and Abuse of Authority
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> … In **2007,** the Applicant joined the Organization, serving as a P-5 Senior Investment Officer in the Office of Investment Management (OIM) of the UN Joint Staff Pension Fund. Originally assigned as Senior Investment Officer for real estate, this was later expanded to include real assets comprising infrastructure, timber, and agricultural land investments.
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> … In **2017,** [SR, name redacted for privacy reasons] was appointed Under-Secretary-General and Representative of the Secretary-General ["the former RSG"] for Investments of the UNJSPF, with effect from 1 January 2018.
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> … **On 14 February 2018,** [the Complainant] was reassigned from her P-3 Investment Officer post on a [temporary job opening, "TJO"] as [the former RSG's special] assistant at the P-4 level.
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> … **On 1 March 2019,** the Applicant wrote to ["the former RSG"], copied to his supervisor, [HB, name redacted for privacy reasons], on the subject of the 2020 budget for the Real Assets team. One of the issues raised was ["the former RSG's"] proposal to fill a promised P-4 post to handle infrastructure with his [special] assistant, [the Complainant], without any competitive selection process.
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> … **On 6 March 2019,** the Applicant emailed [EC, name redacted for privacy reasons], copying his whole team, asking them to: "Please also drop [the Complainant] from [the Investment Fund, name redacted for privacy reasons] IV as she is not a member of our team. Anyway, wasn't this approved in the previous meeting?" [EC] replied: "Per your request, I took [the Complainant] off from [the Investment Fund], but I never put her in—[the former RSG] did. Definitely feel free to address that with him should he revert back."
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> … **On 24 May 2019,** the Applicant emailed [HB] about a decision to change the reporting line of [WL, name redacted for privacy reasons], noting: "I believe that the due diligence conducted on the fund by [WL] and [the Complainant] was not executed in a professional manner because of inexperience and many important questions on [the Investment Fund] remained unanswered, such as track record, counter party risk (no financial statements for the sponsor were given) and an excessive fee structure. It should be noted that neither of them had previously underwritten an infrastructure fund, nor are in my opinion qualified to do so without my supervision."
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> … **On 19 September 2019,** the Applicant sent an e-mail, with two attachments, to [the former RSG] … and other senior managers

on the topic of "Special Meeting of Private Markets Committee ["PMC"] on [the Investment Fund]". In his email, the Applicant objected to the former RSG's appointment of [the Complainant and WL] to conduct the due diligence exercise for [the Investment Fund] transaction. The Applicant attached an email dated 1 March 2019, also addressed to [the former RSG], copied to senior managers, including [HB], who was both the Applicant's and [the Complainant's] former First Reporting Officer (FRO), in which he stated:

"I'm also concerned about have [the Complainant] become part of our group as a P4 without the proper search process. Frankly I do not see that [the Complainant] is even remotely ready to be P4 in infrastructure at this time. I believe she would need to be trained as a P 3 in infrastructure for a considerable amount of time before she's ready to be a P4. Given the complicated transactions you would like to do in infrastructure, I would like to get a P4 at the level of [VK or DL, names redacted for privacy reasons] excuse my pronunciation if that was wrong, who have recently left IFC [assumedlypresumably, referring to the International Finance Corporation] in this position, who have great experience structuring complicated infrastructure deals at a capability level for ... far above [the Complainant]."

… **On 19 September 2019,** the Applicant sent a second e-mail to the same distribution list as the first 19 September 2019 email, in which he stated:

"I still believe that further investments in infrastructure, except for renewals with successful funds such as [name of fund redacted for privacy reasons], should wait until OIM hires a qualified P4 with seven years' experience in infrastructure. As you know there is no one currently employed at OIM with those qualifications."

… **On 11 April 2020,** the Applicant emailed [the new (and current) RSG, PG], stating:

"I was surprised after our conversation last week about [the Complainant] stepping down from Infrastructure and my taking over, that [HB] was still introducing her as head of infrastructure Friday and that she is pushing through an infrastructure transaction in the next PMC. If you would like me to handle this asset class I would appreciate if you could communicate this to [HB and the Complainant] as soon as possible."

… **On 25 May 2020,** the Applicant emailed [PG] stating: "I refused to bring on [the Complainant] on as a P4 infrastructure into the real assets group (I was fine with her as a P3)."

… **On 9 June 2020,** [the Complainant] resubmitted her harassment complaint to the head of [the Office of Internal Oversight Services, the Investigation Division, "OIOS/ID"].

… **On 24 November 2021,** the Applicant's laptop and [information communication technology] equipment were seized by OIOS/ID.

… **On 28 September 2022,** the Applicant was presented with allegations of misconduct.

… The Applicant responded **on 5 December 2022.**

… **On 2 May 2023,** the Applicant received the sanction letter notifying him of the decision to separate him from service with compensation in lieu of notice and with termination indemnity.

… Disclosure of confidential information

… **On 1 July 2019,** ["the former RSG"] approved OIM's internal policy on information sensitivity, classification of documents, and records management, which is in addition to the United Nations Secretary-General's Bulletins ST/SGB/2007/06, ST/SGB/2007/05 and ST/SGB/2004/15.

… **On 6 December 2019,** the Applicant emailed [TB, name redacted for privacy reasons], a senior OIM staff, entitled "Supplemental Information—[the Investment Fund]," in which he stated, in relevant part:

"[TB—I sent this to [MR] to forward to the [news media, name redacted for privacy reasons].

[MR], I just wanted to make sure this supplemental information, which is not in my memos, gets to the [news media] reporter.

[The former RSG] recused himself on [the Investment Fund] transaction in the May 10th PMC meeting saying he had a conflict of interest because the former head of the World Bank ... As mentioned in my memo, we have always required staff and management to agree on any illiquid investment in a 'dual key' arrangement. But by proposing this transaction under pressure from Goldman and using inexperienced staff [the Complainant [for due diligence and avoiding my involvement he was effectively approving his own transaction which is a violation of his fiduciary duty as RSG."

… By **e-mail dated 12 December 2019** [emphasis added] to [FF, name redacted for privacy reasons], the Applicant confirmed speaking to her, provided his personal email address, and asked to her to send him a copy of the article.

… On **the same day** [emphasis added], [FF] replied to the Applicant as follows: "[i]t was great speaking with you as well! The article has been written and I assume it will be published later today or tomorrow or when my editor is done looking at it so keep you updated and send you a copy."

… By **e-mail dated 12 December 2019** [emphasis added] to his OIM colleagues, the Applicant stated: "The reporter is very

> interested in doing more profiles on us. She apparently has a copy of the ALM [unknown abbreviation] study and our new benchmarks and asset allocation so anything on this issue is fair game. She will work off the record as she did with me. If you wish to speak with her directly her number is [redacted for privacy reasons] and email is [redacted for privacy reasons]."
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> … Outside activities
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> … Both the New York Department of State Division of Corporations and 'Dun & Bradstreet' list the Applicant as President of [Catskill Mountain Railroad, "CMRR"]. Other open-source documentation on the Applicant's role, including the 2020-2024 CMMR Business Plan, also listed the Applicant as the President, Chief Executive Officer (CEO), Director, and Staff Coordinator.

Consideration

The sanction letter dated 1 May 2023

7. The impugned decision was premised on the Respondent's determination that there is clear and convincing evidence that the Applicant:

a. harassed the Complainant by making disparaging remarks about her in front of other UNJSPF staff, isolated her at work, and created a hostile work environment for her that jeopardized her professional duties and career,

b. made derogatory remarks about her work and integrity in emails to OIM staff and to the new RSG, dated 11 April 2020 and 25 May 2020, to harm her professional reputation,

c. disclosed confidential and commercially sensitive information to the media about the Investment Fund transaction, and

d. engaged in unauthorized outside activities by working with an external entity, CMRR, in senior administrative and operational positions.

The burden of proof and the Tribunal's limited judicial review

8. The Administration bears the burden of establishing, by clear and convincing evidence, that the misconduct occurred, which means that the truth of

the facts asserted is highly probable (see para. 51 of *Karkara* 2021-UNAT-1172, and similarly in, for instance, *Molari* 2011-UNAT-164; *Diabagate* 2014-UNAT-403; *Modey-Ebi* 2021-UNAT-1177; *Khamis* 2021-UNAT-1178; *Wakid* 2022-UNAT-1194; *Nsabimana* 2022-UNAT-1254; *Bamba* 2022-UNAT-1259).

9. Pursuant to art. 9.4 of the Statute of the Dispute Tribunal, and in keeping with established jurisprudence (see, for instance, *Maslamani* 2010-UNAT-028, para. 20), the Tribunal's role is to determine:

a. Whether the facts on which the disciplinary measure was based have been established;

b. Whether the established facts legally amount to misconduct under the applicable Regulations and Rules;

c. Whether the disciplinary measure applied is proportionate to the offence; and

d. Whether there was a substantive or procedural irregularity.

The general issues as presented by the parties

10. In the 20 July 2022 investigation report, OIOS found, and the Respondent maintains, that on 23 July 2019, 27 January 2020, 9 April 2020, and 5 November 2020, the Applicant made derogatory remarks about the Complainant's professional experience, her suitability for a P-4 level position, and her relationship with the former RSG, in emails sent from his personal email address to the personal email addresses of other OIM senior staff. He sent emails dated 11 April 2020 and 25 May 2020 to the new RSG, bearing negative references about the Complainant's professional experience and about events at OIM that pre-dated his appointment as RSG.

11. The Respondent also seeks to rely on the Applicant's emails of 6, 8, and 27 March 2019, to prove that he requested that his team members exclude the Complainant from meetings and groups and that OIM staff refrain from working with her. Further, that in an email exchange of 5 and 6 March 2019 with the subject

line, "RE: March 15th PMC Agenda – RA TEAM NEED YOUR INPUT by 5 pm Tuesday 5 March", he stated that: "Please also drop [the Complainant] from [the Investment Fund] as she is not a member of our team".

12. The Respondent also maintains that on 19 September 2019, the Applicant sent an email titled, "Special Meeting of Private Markets Committee (PMC) on [the Investment Fund]", with two attachments, to the former RSG and 33 OIM staff members, criticizing the Complainant's professional experience and capacity to assume a P-4 level position requiring infrastructure investment experience.

13. The Applicant explains that his actions were part of well-founded concerns which were shared by his fellow directors over the former RSG's decisions. He contends that the former RSG decided to appoint the Complainant, who assumed the P-4 level post of his Special Assistant without a competitive selection process. She was to manage infrastructure investments and advocate for a large investment in the Investment Fund favoured by the former RSG, yet she had no experience in private market equity infrastructure investments at the time. The Applicant claims that he privately raised reservations with the former RSG over the appointment with no response. The former RSG subsequently withdrew the proposed P-4 level post from the 2020 budget request.

14. The Applicant voiced reservations over the way the Investment Fund investment had been handled in fulfilment of his fiduciary obligation to ensure that the assets of the UNJSPF are managed in the best long-term interest of its participants and beneficiaries.

15. In May 2019, however, the Real Assets portfolio was removed from his portfolio and shortly thereafter the proposal for investing USD150 million in the Investment Fund was added to Real Assets.

16. The Complainant was to perform due diligence in lieu of the investment team. On 14 June 2019, the Applicant again raised objections to the former RSG. On 26 June 2019, the former RSG copied the communication to the Complainant and four others.

17. It was only after this that the Applicant submitted his response of 19 September 2019 to the same parties, who attended the PMC meeting of 27 August 2019 where the Investment Fund investment was discussed. This included those copied in by the former RSG on 26 June.

Whether the Applicant was a whistleblower

18. Regarding allegations that the Applicant disclosed confidential and commercially sensitive information to the media, one of the defences he advances is that he was a whistleblower who is legally protected.

19. Section 4 of ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) provides that "[n]otwithstanding staff regulation 1.2(i), protection against retaliation will be extended to an individual who reports misconduct to an entity or individual outside of the established internal mechanisms, where the criteria set out in subparagraphs (a), (b) and (c) below are satisfied":

a. Such reporting is necessary to avoid:

i. A significant threat to public health and safety; or

ii. Substantive damage to the Organization's operations; or

iii. Violations of national or international law; and

b. The use of internal mechanisms is not possible because:

i. At the time the report is made, the individual has grounds to believe that he/she will be subjected to retaliation by the person(s) he/she should report to pursuant to the established internal mechanism; or

ii. It is likely that evidence relating to the misconduct will be concealed or destroyed if the individual reports to the person(s) he/she should report to pursuant to the established internal mechanisms; or

iii. The individual has previously reported the same information through the established internal mechanisms, and the Organization has failed to inform the individual in writing of the status of the matter within six months of such a report; and

c. The individual does not accept payment or any other benefit from any party for such report.

20. For a claim to sec. 4 protection to succeed, part (c) criteria and at least two criteria, one from each of parts (a) and (b), must be satisfied.

21. The Tribunal notes that the Applicant substantiated the part (b) criteria as follows:

a. Both the former RSG and HB were the objects of the complaint to OIOS in July 2019 and were the subject of a request for protection from retaliation. No investigation was ever initiated and instead, the Applicant and his colleagues were investigated,

b. he privately raised reservations with the former RSG over the decision to appoint the Complainant, absent a competitive selection process, to a proposed P-4 level post to manage infrastructure investments, and in particular to advocate for a large investment in the the Investment Fund favoured by the former RSG,

c. he raised reservations over the way in which the Investment Fund investment had been handled,

d. he wrote to the former RSG and the PMC listing his concerns with the process by which the Investment Fund transaction was approved, and to a lesser extent his concerns about the qualifications of the Complainant to underwrite the transaction, and that

e. he filed for protection from retaliation with the Ethics Office which found a *prima facie* case of retaliation by the former RSG, yet no action was taken.

22. Regarding the part (a) criteria, the Applicant does not substantiate on which one he seeks to rely. It is only in his Counsel's closing submissions that it is stated that the Applicant's activities were necessary to avoid substantive damage to the Organization's operations. Being that Counsel's submissions were neither premised on the Applicant's pleadings nor on his testimony, it remained unsubstantiated, for instance, in terms of how the Organization's operations would be damaged in the event that the Applicant had not conducted the impugned activities.

23. A party's pleadings must contain all their contentions, for the opposite party to have a clear understanding of the claim, and to mount an appropriate defence.

24. In this case, the pleadings are silent on the issue. The issue was only argued at Counsel-to-Counsel level, with Counsel for the Respondent submitting that this case is not about the legitimacy of the Applicant's claims against the former RSG or his duty to challenge the former RSG's decision against the Applicant, and that the Applicant is attempting to broaden the scope of the case beyond his conduct.

25. Since the specifics of the damage which the Organization's operations would suffer were not pleaded, and no evidence was adduced in that regard, given that Counsels' submissions are neither pleadings nor evidence, the Tribunal cannot base any findings, legal or factual, on them.

26. As far as part (b) criteria is concerned, it is understood that the Applicant's claim to whistleblower status is premised on his understanding that he satisfies the criteria in sec. 4(b)(i) and (iii). In this regard, he seeks to prove that the use of internal mechanisms was not possible because; (a) at the time the report was made, he had grounds to believe that he will be subjected to retaliation by the persons he should report to pursuant to the established internal mechanism; (b). that he previously reported the same information through the established internal mechanisms, and the Organization has failed to inform him in writing of the status of the matter within six months of her report.

27. Section 3 of ST/SGB/2017/2/Rev.1 provides that reports of misconduct should be made through the established internal mechanisms: to OIOS, the Assistant Secretary-General for Human Resources Management, the head of

department or office concerned, or the focal point appointed to receive reports of sexual exploitation and abuse.

28. The Applicant states that the former RSG and HB were the objects of the complaint to OIOS on 18 July 2019 and were the subject of a request for protection from retaliation, but that no investigation was ever initiated and instead, him and his colleagues were investigated.

29. In terms of sec. 3 above, the Applicant could only make a report to OIOS or the Assistant Secretary-General for Human Resources Management, being that he could not report to the heads of department since his complaint was against them. He therefore rightly reported to OIOS.

30. It is of note that the Applicant's request for protection against retaliation relates to the former RSG's, and not OIOS's conduct. And, it is to the OIOS and not the former RGS, the Applicant "should report pursuant to the established internal mechanism", in terms of sec. 3 of ST/SGB/2017/2/Rev.1. In the circumstances, even if it were proved that the former RSG retaliated against the Applicant, such proof would not satisfy the sec. 4(b)(i) ST/SGB/2017/2/Rev.1 criteria.

31. Since the Applicant has not proved that at the time, he made the external report he had grounds to believe that he would be subjected to retaliation by OIOS, or the Assistant Secretary-General for Human Resources Management (i.e., the [persons] he should report to pursuant to the established internal mechanism), the Tribunal finds that the criteria in sec. 4(b)(i) of ST/SGB/2017/2/Rev.1 has not been met.

32. Regarding sec. 4(b)(iii) criteria, the dates on which the Applicant is alleged to have corresponded with the media were before the lapse of the sec. 4(b)(iii) six-month period from 18 July 2019 when he filed a report with the OIOS.

33. It is alleged that he corresponded with FF, reporter at the news media, prior to her publication of two articles in 2019 and 2020, that he discussed with her details about confidential internal OIM matters and internal documentation, and that he shared her contact information with other senior staff at OIM and encouraging them

to contact FF. Some of the email exchanges which the Respondent seeks to rely on are dated 4 and 5 of December 2019, 6 December 2019, 10 December 2019, 11 December 2019, and 12 December 2019.

34. Considering that the Applicant's report to OIOS was made on 18 July 2019, the alleged media activities which occurred in December 2019 were not protected under sec. 4(b)(iii).

35. Based on the foregoing, the Tribunal finds that the Applicant has not satisfied the criteria which would support his claim to whistleblower protection.

Harassment and abuse of authority

The legal framework and the basic allegations against the Applicant

36. Under ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), harassment is defined as follows:

> 1.3 Harassment is any unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person, when such conduct interferes with work or creates an intimidating, hostile or offensive work environment.
>
> 1.4 Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another. Harassment may be directed at one or more persons based on a shared characteristic or trait as set out in section 1.2 above. Harassment normally implies a series of incidents.

37. The Applicant is alleged to have: (a) made disparaging remarks about the Complainant in front of other UNJSPF staff, (b) isolated her at work, and (c) created a hostile work environment for her.

The parties' submissions

38. The Applicant's contentions may be summarized as follows:

> a. "Looking at the specific charges, it is evident the Respondent has not articulated any clear and convincing evidence of misconduct". The

former RSG "put the Pension Fund assets at risk", which "was starkly evident in his decision to invest $150 million in a new private equity investment known as the Investment Fund exceptionally using his special assistant to execute his plan while circumventing or ignoring the established process". He "did not act alone" as the Complainant "facilitated this decision".

b. "The Applicant's subsequent objections were not against [the Complainant] personally, but about the irregularity of this entire process. The Complainant "was understandably concerned for her future when faced with the sudden departure of her mentors and direct supervisors, [HB and the former RSG]. She "also disliked the critical appraisals of her role, echoed in the OIOS Governance Audit that expressed the concern that after recusing himself, 'the senior manager designated his subordinate to act on his behalf. OIOS is of the view that the action taken to mitigate the conflict situation in this case was inadequate because the designated individual still reported to the senior manager and remained subject to his authority'". This is "exactly the same argument made by the Applicant for which he is being charged with misconduct".

c. "The Applicant along with six of his colleagues filed a formal complaint with OIOS on 18 July 2019", but the "response was an institutional failure". Although "the Applicant had been found by the Ethics Office to have engaged in a protected activity and to be entitled to protection from retaliation, nothing was done" and he "was abruptly removed from oversight of the infrastructure portfolio". Instead "of initiating an investigation, OIOS leaked the information back to [the former RSG] who retaliated by filing his own complaint against the Applicant with the Secretary-General", which "was later found by the OIOS Special Review as unsupported". The Respondent "has sought to suppress this information". In "due course the actions against the Applicant escalated requiring him and his colleagues to address the Secretary-General directly", and a "select group, but not all of those who complained to the Secretary-General, have since been charged with misconduct".

d. The Complainant's "claims of being the victim of disparaging comments arose out of concern over her involvement in a scheme that was proving to be embarrassing for her in her goal of getting a promotion to P-4". The Applicant's "criticism of the handling of [the Investment Fund] investment including putting an inexperienced P-3 staff member in charge of a new $150 million investment was sincere and well-founded". OIOS "concluded "[t]here was insufficient evidence that [the Applicant] abused his authority and influenced decisions about [the Complainant's] career". The Respondent, however, has "taken the same insufficient evidence to create a false narrative portraying [the Complainant] as a victim".

e. The "case against the Applicant rests entirely on the subjective opinions of [the Complainant] largely drawn from office gossip and hearsay". Her "testimony like her financial analysis is suspect, as shown by the numerous inconsistencies and false assumptions it contains":

i. In her testimony, the Complainant stated, "twice that the Applicant approved her assignment as a resource to the Real Assets team in March 2019, but there is no evidence that this ever happened, and the email sent by the Applicant on 1 March 2019 demonstrates there was no agreement".

ii. She "twice stated that she was assigned as an extra resource by [the former RSG] to this specific transaction due to his own conflict of interest". She "emphatically claimed that she had no conflict of interest as she was assigned to the transaction before it was announced that his former associate, [KK, name redacted for privacy reasons] of the World Bank, was joining [the Investment Fund]". However, "this is contradicted by the announcement on [the Investment Fund's] website of [KK] joining [the Investment Fund] on 8 January 2019, which was the same day that [the former RSG] first contacted the Real Assets team, copying [the Complainant], to meet with [the Investment Fund]". The Complainant, "having been a former World Bank (IFC) employee

herself, just like the former RSG, should have immediately recused herself from working on this transaction".

iii. She "stated that the Applicant questioned not only her qualifications for a P-4 position but also at the P-3 level and claimed he wanted her fired, with no evidence other than her suspicions". This "is contradicted by the memo of 1 March 2019 to [the former RSG] as well as his offer to help train her".

iv. She "stated in her interview that her unfavorable review of the Applicant's performance while she was a Special Assistant motivated him to attack her". This "is also pure speculation". The Applicant "was not aware of her involvement in this process", but on the other hand, the Complainant "wrote privately to [the new RSG] criticizing his performance". The "proof again lies in the OIOS Audit Special Review to which the Tribunal and the Applicant were denied access".

v. She "made many references to feeling disparaged by the Applicant, but apart from hearsay, gave no specific first-hand examples of this in her testimony". Her "repeated references to his denigrating her educational background, are not evidenced anywhere including the statement read by [WL] (who declined to testify) in the 27 August 2019 PMC meeting, which she referenced repeatedly".

f. The testimony and evidence that has been adduced "reflects a very different scenario from [the Complainant's] subjective impressions". For "a person assigned on a part time basis to the Real Assets team (there was no specific TJO for this position, as she claimed in her testimony), it was highly suspicious that she would report directly to [HB] (a D-2) instead of the Applicant who was the head of the Real Assets team". "The removal of the Applicant from supervision of the asset class two days before the transaction was approved at the PMC meeting on 10 May 2019 was equally suspicious, given the recusal of [the former RSG] from the meeting".

g. After "the Applicant and his colleagues filed their complaint against [the former RSG and HB] on 19 July 2019, the complaint was leaked back to [the former RSG], who took aggressive action against the Applicant at the PMC meeting on 27 August 2019 which the Applicant testified was a highly adversarial and unprofessional meeting". The Applicant "felt he had to respond to this improper approval process in writing as a matter of record, which he did on 19 September 2019". The former RSG "immediately shared it with" the Complainant.

h. In the 19 September 2019 email, the Applicant "had questioned the improper approval process for [the Investment Fund] transaction, which included the [former] RSG's assigning of his own special assistant to promote the transaction". For the Complainant, this "assignment as a TJO was a pathway to promotion and all her testimonies emphasize it was her sense of entitlement that motivated her complaints". With "no experience in the private markets, it was an opportunity to enhance her career by getting [the Investment Fund] approved", and the use of TJOs in OIM was criticized in the 2021 HR Audit and ended by the new RSG.

i. Though "the Applicant's email records of concerns over [the Investment Fund] proposal only mention [the Complainant] peripherally, her reaction is full of hyperbole, e.g., he attacked her professional credibility and integrity or slandered her, labeled her a rubber stamp". A "reading of the record does not show this to be true" as it was "the Applicant's way to memorialize his objections to the transaction and how its due diligence was done so that it could be properly reviewed by OIOS".

j. The Complainant "filed her initial complaint against the Applicant on 7 October 2019, which presented the former RSG with the opportunity he needed to discredit the Applicant by immediately forwarding it to OIOS Investigations on 30 October". After "the Applicant and his colleagues met with [the Under-Secretary-General for Management Strategy, Policy and Compliance, "USG/DMSPC"] in March 2020 and wrote directly to [the Secretary-General] on the misconduct of the former RSG, and after another

OIOS Special Review (withheld on spurious grounds of operational independence), [the former RSG] was terminated". "Only a few days after the arrival of the new RSG [PG] in April 2020, [the Complainant] sent her prior complaint about the Applicant to him attacking him personally". PG's "reaction was to allow her TJO as special assistant to the RSG expire naturally in May 2020 and to put [WL] in charge of infrastructure". The Applicant "had nothing to do with these decisions".

k. The 11 April 2020 email "shows his decision was already taken before any exchanges with the Applicant or his colleagues took place". The Complainant "reverted to her former position as a P-3 in Public Markets on 22 May 2020 and was eventually promoted to P-4 in that capacity, her career having suffered little".

l. Even though the Complainant "was no longer the Special Assistant to the RSG, [she] attended the OIOS Governance Audit exit conference on 28 May 2020 in which the auditors voiced agreement on some of the Applicant's concerns". The Complainant testified that "her disagreements with the preliminary Governance Audit results and their 'false narrative' motivated her to write to complain about how the auditors did their work with respect to [the Investment Fund] in an email' to [PG] on 1 June 2020". This "email included her complaints about the Applicant", and the Complainant "argued she and her bosses were not interviewed although there is no indication why that is a necessary procedure in governance audits as opposed to investigations". The Respondent has "refused to share the preliminary governance audit information that [the Complainant] strongly reacted to".

m. "Unhappy with [PG's] reaction, [the Complainant] first went to the Ombudsman and then the head of the Ethics Office [EA, name redacted for privacy reasons] who advised her to forward her prior complaint from October 2019 directly to [BS, name redacted for privacy reasons] who was then head of OIOS Investigations and who acted on her complaint immediately". PG "testified he never witnessed any harassment of [the

Complainant] by the Applicant, demonstrating the extent of [her] embellishment of the facts".

n. There is "a curious contrast between the OIOS response to [the Complainant] and its reaction to the seven Senior Investment Officers who filed their complaint against the former RSG and Director in July 2019 which was never acted on". While the Complainant "complains of the widespread tension in the office directed at her by many staff when she was the Special Assistant to the former RSG, she fails to acknowledge that her involvement in every aspect of the former RSG's work may have been the reason and not just the Applicant's challenge to one investment decision". The "process of questioning investments to make sure they are in the best interest of the fund is the primary fiduciary duty of Management and the Senior Investment Officers of the Fund", and if "the process of challenging an investment is considered harassment, it is impossible for the OIM to function properly". The Complainant and the Applicant "had differences in how they viewed her role and the [the Investment Fund] investment as a whole", and "[v]oicing such differences is not harassment, and [the Complainant] admitted neither was her own far more harsh and personal criticism of the Applicant to the new RSG".

o. The Respondent has "assiduously avoided addressing" the issue of the protection against retaliation for reporting misconduct issue because "he knows that it provides justification for all the Applicant's actions". The Applicant "originally reported his concerns to the head of office on 1 March 2019 and followed this up with numerous subsequent reports, including the joint complaint to OIOS in July 2019 and subsequent report to the Secretary-General in March 2020. "Throughout this time there was no institutional response, not even an acknowledgment, other than attacks on the Applicant by the offenders".

p. According to the case record "the Applicant's concerns over the management of the $150 million [the Investment Fund] proposal was privately conveyed to [the former RSG] early as May/June 2019 … who

then conveyed the Applicant's comments to [the Complainant] and to other OIM officials". The "concern expressed over [the Complainant] was limited only to her experience in this particular area of Private Market investments". Despite "the Respondent's efforts to embellish her credentials, the fact remains unchallenged that she lacked the specific seven years' experience needed at the P-4 level in private investments", and the Respondent "has been unable to demonstrate that any of the Applicant's substantive comments were untrue or malicious". The "actual working relationship, while limited, remained cordial" between the Applicant and the Complainant, who "did not cite any specific direct personal harassment by the Applicant in her testimony".

q. The "accusation that the Applicant had instructed his team not to work with [the Complainant] was due entirely to the surreptitious manner in which [the former RSG] had acted to place her in charge of his pet project" as she was "never formally assigned to the Applicant's team".

r. Before the former RSG's "recusal from the $150 million [the Investment Fund] project, [the Complainant] stated that she was only assigned as an additional resource to [the Applicant's] team". The Respondent has "offered no explanation as to why the Applicant was subsequently removed from involvement in the infrastructure decision making and from all oversight" of [the Complainant].

s. In the Complainant's testimony to OIOS as well as to the Tribunal "it is clear [that her] concern was over the effects that criticism of [the former RSG] was having on her prospects for promotion" to the P-4 level. PG testified that "nothing the Applicant said could be considered harassment and that his decision to discontinue her TJO P4 as his assistant was consistent with an overall OIM-wide reduction of TJO staff". The Complainant was "never a TJO P4 in Real Assets or Infrastructure as there was no such position".

t. The Respondent's "case consists of a single email sent by the Applicant and in extracting comments from select OIM staff to suggest

some impropriety in their motives", which "essentially amounts to assuming private exchanges are official business". This "approach will presumably end by installing listening devices and cameras in hallways and bathrooms to capture office gossip", and all of "these extractions of conversations, often occurring in the course of the pandemic, were taken completely out of context and editorialized to infer an intent to damage" the Complainant.

u. The Respondent's "suggestion that [the Applicant's] witnesses have failed to prove his innocence overlooks his own burden of proof" as other "than [the Complainant] not a single witness has been produced (two of Respondent's Senior Staff witnesses refused to participate in the hearings) to support her prejudicial opinions about the Applicant and his colleagues". The Respondent "dismisses the corroborating testimonies of the Applicant's whistleblower colleagues as all part of a conspiracy to undermine [the Complainant], who was promoted to P-4 in Public Markets in January 2022, but he cannot dismiss [PG's] testimony as the Head of OIM in terms of what he witnessed and what he thought".

v. The Complainant's "motivation for filing this case in early June 2020 seemed to be a direct response to the unflattering way in which her actions on [the Investment Fund] transaction were stated in the OIOS Governance Audit exit interview on 28 May 2020 as she stated in an email to [the new RSG (PG)] on 1 June 2020". The "material presented in the 28 May 2020 meeting witnessed by [the Complainant], which could have significantly assisted the Applicant in his defense, [was] withheld by Respondent from both the Applicant and the Tribunal".

w. The "OIOS investigation report on [the Complainant's] complaint found there was no evidence of abuse of authority by the Applicant or that he influenced any decisions about her career".

39. The Respondent, in essence, contends that the case record shows with clear and convincing evidence that the Applicant harassed the Complainant and also abused his authority.

Whether the Applicant made disparaging remarks about the Complainant in front of other UNJSPF staff

40. The remarks which formed the basis for this complaint are that the Complainant was not competent to work at the P-4 level, that she lacked the qualifications and experience relevant to her role in the Real Assets team, and that she held an arts degree. The Applicant also questioned the Complainant's integrity by suggesting that she had an inappropriate relationship with the former RSG.

41. Under the list of agreed facts, the Applicant admits that in his 24 May 2019 email he stated that "I believe that the due diligence conducted on the fund by [WL and the Complainant] was not executed in a professional manner because of inexperience and many important questions on [the Investment Fund] remained unanswered, such as track record, counter party risk (no financial statements for the sponsor were given) and an excessive fee structure. It should be noted that neither of them had previously underwritten an infrastructure fund, nor are in my opinion qualified to do so without my supervision".

42. The Applicant also admits that in his 19 September 2019 email to which he attached the one of 1 March 2019, he stated that "I'm also concerned about have [the Complainant] become part of our group as a P4 without the proper search process. Frankly I do not see that [the Complainant] is even remotely ready to be P4 in infrastructure at this time. I believe she would need to be trained as a P3 in infrastructure for a considerable amount of time before she's ready to be a P4. Given the complicated transactions you would like to do an infrastructure, I would like to get a P4 at the level of [VK and DL, names redacted for privacy reasons] … who have recently left IFC in this position, who have great experience structuring complicated infrastructure deals at a capability level ... far above [the Complainant]".

43. The Applicant admits that on the same day (19 September 2019), he sent another email stating that, "I still believe that further investments in infrastructure, except for renewals with successful funds such as [name of fund redacted for privacy reasons], should wait until OIM hires a qualified P4 with seven years'

experience in infrastructure. As you know there is no one currently employed at OIM with those qualifications".

44. When the above emails were put to him during his subject interview, the Applicant acknowledged that the wording "she's not even remotely ready" was probably "a little strongly worded". He, however, explained that he wanted to be sure that he was clear that the former RSG had hired the Complainant at the P-4 level, which he thought was inappropriate. He also thought that she was not ready for a P-4 level post as her experience was in public equities which differed from the work undertaken by his team. He thought that the Complainant and others were trying to please the former RSG as "there was a pattern of behavior of dangling promotions to get people to do things and the Senior Investment Officers were seen as an obstacle".

45. Still about the 19 September 2019 email, the Applicant stated that "normally he wouldn't do that, but this wasn't a normal situation", and that when he wrote it, he intended it to be a private e-mail. If he knew it was going to be attached to the 19 September e-mail, he "probably would have re-worded it. I would've just said something like to not have the required seven years' experience"; however, it was the email he wrote, and he had to use it when he sent the 19 September 2019 email. He felt that the fact that the former RSG had tried to push this inappropriately needed to be discussed. He did not think it was the Complainant's problem. She was given an opportunity that she took. His issue was with the former RSG. The Applicant, however, did not regret writing the email. "I had to write it".

46. In his oral evidence, the Applicant explains that his concerns were more about the process than about the Complainant. Further, that his concern was not so much about her qualifications; rather, he questioned the fact that she was at a very junior level, yet she was assigned to a high-profile transaction.

47. The Tribunal notes that one of the emails in issue bears the statement that "I believe that the due diligence conducted on the fund by [WL and the Complainant] was not executed in *a professional manner because of inexperience*". {emphasis added}

48. Professionalism and experience are acquired and have nothing to do with processes. The fact that the Applicant's concern is that the due diligence was not conducted in a professional manner because of inexperience nullifies the explanation that his concerns were more about the process than about the Complainant. The Applicant's explanation moreover contradicts the statement in the email that "It should be noted that neither of them had previously underwritten an infrastructure fund, *nor are in my opinion qualified to do so* without my supervision" (emphasis added}. There can be no doubt that this statement is about the Applicant's qualifications.

49. In his oral evidence, the Applicant suggested that since his concern is that the Complainant did not have qualifications, she either has them or not. In other words, to him, the issue is about her qualifications. It should not be considered as harassment.

50. In the Tribunal's view, the above explanation would only be valid if it were proved that the statements were either correct or justifiably made.

51. As far as qualifications are concerned, uncontradicted evidence is that the Complainant has undergraduate and graduate degrees in economics and finance and is a Chartered Financial Analyst (CFA). Moreover, the Applicant's oral evidence contradicts the statements attributed to him in the various emails. He testified that he did not say that the Complainant was not qualified, thereby nullifying his statements in the various emails.

52. The Applicant's oral evidence, coupled with the fact that the Complainant has the qualifications, nullifies statements in the various emails that she does not have the relevant qualifications. The assertion that the Applicant stated that the Complainant has an arts degree is rejected because it was not corroborated.

53. Regarding the Complainant's experience, she testified without contradiction that before she was appointed Special Assistant to the former RSG, she had work experience in public and private investment areas. She had over 18 years of experience in investment management with the UNJSPF, having also worked there as an assistant at the General Service level before joining at the Professional level.

She had infrastructure analysis experience in North America which is the focus. She also analyzed companies which had energy specific infrastructure, such as pipelines or energy terminals, and natural gas thermals. She has recommended investments entering those sectors, and utility companies which have, for example, wind or renewable energy. She worked for the department for infrastructure and natural resources in the International Finance Corporation, which is the private sector branch of the World Bank Group. She was involved in underwriting much more complicated transactions.

54. The Applicant has not provided the basis for the assertion that the Complainant has no experience. He admitted that he has never discussed the Complainant's professional qualifications and investment experience with her, and that she has never formally submitted her personal history profile (a *curriculum vitae*-type document used at the United Nations) to him for consideration. He admitted that he has never interviewed her.

55. Regarding the assertion that the Complainant was irregularly assigned to the position, her uncontroverted evidence is that the temporary job opening at the centre of the Applicant's concerns was advertised and several candidates, including her, applied. She testified without contradiction that she was interviewed and selected. This nullifies the concern that she was irregularly selected for the position. Based on the foregoing, the Applicant's concerns that the Complainant was irregularly selected for the P-4 level position were not well-founded.

56. According to the emails attributed to the Applicant, the P-4 level position required 7 years' experience. The Complainant, however, testified, again without contradiction that she has 18 years' experience in the subject area. Based on this, the Tribunal accepts that contrary to the Applicant's assertions, the Complainant has both the relevant qualifications and experience.

57. Both the Complainant and the former RSG stated in the subject interviews that the Applicant had previously commended the Complainant's work on the Investment Fund investment, but that his opinion only changed after unfavourable changes in reporting lines were made (according to the former RSG), and when the Complainant made unfavourable assessments of the Applicant's work (as per the

Complainant). The Tribunal notes that the Applicant does not challenge or deny these assertions.

58. The foregoing factors form fair ground for a conclusion that the Applicant's concerns were convenient excuses for the expression of his dissatisfaction with unfavourable administrative decisions or assessments. Indeed, in his interview statement, and to some extent in his oral evidence, the Applicant admitted that his real problem was with the former RSG, and that the Complainant was a mere victim of the situation. As already noted, in his oral evidence, the Applicant states that he does not challenge the Complainant's qualifications, which contradicts the information in his emails.

59. The above considerations, coupled with the undisputed evidence that the Complainant has both the relevant experience and qualifications, and that her selection for the temporary job opening followed a competitive process leads to no other conclusion than that the Applicant's concerns against the Complainant are without basis.

60. During the subject interview, the Applicant conceded that the statement that "she's not even remotely ready" was probably "a little strongly worded", and that "normally he wouldn't do that", but that "this wasn't a normal situation". He explained that when he wrote the email, he intended it to be a private email. Had he known that it was going to be attached to the 19 September 2019 email, he "probably would have re-worded it. I would've just said something like to not have the required seven years' experience". The Applicant also conceded that the Complainant is a victim of a problem he had with the former RSG.

61. The assertion that the Applicant intended the email to be private is unsupported. The email does not, for instance, bear evidence that it was meant to be private by insertions such as "private email", "not for wider distribution" or similar. It was originally copied to one more person. This removed it from the realm of privacy, since it was distributed beyond the addressee. That it was later attached to an email which had an even wider public audience negates the assertion that it was meant to be private. The Applicant's assertion is therefore rejected. That strong

language was used as is conceded supports the conclusion that the attacks were "extremely offensive" and hurtful to the Complainant as per her subject interview.

62. Based on the foregoing considerations, the Tribunal finds that the Complainant had the relevant qualifications and experience. The Applicant's attacks are neither well founded, nor do they constitute a fair response or comment in the circumstances. The concerns are defamatory of her professionalism and integrity.

63. In resolution of the issue which is the subject of this part of the judgment, the Tribunal finds that the Applicant made disparaging remarks about the Complainant in front of other UNJSPF staff.

Whether the Applicant isolated the Complainant at work

64. The Respondent seeks to rely on the Applicant's emails of 6, 8, and 27 March 2019, to prove that the Applicant requested that his team members exclude the Complainant from meetings and groups and that on his orders, OIM staff refrained from working with her.

65. The Applicant does not deny that he emailed EC on 6 March 2019, copying his whole team, asking them to: "Please also drop [the Complainant] from [the Investment Fund], as she is not a member of our team. Anyway, wasn't this approved in the previous meeting?" EC replied: "Per your request, I took [the Complainant] off from [the Investment Fund], but I never put her in [the former RSG] did. Definitely feel free to address that with him should he revert back".

66. Given that the Applicant's actions took place during the time he was actively challenging the Complainant's position in the team, his explanation that he asked that the Complainant be dropped because he thought that her inclusion had been by mistake does not nullify the allegation as laid. EC's reply indicates that the issue was still alive, the reason she clarified that "but I never put her in—[the former RSG] did. Definitely feel free to address that with him should he revert back".

67. The Applicant does not dispute the contents of the 8 March 2019 email from WL that "You have told me yesterday in our meeting of four [with NH and GS] that

am not to work with [the Complainant] on [the Investment Fund]". He has not provided a reasonable explanation for his instructions to the four members of staff not to work with the Complainant.

68. In the 27 March 2019 email to NH, the Applicant proposed to have lunch with two departing investment officers of the IFC infrastructure fund, namely VK and DL, and added, "Please keep this between us as I don't want [the Complainant] to be there."

69. At the oral hearing, the Applicant explained that the Complainant was not assigned to the team, and that he wanted to make sure that it was clear that only team members were going to participate since they were not in the habit of inviting non-team members to lunches.

70. The Applicant's instructions to NH would not be warranted had it been true that the team was not in the habit of inviting non-team members to lunches. That the Complainant was singled out can only mean that she is the only one who the Applicant did not want at the lunch. This supports the charge that he isolated her at work.

71. WL's unchallenged statement that the Applicant made disparaging comments to her about the Complainant's experience in infrastructure and told her that she (WL) was not to work with her on the Investment Fund deal is also relevant to this charge.

72. GS also stated in his subject interview that the Applicant told him that the Complainant was not appropriate for the team and that she did not have a lot of experience in the sector. Further, that the Complainant did not have a place in the Organization; and that the former RSG was trying to find places for her to work, which was why she had been inserted into an infrastructure project.

73. At the hearing, the Applicant explained that he told GS that the Complainant was on a temporary job opening position which was to expire soon, and she had to find a different position or go back to her original P-3 level position. While the Applicant's explanation confirms that he talked to GS over the issue, it is recalled that GS was not cross-examined on her statement which was made before

investigators. Given that the Respondent bears the burden of proof (see, for instance, the Appeals Tribunal in *Nimusiima* 2024-UNAT-143, para. 90), the fact that GS was not cross-examined on his statement, which is not even corroborated in any way, and since the statement is contradicted by the Applicant's explanation, the Tribunal determines that GS's statement cannot form the basis for a conclusion that the Applicant made the statements attributed to him.

74. Based on the contents of the emails of 6, 8, and 27 March 2019, and on WL's evidence as discussed at para. 67 above, however, the Tribunal finds that the Applicant isolated the Complainant at work.

Whether the Applicant created a hostile work environment for the Complainant

75. The Tribunal agrees with the Respondent that the Applicant's derogatory comments and his isolation of the Complainant at work created a hostile work environment. The Complainant's testimony that the Applicant created a hostile work environment and humiliated her is therefore accepted.

76. The Applicant argues that the criticism that the Complainant did not have the necessary experience and expertise to operate independently as an investment officer at the P-4 level represents "disagreement on work performance or other work-related issues", which is normally not considered prohibited conduct and is not dealt with under the provisions of the harassment policy.

77. While it is true that disagreement on work performance or on other work-related issues is normally not considered prohibited conduct in accordance with sec. 1.1 of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), the Applicant's concerns should have been well-founded and not just abusive criticism for his comments to be protected under the anti-harassment framework.

78. The Respondent adduced substantial evidence disproving the assertions that the Complainant did not have relevant qualifications and experience, and that she was selected for a P-4 level position without going through a formal selection process. The Applicant admitted there was no basis for his assertion that the

Complainant did not have relevant qualifications. It was on this basis that the Tribunal found that his concerns were not well-founded and constituted abusive criticism.

79. The whole matrix of evidence and the law support the conclusion, as the Tribunal does, that there is clear and convincing evidence that the Applicant's actions constituted unwelcome conduct and caused offence or humiliation to the Complainant. There is clear and convincing evidence that his actions interfered with work and created an intimidating, hostile or offensive work environment for the complainant. The Tribunal finds that the allegation that the Applicant harassed the Complainant was supported by clear and convincing evidence.

Abuse of Authority

80. Abuse of authority is defined in the following terms in sec. 1.8 of ST/SGB/2019/8:

> … Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses their influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation, working conditions or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

81. It is alleged that in emails to OIM staff, the Applicant made derogatory remarks about the Complainant's work and integrity. The contents of the emails included disparaging remarks about the Complainant's background and work and her relationship with the former RSG.

82. The Applicant does not deny that he sent an email to TB on 17 October 2019, in which he called the former RSG's devotion to the Complainant unnatural. In his testimony, he explains that he based this comment on the fact that there was an inner circle of people that seemed to have very special treatment, and that what

the Complainant and the inner circle were doing was a mystery. This, however, does not support the conclusion that the Complainant had an unnatural relationship with the former RSG. His further explanation that he obtained a copy of an email in which the special group were invited to a cocktail party at the RSG's home, and yet he has never been invited to such a cocktail party, does not support his conclusion that there was an unnatural relationship between the two.

83. The Applicant does not deny that in the 23 July 2019 email to HT, EC, MS, TW and TB (names redacted for privacy reasons), he wrote that he needed to provide a witness list to OIOS, and said, "I would avoid [the Complainant] as she will lie".

84. He admits that on the 27 January 2020, he wrote to the same group on the subject, "timeline on [the Complainant]", stating that "I put together a timeline on [the Complainant]— picking up the few statements I made about her (in red). At the end I put in the statement from the [electronic performance appraisal system]. I really think the 'conduct' case is absurd, but I thought I would put it all together for everyone to review".

85. The timeline contained the Applicant's concern about the Complainant's becoming part of "our group as a P4 without the proper search process. Frankly, I do not see that [the Complainant] is even remotely ready to be a P4 in Infrastructure at this time. I believe she would need to retrain as a P3 in infrastructure for a considerable amount of time before she is ready to be a P4".

86. The Applicant's explanation that he shared the timeline to establish his colleagues' view of the text of his three emails (of 1 March, 14 June and 19 September 2019) in the context of the harassment allegation does not nullify the complaint that he circulated offensive information against the Complainant.

87. He also wrote that "[He is] worried that the gender parity issue may allow [the Complainant] to get the 2nd P-4 slot for [North America] equities over [MM, name redacted for privacy reasons]. Can you guys watch this carefully? Since it is a [general temporary assistance, "GTA"] post, it will be hard to get qualified external female candidates for this post (it is only a 1-year post for externals). We

don't want [the Complainant] to get it by default. I hope that [the new RSG] knows that this is one case where he has to make an exception. Of course, [the Complainant] will likely file a complaint if she is not selected" (email of 5 November 2020 to OIM colleagues).

88. The Applicant is also alleged to have made derogatory remarks about the Complainant's work and integrity in emails dated 11 April 2020 and 25 May 2020, to the new RSG, in an effort to harm her professional reputation.

89. In his oral testimony, the Applicant admitted that he contacted the new RSG over the Complainant, and emailed the new RSG on 11 April 2020, stating:

> I was surprised after our conversation last week about [the Complainant] stepping down from Infrastructure and my taking over, that [HB] was still introducing her as head of infrastructure Friday and that she is pushing through an infrastructure transaction in the next PMC. If you would like me to handle this asset class I would appreciate if you could communicate this to [HB and the Complainant] as soon as possible.

90. The Applicant further stated that, after he recommended the rejection of the Investment Fund transaction to the PMC, he questioned the "professional judgment of all three of these individuals, [the Complainant, HB, and WL] that leads [him] to question anything they do in private markets".

91. The new RSG testified that upon his appointment with UNJSPF, he had discussions with the Applicant regarding the Complainant, and that they had several exchanges, both via MS Teams and email. Further, that the Applicant expressed concerns regarding the Complainant, who he believed was not the best person to be involved in the infrastructure projects. He also expressed a refusal to hire her as a P-4 level staff in infrastructure. In his assessment, she was not qualified to do infrastructure projects.

92. Other allegations are that the Applicant attacked the Complainant's professional experience and competence in front of the Real Assets Team with specific staff members, including NH, WL, and GS. Further, that on 19 September 2019, he sent an email titled "Special Meeting of Private Markets Committee (PMC) on [the Investment Fund]" with two attachments to the former RSG and 33

others, including many senior OIM staff members, criticizing the Complainant's professional experience and capacity to assume a P-4 level position requiring infrastructure investment experience.

93. He sent a second email on the same day (19 September 2019) to the same distribution list stating that, "I still believe that further investments in infrastructure, except for renewals with successful funds such as [name redacted], should wait until OIM hires a qualified P4 with seven years' experience in infrastructure. As you know there is no one currently employed at OIM with those qualifications".

94. The Applicant seeks to discount the argument that the email of 19 September 2019 was intended to curtail the Complainant's career aspirations on the ground that he had no control over or interest in her career as an Investment Officer in North American Equities. Also, that he had no decision-making authority over the proposed P-4 level infrastructure position, which never materialized due to the former RSG, and he was never her reporting officer. Further, that she has demonstrated no harm to her career, but on the contrary is still gainfully employed by the UNJSPF in OIM and promoted from the P-3 to the P-4 level as of 1 January 2022.

95. The prevailing legal regime, however, only requires that the abuser has improperly used a position of influence, power or authority against another. There is no requirement that the abuser should have direct decision-making authority, control and interest with regard to the affected individual's career. The position of influence, power or authority does not have to be of a direct senior-to-junior nature. Moreover, the policy ascribes abuse of authority a wider meaning in that it includes conduct that creates a hostile or offensive work environment. This nullifies arguments that the Applicant had no control over or interest in the complainant's career, and that he had no decision-making authority over the proposed P-4 level infrastructure position.

96. The following statements prove that the Applicant was in position to influence the Complainant's deployment (emphasis added):

a. "*I refused to bring on [the Complainant]* on as a P4 infrastructure into the real assets group (I was fine with her as a P3)",

b. "… Frankly, I do not see that [the Complainant] is even remotely ready to be a P4 in Infrastructure at this time. I believe she would need to retrain as a P3 in infrastructure for a considerable amount of time before she is ready to be a P4";

c. "I am worried that the gender parity issue may allow [the Complainant] to get the 2nd P-4 slot for NA equities over [MM]. Can you guys watch this carefully? Since it is a GTA post, it will be hard to get qualified external female candidates for this post (it is only a 1-year post for externals). *We don't want [the Complainant] to get it by default*. I hope that [the new RSG] knows that this is one case where he has to make an exception. Of course, [the Complainant] will likely file a complaint if she is not selected";

d. The Applicant even proposed to talk to the hiring manager to ensure that the Complainant would not get the P-4 level position, and even inquired whether anybody was "close to [PP?] so that we can talk to him on this issue?"; and

e. "I was surprised after our conversation last week about [the Complainant] stepping down from Infrastructure and my taking over, that [HB] was still introducing her as head of infrastructure Friday and that she is pushing through an infrastructure transaction in the next PMC. *If you would like me to handle this asset class I would appreciate if you could communicate this to [HB and the Complainant] as soon as possible*";

97. The Complainant stated in her subject interview that she was "shocked that the Applicant would circulate this to the most senior people in OIM, including the entire [Senior Management Team] and all team heads, as well as a number of other people who were in a position to judge on her future career moves and qualifications within OIM." She further stated it was "extremely shocking but also extremely humiliating for me to experience and to be honest, I was quite upset about that".

98. The Tribunal's findings at paras. 40-79 above that: (a) the Applicant wrote the emails containing offensive statements; (b) his concerns were without basis; and (c) his conduct created a hostile work environment against the Complainant, are relevant to the resolution of this issue.

99. The statements at para. 96 represent improper use of a position of influence, power or authority by the Applicant against the Complainant. This, coupled with the offensive nature of the attacks and the extent to which the Applicant went in terms of the publicity he gave the comments and persistence with which he made them, form the basis for a finding that there is clear and convincing evidence that the Applicant created a hostile or offensive work environment for the Complainant. The Applicant abused his authority in terms of sec. 1.8 of ST/SGB/2019/8.

Whether the Applicant disclosed confidential and commercially sensitive information about the Investment Fund transaction to the media

The issue

100. The Applicant is alleged to have disclosed information, denoted as confidential, to the media.

101. The Applicant's first line of defense is that at the time of the alleged disclosure, there was no directive providing guidance on dealing with media inquiries to OIM. He, however, contradicts himself when, in cross-examination, he states that at the time this happened the policy was not very clearly articulated, but that it was "later better articulated", meaning that the policy in fact existed.

The parties' submissions

102. The Applicant's contentions may be summarized as follows:

a. There is "absolutely no evidence the Applicant ever shared any confidential internal documents with any external sources". The Complainant's "supposition that because the Applicant's name is mentioned in one article, he must be the source, is simply conjecture". MR, "who was never interviewed by OIOS, confirmed she received the Applicant's private

commentary on his protected activity and it was her decision to share these comments with the journalist". Instead, HB is "cited as the primary contact and is cited by name in the report which also referenced [the former RSG's] extensive submission to the PMC". It is "more than likely it was they who originally shared the documents, as the reporter merely called the Applicant to comment on them", and it "could even have been [the Complainant] herself".

b. It is "also revealing that [the Complainant] never considered allegations against [MR] prior to her retirement". The Complainant "wrongly attributed blame to the Applicant for the hearsay conversations with" PG.

c. Throughout this case, the Respondent "has intentionally conflated the roles of the Applicant with those of the staff representative, [MR], whose mandate was quite different from his". Her "testimony corroborates his own that he did not convey any official or sensitive information to the press and it was she, not the Applicant, who shared his comments on the violations of OIM guidelines". The Respondent "cannot identify any instance or any confidential information conveyed by the Applicant and has avoided addressing his protected status for reporting misconduct to external sources outlined in the relevant whistleblowing instruction".

d. The Respondent "ignores that prior to [the new RSG's] arrival, there was no written instruction on how to respond to public inquiries but that it was not an uncommon practice". The Respondent's "case consists entirely of conjecture" and he "can point to no evidence the Applicant initiated any contact with [FF, the news media reporter] nor provided her any confidential documentation".

103. The Respondent, in essence contends that there is clear and convincing evidence that the Applicant disclosed commercially sensitive and confidential information to the media, specifically by leaking confidential information to FF.

Discussion

104. One of OIOS's findings is that OIM had an internal policy on information sensitivity, classification of documents and records management, which is in addition to the bulletins of the Secretary-General: ST/SGB/2007/6 (Information sensitivity, classification and handling), ST/SGB/2007/05 (Record-keeping and the management of United Nations archives) and ST/SGB/2004/15 (Use of information and communication technology resources and data). OIOS found that the policy was last approved on 1 July 2019 by the former RSG.

105. The new RSG, who testified to the existence of a policy, explained in an email dated 25 March 2022 to OIOS that "[i]f a crisis management incident response was required, no OIM staff were authorized to speak to the media without permission of the Crisis Management Team and, in particular, if it was an incident affecting OIM's public image, the established process was to contact the United Nations Spokesperson's Office in order to make an official statement".

106. In his testimony, the new RSG further explained that some of the provisions in the policy were that staff members could not have opinions on individual investments outside the office, and that one had to seek approval from the RSG or the supervisor to speak to the media. Also, that sharing of internal working documents with the media should not happen.

107. Regarding members of staff interacting with the media, the new RSG stated in an email dated 12 May 2022 to OIOS that: "[there are] two principles that need to be followed regarding engagement with the press. The first principle is that our mandate does not require any of us to proactively approach the press. The second principle is that if somebody from the press approaches an OIM staff member, that staff member should inform her/his supervisor to define, if suitable, an adequate response".

108. SB (name redacted for privacy reasons) also explained in her subject interview that staff members were advised not to engage with the media and to direct journalists to the United Nations Press Office, noting that "we went to great lengths to protect our confidentiality". She further explained that "we made a big deal about confidentiality because we didn't want anybody to be trading against us

in the markets … [t]his direction came from the then RSG, [WS, name redacted for privacy reasons)".

109. The Tribunal notes that the tone of some of the email exchanges indicates that the Applicant and his colleagues were aware of the existence of the policy. That is why they were guarded in the way they interacted with the reporter, with the Applicant having an "off the record" chat with her as per his 11 December 2019 email to MR and having "concerns around potential retaliation consequences." These considerations, coupled with the evidence as laid out above, leave assertions that there was no policy unsupported. The Tribunal finds that there was a policy on outside media activity and reporting.

110. At the oral hearing, the Applicant admitted that he spoke to the reporter (FF) and that he did not have permission to speak to the media when he did.

111. The Tribunal notes that the fact that the information in issue was confidential and commercially sensitive is not disputed. The only issue therefore is that of disclosure of the information.

112. According to the Respondent, the Applicant corresponded with FF prior to her publication of two articles in 2019 and 2020. Further, he discussed details about confidential internal OIM matters with her and, in an email exchange between him, EC, TB, AR, TW and TH (name redacted for privacy reasons) on 12 December 2019, shared her contact information with other senior staff at OIM, encouraging them to contact her to discuss internal OIM matters.

113. The Applicant maintains that it was the reporter (FF) who called him, but that he tried to respond to her questions in a professional manner. He denies that he gave the reporter any documents, and that he is responsible for the content of her article. He is emphatic that he is not responsible for what the reporter may have obtained from others.

114. Excerpts of the emails are reproduced below for the Tribunal to appreciate their import. (emphasis added):

a. Email exchange from TB to the Applicant from 4 and 5 December 2019 informing him that he: "Spoke to [a news media] … let me know when you can chat" and "the [news media] reporter (a young woman) was most focused on [the Investment Fund] deal and the circumstances around the [United Nations] approval process … she identified you as the [Senior Investment Officer] for RE/RA [unknown abbreviations] I did not reveal you, but confirmed you/your role after she mentioned your name ... she would like to talk to you directly, as *she had detailed questions that I could not answer ... I do think you should consider this ... She seemed to realize that there is more to this situation than just [the Investment Fund] angle and was quite interested in following up on the state of OIM*".

b. The Applicant's email dated 6 December 2019 to TB, copying other OIM staff members, titled, "Supplemental Information—[the Investment Fund]", in which he confirmed disclosing information to the news media in relation to the former RSG's appointment of the Complainant to the Investment Fund transaction. He wrote that "*I just wanted to make sure this supplemental information, which is not in my memos, gets to the [news media] reporter*".

c. TB's email dated 10 December 2019 forwarding to the Applicant an email exchange that he had had with FF about the Applicant's concerns with speaking to her: "I did speak with [the Applicant] and he does not wish to speak directly with you on the topics we discussed … he has concerns around potential retaliation consequences, from the RSG, and prefers to remain anonymous ... this is an unfortunate fact facing those still within the organization ... I recommend working through [MR] ... should you need further follow up, I would be glad to accommodate you, as much as possible...".

d. FF's email response to TB on the same day in which she stated: "No problem [unknown sign] I respect his decision to remainn (sic) off the record. Unfortunately I only have a redacted version of the memo he sent to the private markets committee voicing his objections to the Investment Fund

investment. I need a non-redacted version to include it in the story and adhere to the [new media] editorial standards. Would you be able to send me the memo in its original version?".

e. The Applicant's email dated 11 December 2019 to MR, noting, "I had [a] good off the record chat with the [news media] lady today. She would not say that she talked to the RSG—but apparently he sent her the minutes of the August 27th meeting none of it redacted plus the stepstone memo—pretty amazing. I think it will not be a good article for him. I am glad I got the last word".

f. The Applicant's email dated 12 December 2019 to FF confirming their prior discussions, providing his personal email address, and asking her to send him a copy of [news media] article.

g. FF's email dated 12 December 2019 responding to the Applicant confirming their prior discussions.

h. The Applicant's email dated 12 December 2019 to OIM staff in which he stated that FF is willing to speak with them "off the record" on the work of OIM. The Applicant's email also included FF's contact details.

i. The Applicant's 21 July 2020 email correspondence with MR that FF "emailed to get a copy of the OIOS audit (she read the blog post). *What is the best way to get it to her? I can send it, but I don't want to implicate you*".

j. The Applicant's additional email correspondence with MR in 2019 and 2020. These emails were about the Applicant and TB getting in contact with FF, suggesting what could be posted, and MR providing advice on and acting as a conduit between OIM staff and FF.

115. The Applicant denies that he gave the reporter any documents, and that he is responsible for the content of her article. He is emphatic that he is not responsible for what the reporter may have obtained from others.

116. The following statements, however, confirm that the Applicant shared confidential information on the Investment Fund transaction to the media:

a. "[T]he [news media] reporter (a young woman) was most focused on [the Investment Fund] deal and the circumstances around the [United Nations] approval process … she would like to talk to you (Applicant) directly, as she had detailed questions that I could not answer ... I do think you should consider this..." (email exchange from TB to the Applicant from 4 and 5 December 2019).

b. "I [the Applicant] just wanted to make sure this supplemental information, which is not in my memos, gets to the FT reporter" (email dated 6 December 2019 from the Applicant to AR, MS, and HT).

c. "I [the Applicant] had [a] good off the record chat with the [news media] lady today", (email dated 11 December 2019 from the Applicant to MR) and that

d. FF "emailed to get a copy of the OIOS audit (she read the blog post). What is the best way to get it to her? I [the Applicant] can send it, but I don't want to implicate you" (email dated 21 July 2020 from the Applicant to MR).

117. In the Applicant's 6 December 2019 email to TB, AR, MS and HT, he stated that (emphasis added):

> "[TB's first name]—I *sent this* to [MR] to forward to the [news media].
>
> [MR's first name],
>
> I just wanted to make sure this supplemental information, which is not in my memos, gets to the [news media] reporter.
>
> The [former] RSG recused himself on [the Investment Fund] transaction in the May 10th PMC meeting saying he had a conflict of interest because the former head of the World Bank [name redacted for privacy reasons] was hired by [the Investment Fund] in February …
>
> …

> As mentioned in my memo, we have always required staff and management to agree on any illiquid investment in a 'dual key' arrangement. But by proposing this transaction under pressure from Goldman and using inexperienced staff [the Complainant] for due diligence and avoiding my involvement he was effectively approving his own transaction which is a violation of his fiduciary duty as RSG.
>
> …

118. This email leaves no doubt that he shared confidential information on the Investment Fund transaction to the media, and that he is responsible for what the reporter obtained from MR. It also nullifies the Applicant's assertion that his discussion with the reporter (FF) was basically related to misconduct and the RSG. Moreover, the suggestion that discussions of misconduct and the former RSG, if unauthorized, do not constitute disclosure of confidential information is fundamentally flawed.

119. The Applicant does not deny that he provided his personal email address to the reporter (FF) and asked her to send him a copy of the article. This is confirmed by the contents of his email of 12 December 2019 to the reporter. The reporter's response to him that "[i]t was great speaking with you as well! The article has been written and I assume it will be published later today or tomorrow [or] when my editor is done looking at it so keep you updated and send you a copy" confirms that the information which the Applicant disclosed was published. He is therefore responsible for the content of the reporter's article.

120. The Tribunal finds that there is clear and convincing evidence that the Applicant disclosed confidential and commercially sensitive information about the Investment Fund transaction to the media.

Whether the Applicant engaged in unauthorized outside activities by working with an external entity, CMRR, in senior administrative and operational positions

The issue

121. The Respondent maintains that the Applicant engaged in unauthorized outside activities by working with CMRR as President, Chief Executive Officer, Director, and Staff Coordination since 2006. He also owned approximately 100

CMRR shares that were not disclosed in his 2019-2021 United Nations Financial Disclosure statements. It is also alleged that he used the photocopiers at the United Nations to scan contracts and correspondence he had signed as President of CMRR, and that he performed his CMRR functions during his official working hours.

122. While admitting his involvement with CMRR, the Applicant maintains that the entity was neither an occupation nor employment. Further, that it was non-profit volunteer work, which is specifically authorized under ST/AI/2000/13 (Outside activities), sec. 5, as private non-remunerated activities for social or charitable purposes. While he admits that he had shares in the entity, he claims that they had only nominal value and produced no income. He also argues that the requirement for their disclosure had not been set forth in any directive or instruction that the Respondent can cite.

The parties' submissions

123. The Applicant submits that "[t]his is an example of fishing for an issue to raise". The "allegation covering [his] participation in antique railroad activities 90 miles from New York City over the years is nothing more than a trumped-up charge". The Applicant "disclosed the activities upon his recruitment and was told it was not necessary to report them". There "was no income to report either". Had "the Administration followed its own procedures, it would have gone to the Ethics Office and used its External Reviewer for an opinion, but it chose instead to just use it as an additional argument". The "circular governing outside activities [ST/Al/2000/13] specifically exempts social or charitable activities not involving remuneration". The Respondent's arguments "on engaging in outside activities are entirely misplaced" as there is "no prohibition against unremunerated activities in connection with a social activity, whether it is registered as for-profit or not-for-profit". There "is a reason the Respondent has not sought an opinion on this from the Ethics Office", and PG "testified at the hearing that UNJSPF followed the general United Nations' policies on outside activities to the letter".

124. The Respondent, in essence, contends that there is clear and convincing evidence that the Applicant engaged in unauthorized outside activities by working

for CMRR in senior roles performing operational and administrative functions since 2006.

Discussion

125. In his oral evidence the Applicant maintained that he did not consider the CMRR activity to be an outside activity needing approval. He explained that he was involved in it before he joined the United Nations, and he mentioned it to his first Director (and to the first Compliance Officer, both of whom felt it was not reportable since the Applicant was a volunteer in the entity. At that time, the compliance procedures were much looser than they are today. As far as he was concerned, the entity was a charitable community service organization in which he did not make any money. His involvement in it was therefore non-reportable.

126. Clearly, the Applicant does not deny that he did not disclose his involvement in CMRR. He only maintains that he was not legally bound to disclose his interest because the entity is a non-profit volunteer/charitable community service organization for which he was doing voluntary work.

127. The Applicant's assertions are, however, contradicted by information on the entity's website, which was submitted in evidence, in which CMRR is described as a for-profit organization, which depends on ticket sales and volunteer efforts to operate. The Applicant confirms that he owns shares in the entity. This is confirmed by the information in an email dated 22 December 2013 from the Applicant in which it is indicated that the Applicant owned 14 shares at the relevant time.

128. The Applicant is privy to the contents of a brochure/flyer of CMRR in which its commercial operations and program are described. This was submitted in evidence and served on him as part of the pleadings. He, nonetheless, failed to comment on, or even dispute its contents which contradict his account. The only reasonable conclusion is that what the document bears is authentic. Based on this, the Tribunal finds that CMRR is a for-profit entity. The Applicant was therefore legally bound to disclose his interest in it.

129. The Applicant's explanation that his use of United Nations issued equipment for private work was the inevitable result of the COVID-19 pandemic lockdown has not been contradicted. The explanation is therefore accepted.

130. Since he did not disclose his interest (shares) in CMRR, the Tribunal finds that there is clear and convincing evidence that he engaged in unauthorized outside activities by volunteering with an external entity, CMRR, in senior administrative and operational positions.

The facts established after the Tribunal's review

131. The Tribunal finds that the facts presented by the Respondent have been established by clear and convincing evidence, namely that the Applicant;

a. harassed the Complainant by making disparaging remarks about her in front of other UNJSPF staff, isolating her at work, and creating a hostile work environment for her that jeopardized her professional duties and career;

b. made derogatory remarks about her work and integrity in emails to OIM staff and to the new RSG, dated 11 April 2020 and 25 May 2020, in an effort to harm her professional reputation,

c. disclosed confidential and commercially sensitive information to the media about the Investment Fund transaction, and

d. engaged in unauthorized outside activities by working with an external entity, CMRR, in senior administrative and operational positions,

Whether the established facts legally amount to misconduct under the applicable Regulations and Rules

<u>The parties' submissions on misconduct and proportionality</u>

132. The Applicant's contentions may be summarized as follows:

a. The "case against the Applicant, which is based on accusations made after receiving whistleblower protection for engaging in a protected activity, unfortunately exemplifies the Respondent's institutional failure to protect those who come forward to report wrongdoing".

b. The Applicant's "fiduciary duty compelled him to speak out against the mismanagement of the 80-billion-dollar [United Nations] Pension Fund, which belongs to the staff who work for the Organization, and for which over the years the Applicant and his colleagues in OIM helped achieve a consistent positive rate of return by adhering to mandated policies". Although "the Respondent argues that the Applicant's whistleblowing is irrelevant to the allegations, if reporting misconduct and abuse of authority by senior officials is not wrong, and is in fact a duty, then the actions and communications pursuant to that activity cannot be wrong".

c. The Respondent's "harassment policy specifically provides that disagreement on work performance or other work-related issues is normally not considered prohibited conduct and is not dealt with under the provisions of the harassment policy". This "would include the criticism that she did have the necessary experience and expertise to operate independently as an investment officer at the P-4 level. Her P-3 role in public markets or her role as Special Assistant to the RSG were never questioned, contrary to her unsupported assertions".

d. The "ultimate proof of whether the Applicant's concerns were well-founded or just abusive criticism rests with the Respondent who has refused to share the results of two Special Reports by OIOS that examined this very question", and the Tribunal "may draw its own conclusion from this".

e. "The Applicant could have taken the easy route through all of this and let [the Investment Fund] transaction occur". If "he had not objected, this case would have never happened and he would still be at OIM. However, to protect the beneficiaries and participants he chose, along with his colleagues, to use the proper processes to report misconduct, retaliation and abuse of authority". Although "he paid dearly for this for years, first

from the former RSG and more recently from the [United Nations] itself, the Applicant still believes he did the right thing standing up for [United Nations] principles, and using the proper channels to protect the beneficiaries and participants of the Fund and would do so again".

f. The Respondent's submission that sec. 4 of ST/SGB/2017/2/Rev/1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations] "for reporting misconduct externally is inapplicable since in August 2019, OIOS responded". However, "the response was that OIOS would not investigate but instead had forwarded the complaint to" the United Nations. "Due to the lack of any further response by [the United Nations], after interventions by the Union and Board members, the Applicant with his whistleblower colleagues, had to take their case directly to the Secretary-General in March 2020, apparently resulting in the termination of the former RSG two weeks later". "Despite that, no further response was received until 2021 saying the case had been closed".

g. The "issue of proportionality is raised in connection with the disparate treatment afforded to other OIM staff who engaged in similar behaviour and the Applicant's unblemished sixteen-year career as a dedicated fiduciary for the participants and beneficiaries safeguarding the investments of the Pension Fund".

133. The Respondent, in essence, contends that the Applicant engaged in compound misconduct and that the sanction was a reasonable exercise of the Secretary-General's discretion in disciplinary matters.

Discussion

134. Save for the Applicant's argument that he is legally protected, which has been rejected, he does not contest the fact that each of the allegations against him amounts to misconduct under the applicable Staff Regulations and Rules.

135. Harassment and abuse of authority are prohibited under secs.1.3 and 1.4 of ST/SGB/2019/8. Moreover, considering that the Applicant was a manager and supervisor at the relevant time, his actions also violated sec. 3.5(c) of ST/SGB/2019/8, which obliges managers and supervisors to take all appropriate measures to promote a harmonious work environment and to act as role models by upholding the highest standards of conduct.

136. By disclosing confidential and commercially sensitive information to the media, the Applicant violated the UNJSPF/OIM (2019) Information Sensitivity, Classification of Documents, and Records Management Policy, which incorporates Staff Regulation 1.2(i) and ST/SGB/2007/6.

137. Since CMRR is not a social or charity entity, but a for-profit organization depending on ticket sales and volunteer work, he was under obligation to disclose his interest in it. By failing to do so, he violated sec. 3 of ST/AI/2000/13 and staff regulation 1.2(o).

138. In sum, the Tribunal finds that the Applicant violated:

a. Staff regulations 1.2(a) and 1.2(b), staff rules 1.2(a) and 1.2(f), and secs. 1.3, 1.4, and 3.5(c) of ST/SGB/2019/8;

b. Sections 3, 4, and 5 of UNJSPF/OIM (2019) Information sensitivity, Classification of Documents and Records Management Policy, which incorporates staff regulation 1.2(i) and ST/SGB/2007/6; and

c. Section 3.1 of ST/AI/2000/13.

139. Accordingly, the Tribunal finds that the established facts legally amount to misconduct under the applicable Regulations and Rules.

Whether the disciplinary measure applied is proportionate to the offences

140. On the principle of proportionality, the Appeals Tribunal held in its seminal judgment in *Sanwidi* 2010-UNAT-084, as affirmed in many later judgments, that (see para. 39):

> … … [T]he principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective.

141. In *Egian* 2023-UNAT-1333, the Appeals Tribunal further found that: "even though the sanctions ultimately imposed could be considered severe or harsh, they were nevertheless not unreasonable, absurd or disproportionate, and therefore the Appeals Tribunal did not substitute its judgment for that of the Administration" (see para. 104).

142. The Applicant argues that what factors led the Respondent to apply a disproportionate and harsh sanction so long after the fact, is unclear. He asserts that termination fails the test of being balanced and proportional, given his long period of service, and the fact that he was a whistleblower, who spoke up against abuse of authority, yet he was instead targeted.

143. The stated reasons for the sanction include the following in accordance with the 1 May 2023 sanction letter:

> Regarding harassment and abuse of authority,
>
> a. the Applicant had managerial responsibilities,
>
> b. the Organization's zero-tolerance policy entails severe punishments for those who engage in behaviour as established by the facts in this case, and
>
> c. the harassing behaviour was repeated over a period of time.
>
> Regarding disclosure of confidential information to the media,
>
> a. for cases relating to the disclosure of confidential information to the media, the disciplinary measure imposed for such conduct has been strict, and

b. the Applicant was aware that he needed authorization to interact with the media, but nevertheless proceeded with sharing confidential information and internal documents with a journalist who used this information in publishing two articles.

Regarding failure to disclose outside activities,

c. the Applicant had worked for CMRR in a senior capacity for several years without authorization, and

d. he performed these functions at CMRR using United Nations information and communication technology resources, including during official United Nations working hours.

144. The Tribunal considers that each of the four allegations is serious. Firstly, the compound nature of the allegations left no possibility for any other punishment than separation. Secondly, as submitted by the Respondent, the Organization's zero-tolerance policy entails severe punishments for those who engage in harassment. Factors such as that the harassing behaviour was repeated over a period of time, and that the Applicant was aware that he needed authorization to interact with the media were validly considered as aggravating.

145. The record indicates that the decision-maker weighed all mitigating and aggravating factors before arriving at the decision. Since there is sufficient evidence that all factors were given due consideration, but that the aggravating factors outweighed the mitigating factors, there is no basis upon which the Tribunal may interfere with the decision.

146. Consequently, the Tribunal finds that the disciplinary measure applied is proportionate to the offences.

Whether there was a substantive or procedural irregularity

147. The Applicant takes no issue over his due process rights during the investigative and disciplinary processes, and no such question arises based on the case record. It is on record that he was provided with the Allegations Memorandum

dated 28 September 2022 and all the supporting documentation. He was informed of his right to seek the assistance of counsel and availed the opportunity to comment on the allegations. He was also granted extensions of time within which to submit his comments, and his comments were considered when determining the outcome of the matter. There was therefore no substantive or procedural irregularity during the investigative and disciplinary processes.

Conclusion

148. The Tribunal finds that the decision to impose the impugned disciplinary measure on the Applicant was based on clear and convincing evidence and was taken in compliance with applicable legal norms. It also finds that the disciplinary measure applied is proportionate to the offences. The application is dismissed for lack of merit.

(Signed)

Judge Margaret Tibulya
Dated this 4th day of September 2024

Entered in the Register on this 4th day of September 2024

(Signed)

Isaac Endeley, Registrar, New York