



Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Wanda L. Carter

TOMECI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Wei Zhuang, DAS/ALD/OHR, UN Secretariat

Jacob van de Velden, DAS/ALD/OHR, UN Secretariat

Introduction and procedural history

1. On 22 August 2023, the Applicant, a former staff member of the United Nations Mission in South Sudan (“UNMISS”), filed an application before the Dispute Tribunal challenging the 30 June 2023 decision to impose upon him the disciplinary measure of separation from service with compensation in lieu of notice for serious misconduct (“the contested decision”).

2. The disciplinary sanction was imposed based on a finding that it had been established by clear and convincing evidence that:

a. On at least 105 different times, between 8 October 2019 and 11 April 2020, he permitted his wife to reside in his UNMISS-provided accommodation without permission and without paying due accommodation fees;

b. On 10 December 2019, during a session with a Staff Counsellor, he threatened to kill his wife and threatened to kill anyone in the Organization to protect their marriage and their need to live together; and

c. On 114 nights, between 25 January 2021 and 19 May 2021, he permitted his wife to reside in his UNMISS-provided accommodation without permission and without paying due accommodation fees.

3. It was further found by a preponderance of the evidence that:

a. In February or March 2017, the Applicant engaged in a verbal altercation with FB during a barbecue at AC’s accommodation;

b. During that altercation, he left and came back half an hour later and beckoned FB from the dark some 10 meters from the gathering;

c. Sometime later, he ran into FB and told him that if FB would have come when he beckoned him from the dark, he would have stabbed him; and

d. Afterwards, one day when FB was picking the Applicant up at his accommodation to change cars for service the next day, the Applicant told

him: “ok, just remove your things cause otherwise I am going to drag you behind the car”.

4. Consequently, the Organization concluded that the Applicant’s conduct violated staff regulations 1.2(a), 1.2(b), 1.2(f) and 1.2(q), staff rule 1.2(f), section 2.1 of Administrative Instruction No. 005/2011 (Camp Regulations for UNMISS-provided accommodation), and sections 2.3, 5.3, and 5.4 of the Mission Directive No. 2017/012 (Camp Rules for Persons on UNMISS Premises).
5. The Organization imposed on the Applicant the contested decision and also:
 - a. Decided that the Applicant was required to reimburse the Organization for the financial loss suffered by the Organization of USD9,417, in accordance with staff rules 10.1(b) and 10.2(b)(ii), as his actions were determined to be wilful or, at the least, reckless or grossly negligent.
 - b. Decided that the amount of USD9,417 would be recovered to the extent possible by deducting that amount from his final entitlements or emoluments, in accordance with staff rule 3.18(c)(ii), and by delaying the issuance of his P.35 form, in accordance with paragraph 12 of ST/AI/155.Rev2 (Personnel Payroll Clearance Action).
6. The Applicant filed with this Tribunal a timely application for judicial review of this decision.
7. The Tribunal heard the case from 19 to 20 August 2024. The Applicant and two other witnesses: GM, former UNMISS Principal Security Adviser (“PSA”) and AT, the Applicant’s wife, testified at the hearing.
8. The parties filed closing submissions on 9 September 2024, and thus the case is ripe for ruling.
9. For the reasons set forth below, the application is rejected.

Parties' submissions

10. The Applicant's principal contentions are:

a. The case against him consists entirely of hearsay collected in a flawed Office of Internal Oversight Services ("OIOS") report which nevertheless dismissed two of the four allegations raised against him.

b. The Respondent further confuses matters by claiming that some allegations are proven with clear and convincing evidence while others only with a preponderance of evidence. Thereafter, the Respondent decided to construct a case out of other issues, including the allegations surrounding his wife's presence in the compound.

c. The charge of continuing to have a South Sudanese national stay with him in his accommodation, after being advised against it, ignored the changed context in that AT was both an UNMISS staff member and became the Applicant's wife in October 2019. This was a unique situation not provided for in any rule and not the objective of the Directive excluding local Sudanese from residing in the compound.

d. The Applicant, his spouse and GM testified about advice and encouragement received from other senior officials to continue to pursue the matter officially. In the interim, COVID-19 restrictions in 2021 further complicated working and living arrangements. The Applicant's wife testified that they asked for and were later given permission through the same established channels for her to remain in the compound over the holidays as a paying guest, thus sending mixed messages.

e. From the correspondence at the time, he disclosed his relationship and offered to pay the cost involved in having his wife stay there.

f. Regarding the allegations that he threatened his wife as well as other United Nations colleagues, neither his wife nor any United Nations staff confirmed these accusations, which OIOS noted were the product of gossip

and hearsay. Nevertheless, the Respondent has cherry picked several statements to justify a harsher penalty.

g. Regarding the alleged threat to FB, none of the corroborating witnesses cited by the Respondent saw the incident described or any other similar incident. Hearsay is not persuasive. FB did not like the Applicant and wanted to be transferred, which this story helped to effect. FB's assertions are self-interested.

h. He is not a native English speaker and speaks English with difficulty. Much of what he is reported as having said, in addition to its unreliability, must be considered in the context of emotional expressions rather than indications of intent. The fact is he has never threatened anyone with a weapon, engaged in any physical altercations or been cited for or been seen assaulting anyone.

i. Both OIOS and the Respondent have chosen to ignore crucial evidence in favour of hearsay. The UNMISS Staff Counsellor, met with the Applicant and his wife over an extended period yet she was not interviewed. The failure to interview the Staff Counsellor, who had a very different impression from meeting with him and his wife, is a major lacuna. Even more egregious is the failure to give any weight to the psychiatric evaluation requested and received by the Mission.

j. The weight given to the gossip and hearsay in this regard must be considered in light of the fact that the principal accusers in this regard made a number of false accusations, including drunkenness on duty and consorting with prostitutes, which were proven to be entirely unsupported.

k. The Respondent has not demonstrated good faith and fair dealing with him as he was depressed and isolated following the forced separation from his spouse and after receiving misleading and erroneous responses to his dilemma.

l. Neither UNMISS, Mission Support nor the Staff Counsellor provided any real assistance to him. Instead, the Respondent embarked on a determined effort to separate him despite his long service in several difficult and dangerous missions.

m. The Respondent applied a disproportionate and harsh sanction long after the fact. In justifying his decision to impose the harshest of penalties, the Respondent has taken the conclusions of the OIOS report further than what was warranted by the limited findings.

11. The Applicant requests the Tribunal to rescind the contested decision and award him compensation for harm to his career and *dignitas* in the amount of two years' net base pay.

12. The Respondent's principal contentions are:

a. The record contains clear and convincing evidence establishing the facts underlying the contested decision.

b. The Applicant has not contested that AT stayed in his UNMISS-provided accommodation on the dates in question, nor claimed that he received permission or paid the due fees for those stays.

c. The sworn statement of JM, the Staff Counsellor who witnessed the Applicant issuing the threats, and her contemporaneous report of the threats to the Applicant's supervisors support the allegation. The Applicant has not offered any reason why JM's evidence should be ignored

d. AT's denial, at the hearing, that the Applicant threatened to kill her is not credible. AT has an interest in the case and has shown a clear motive to protect the employment of her husband or to help him get his job back. At the hearing, AT confirmed that she had a personal interest in the Applicant winning the case, adding that she did not want the Applicant to lose his job because he married her.

e. There is a preponderance of the evidence that the Applicant engaged in a verbal altercation with FB in February or March 2017 during a barbecue at AC's accommodation, and that the Applicant subsequently told FB that he would have stabbed him during the altercation if he would have approached him. There is also a preponderance of the evidence that the Applicant told FB that he would "drag [him] behind the car" if he did not remove his possessions from the vehicle.

f. The Applicant's actions amounted to serious misconduct. He flaunted the rules and the duly communicated decisions of the Organization and allowed AT to stay with him without authorization before making his request, while his request was pending, after it was rejected, and even after he was interviewed as a subject of unsatisfactory conduct for permitting AT to stay with him.

g. The threats to kill AT and to kill anyone in the Organization to protect their marriage and the need to live together amounted to serious misconduct. The Applicant's contention that he speaks English with difficulty and that "what he is reported to having said [...] has to be considered in the context of emotional expressions rather than indications of intent" is not plausible. In his Personal History Profile, the Applicant stated that he reads, speaks, and understands English fluently

h. The Applicant's argument that he and his wife also met with another Staff Counsellor who was not interviewed is irrelevant as his misconduct was making threats during a specific counselling session on 10 December 2019. The fact that JM, a Staff Counsellor embedded with the United Nations Department of Safety and Security ("UNDSS") in a mission setting and used to hearing security personnel venting their frustrations and difficulties, took the unusual step of breaking confidentiality to report the Applicant's threats demonstrates that these were credible.

i. Contrary to the Applicant's contention, his psychiatric assessment does not justify his misconduct or even mitigate it.

j. The threats to harm FB amounted to serious misconduct and were considered as evidence of a pattern of conduct that supports the other allegations of threats of violence.

k. The sanction imposed on the Applicant is consistent with the Organization's past practice in comparable cases, involving issuing threats to kill without proceeding to use physical violence, which have resulted in the sanction of separation from service with compensation in lieu of notice with or without termination indemnity. Issuing threats to harm have attracted sanctions ranging from demotion to written censure.

l. The Applicant's misconduct was compounded and repeated. He persisted in permitting AT to stay in his UNMISS accommodation even after he was interviewed by the Special Investigations Unit and he had been previously reprimanded for similar conduct. The Applicant's role as a Close Protection Officer and his access to firearms was also considered an aggravating factor, especially in relation to the misconduct involving threats to kill. Lastly, the fact that the threat to kill was issued to his wife in relation to potential infidelity is considered an aggravating circumstance due to the violence against women context.

m. The letter by which the Applicant was informed of the contested decision mentioned that the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/DMSPC") considered that his long service in mission environments was a mitigating factor. However, the aggravating factors outweighed the mitigating factor. The circumstances of the threats and the obdurate nature of the failure to comply with the rules relating to UNMISS-provided accommodation rendered it impossible to continue the employment relationship as the trust with the Applicant was irreparably broken. A lesser sanction would not have satisfied the objectives of disciplinary policy as it would not have reflected the gravity of the Applicant's misconduct and the panoply of aggravating circumstances.

n. The Applicant's procedural fairness rights were respected throughout the investigation and disciplinary process. Contrary to the Applicant's unsupported assertion, the OIOS investigation was not deficient and its report was not flawed.

o. All facts leading to the sanction were established to the required evidentiary standard, they amounted to misconduct under the applicable Staff Regulations and Rules of the Organization, and they warranted the imposition of the disciplinary measure. All evidence was duly considered and contrasted with the Applicant's Comments. An allegation being withdrawn was the result of careful analysis and consideration, rather than a deficiency in the investigation report and not a rush to judgment as the Applicant suggests.

Consideration

Standard of review and burden of proof

13. Article 9.4 of the Tribunal's Statute, as amended on 22 December 2023, provides that in reviewing disciplinary cases:

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

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

15. The Appeals Tribunal also observed that:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and

proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. (*Sanwidi* 2010-UNAT-084, para. 40).

16. However, UNAT also held that “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” or otherwise “substitute its own decision for that of the Secretary-General”. In this regard, “the Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision” (*Sanwidi, op. cit.*).

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

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

18. In examining the sufficiency of the evidence in this case, there are two major allegations: (1) that the Applicant allowed his wife to live in his quarters when she was not permitted: and (2) that he threatened to physically harm others. The Applicant presented testimony from three witnesses: himself, his wife, and his former supervisor. The Respondent did not call any witnesses to testify live at the hearing, instead relying on the record assembled by the Organization and cross-examination of the Applicant’s witnesses.

A. Housing his wife at a non-family duty station

19. It is important to clarify the context in which the alleged violation of permitting his wife to live in his quarters took place. It is undisputed that the

Applicant's duty station at UNMISS in Juba is designated as a non-family duty station based on the determination by the Department of Safety and Security "that, for reasons of safety and security, all eligible dependants are restricted from being present at the duty station for a period of six months or longer." (Paragraph 1.7 of ST/AI/2016/6 (Mobility and hardship scheme). Despite the Applicant's claim to the contrary, the purpose of the rule regarding non-family duty stations is to ensure safety and security of dependants.

20. That means that staff members serving at UNMISS are not permitted to have their family present at the duty station and are given a non-family service allowance of nearly USD20,000 a year, along with five days of extra time off for rest and recuperation (R&R), time off for every six weeks of service at the duty station. (ST/AI/2018/10 (Rest and recuperation) and ST/IC/2020/9 (Designation of duty stations for purposes of rest and recuperation)).

21. While posted to UNMISS, the Applicant met a national staff member, AT and began a romantic relationship with her. Eventually they were married on 5 October 2019. The evidence is undisputed, clear and convincing that the Applicant permitted AT to stay overnight in his UNMISS accommodation on hundreds of occasions.

22. The Applicant justifies this conduct by arguing that he did not wilfully disregard the applicable rules and that the Respondent gave him conflicting advice, delaying and mismanaging the response to his requests for permission to have his wife stay in his accommodation.

23. The applicable rules regarding accommodations at UNMISS are set forth in various provisions. Section 2.1 of Administrative Instruction No. 005/2011 (Camp Regulations for UNMISS-provided accommodation) provides that "[u]se of UNMISS-provided accommodations assets ... is exclusively restricted to authorized personnel checked-in and registered with General Services Section Facility Management Unit (GSS FMU)."

24. Mission Directive No. 2017/12 Camp Rules for Persons on UNMISS Premises further provides that:

2.3 Authorized persons who are assigned an accommodation by GSS'FMU shall exclusively occupy the assigned accommodation as prescribed by GSS-FMU. The authorized person may submit to the GSS-FMU a written request for permission to allow a temporary occupant to register/check-in in order to share the assigned accommodation. The categories of persons permitted to reside in UNMISS premises/accommodation are listed in Mission Directive 2015/013, at the applicable rates established therein. UNMISS Management may, at its sole discretion, waive requirement of an advance written authorization, in cases of emergency. (Emphasis added)

5.3 Authorized personnel residing on UNMISS premises who wish to have their guests stay overnight in UNMISS premises, shall request and obtain security clearance from the UN Security Section and the Approval of CGSS or the Field Administrative Officer, 72 working hours in advance of the expected stay. Guests shall register at GSS-FMU during normal working hours and pay the relevant accommodation charges to Finance Section in advance.

25. The Standard Operating Procedure for UNMISS-Provided Accommodation and Rental Deduction states that:

5. The use of UNMISS-provided accommodation assets ... is exclusively restricted to authorized personnel who checked-in and registered with GSS Facility Management Unit (FMU). The following categories of personnel are eligible for UNMISS-provided Accommodation:

5.1 UNMISS personnel, i.e., international civilian personnel, international-UN Volunteers, Military Staff Officers, UNPOLs, MLOs, Correction Officers and UNMISS International Individual Contractors. This SOP does not apply to members of Troop Contributing Countries (TCCs) and Police Contributing Countries (PCCs) ...

5.2 Personnel of UNMISS Contractors, UN AFPs which have MOUs with UNMISS and other Organizations with which UNMISS has contractual obligations to accommodate their personnel ...

5.3 Other individuals as approved by DMS. Personnel from other organizations who wish to stay in UNMISS-provided accommodation must receive prior written approval from the DMS before he/she can submit a request for accommodation to GSS.

26. The Applicant was quite aware of these rules against having unauthorized guests stay in his UNMISS accommodation, having been reprimanded previously for violating those same rules.¹ He also testified that he knew the rules and regulations regarding accommodation in the United Nations compound “which were built especially for international staff and, with some exception for security reasons, for national staff and their dependents.”²

27. The Applicant also stated that he knew “the camp rules say national staff are not allowed to ask for residence inside the camp because they have houses outside.”

28. Nonetheless, he had AT spend the night in his accommodation, without permission, several times prior to their marriage. After the marriage, he requested authorization for her to stay in the accommodation and continued having her stay while his request was pending.

29. The decision denying the Applicant’s request was communicated to him on 5 December 2019, and he repeatedly sought “clarification” or reconsideration of that decision. Finally on 16 December 2019, the Director of Mission Support (“DMS”) wrote that “[t]he matter was settled from our perspective and the SM [staff member] has been referred to the PSA [Principal Security Adviser,], in copy, for options to live outside with his wife.”

30. When the Applicant persisted in arguing his case to the DMS, she responded “I trust you do understand the importance of complying with existing rules and regulations and will recognize the efforts by the Mission to address your new circumstances. There are options available and would again advise you to discuss these with PSA.”

31. The PSA confirmed to the Applicant that he had two options at that point: “(1) to remain in UNMISS accommodation whilst his wife resides outside, or (2)

¹ The parties have dramatically different versions of the facts surrounding this reprimand, but it is not disputed that the Applicant allowed a Ugandan national, who was employed as a cleaning lady by a United Nations Contractor, to spend the night and have sex with him in his UNMISS accommodation, without authorization.

² Citations of what witnesses stated are derived from the audio recordings from the hearing and from the OIOS interviews when available, rather than the written summaries.

he and his wife reside in a ‘DSS approved’ residential site in the city.” According to PSA, the Applicant felt that neither option was acceptable to him, and he continued to have his wife spend nights in his UNMISS accommodation.

32. By early 2020, the PSA continued hearing rumours that the Applicant’s wife was still staying in his accommodation and again told him that she was not to stay there. In response the Applicant nodded, and the PSA understood this to mean that she was no longer staying there. In fact, UNMISS gate records showed that AT was still spending the night on the compound during this time.

33. On 23 March 2020, the Applicant was interviewed by the Special Investigations Unit (“SIU”) at UNMISS about allegations that he allowed AT to stay overnight without authorization³. Even following that interview, the Applicant permitted his wife to stay in his UNMISS accommodation. In fact, she never left the UNMISS compound between 25 January 2021 and 19 May 2021.

34. The Applicant claims he received “advice and encouragement from other senior officials to continue to pursue the matter officially.” Specifically, the Applicant testified that the Deputy DMS said it should not be a problem but advised the Applicant to make a formal request with the DMS. And when the Applicant made that formal request, the DMS congratulated him on his marriage, asked him to provide documentation of the marriage and then told him to await a decision.

35. These conversations, while supportive, were always clear that a formal decision was needed. The evidence shows that the advice and orders given by the Administration to the Applicant were clear and consistent: his wife was not permitted to stay in his accommodation at UNMISS, a non-family duty station.

36. The Applicant also points to a statement obtained from the PSA in preparation for the hearing in this case. In that statement, the PSA says, *inter alia*, that “[n]ot previously being aware of any potential consequences of his wife living with him in UNMISS accommodation, Mr. Tomeci suddenly fell into a UN legal situation after intervention through the UNMISS Director of Mission Support ... It later

³ As a result of that investigation, the Organization recovered from the Applicant USD1,984 in accommodation charges for 31 overnights between December 2018 and September 2019.

appeared to be an innocent misunderstanding of a relatively obscure UN staff rule for Missions.”

37. This statement conflicts with the facts as set forth above. By his own admission, the Applicant was fully aware of the rules. They were not “obscure” to him, and he did not misunderstand them. The DMS’s “intervention” was at the request of the Applicant.

38. The PSA’s recent statement also conflicts with his own previous statements at the time in question. Contrary to the sympathetic tone of his newest statement, on 3 December 2019 the PSA wrote that the Applicant’s plan to move his wife into the UNMISS compound “is not acceptable to us as it will cause a number of other staff to start compiling similar actions, but perhaps more importantly is what does the UN do if the new wife becomes pregnant? Do we protect the new baby also?”

39. After he communicated to the Applicant the decision denying his request, the PSA reported to the Organization that “[t]his issue will not be readily accepted by the [Applicant] though we are closely following any responses.” Indeed, the Applicant’s refusal to accept this decision, and his repeated efforts to reargue his position to anyone and everyone, does not mean that he was given inconsistent advice.

40. The Tribunal finds that the Applicant’s continued violations over a year and one-half, despite a prior reprimand, numerous warnings, a clear directive, and a new investigation, clearly show that he willfully disregarded the applicable rules prohibiting his wife from living with him in a non-family duty station.

B. Threats to physically harm others

41. The Organization also found that, during a session with a Stress Counsellor, the Applicant threatened to kill his wife and anyone in the Organization to protect his marriage and his desire for his wife to live with him.

42. According to the evidence, the session came about when the Applicant contacted his supervisor, Close Protection Coordination Officer, JD, on 5 December

2019 saying that he felt too stressed out to work and would like to be replaced on duty. The supervisor promised to replace him as soon as possible, told the Applicant to contact the UNDSS Stress Counsellor to discuss his issues, and gave him the counsellor's contact information.

43. A few days later the Applicant again called his supervisor to say that he was too stressed to work. The supervisor arranged a replacement and reiterated the need for the Applicant to see a stress counsellor. The Applicant affirmed that he had an appointment with the Stress Counsellor scheduled for that day.

44. Following the session, the Stress Counsellor ("JM") reported to the PSA that, during a joint session with the Applicant and his wife, the Applicant "verbally threatened his wife of (1) killing her should he find out that she is cheating on him and (2) he will kill anyone to protect their marriage and the need to live together."

45. The report recounted that, at the beginning of the counselling session, JM explained the protocol whereby their discussions would remain confidential, except if there were a threat to life or safety. This protocol was repeated to the Applicant when he made the threats. "In reaction, he even became suspicious about me that I may be recording his conversation. He showed me his gun and insisted that killing someone would not be a problem for him." JM also wrote that the wife separately confirmed to her that the Applicant had in the past expressed anger outbursts, been overly jealous and suspicious that she was unfaithful, and had threatened her with aggressive behaviour.

46. JM said that she discussed these threats with her supervisor and they "agreed that due to the paranoid ideas that [the Applicant] is frankly expressing and his access to a firearm, the issue is very serious and needs to be escalated to [the PSA], in order to get a specialist assessment and care for [the Applicant], ensure the safety of his wife, and protect the organization."

47. The PSA responded by email stating that he understood and was taking action. The Regional Senior Stress Counsellor followed up confirming that,

- As stress counsellors, client confidentiality is critical for our work ...
 - a. The only exception is when there is a threat to life or safety of a client, or of another person due to the actions of the client. In such situations, we are ethically bound to breach confidentiality in the interest of protection a life.
 - b. Even in these situations, we have a strict protocol that we follow for the disclosure. [JM] followed that step by step process excellently, and I just want to document it for transparency and accountability ...
- [JM] carried out these steps in consultation with me and the Chief of CISMU (Moussa Ba).
- We hope his disclosure as an exceptional measure will help to get specialist assessment and care for [the Applicant], ensure the safety of his wife, and protect the organization.

48. As a result of JM's report, the PSA had the Applicant's firearm withdrawn and sent him for a psychiatric evaluation.

49. During the investigation leading to these charges, JM was interviewed by OIOS. She described being contacted by the Applicant's supervisor who said the Applicant needed some counselling service. JM advised that she does the counselling and then called the Applicant. He told her that he was not ready to have a session, so she said she was always available should he be ready.

50. A few days later the Applicant called her to say he wanted to have a session and that he wanted to come with his wife "who was by his words 'suicider'." Since this sounded urgent, JM left her location and met the Applicant and his wife at the UNMISS compound.

51. In her interview, JM reiterated that she had begun the session by discussing the protocol on confidentiality described above. Then the Applicant produced a folder with wedding photos, explaining how devastating it was for them not to be allowed to live together in the UNMISS compound, and said this was the reason for the stress.

52. JM said that she asked about the suicide issue because this seemed like an emergency matter. The Applicant's wife said that she did not want to commit suicide; she was just sad, extremely sad. She was also angry at her husband as he was overreacting.

53. As the discussion focused on the issue of them living together, JM told the couple that she could not be a mediator between the staff and the Organization and that should be done through the Office of the Ombudsman. The Applicant became suspicious that JM was recording the conversation and demanded to see her phone. She showed him her phone, reassured him about confidentiality unless there was a threat to life and tried to calm him down.

54. The Applicant got up and began moving around, chain smoking, while his wife continued crying. His wife then told the Applicant "please, lets give her some time to do her work, let's not be suspicious." The Applicant then said to his wife "I know you don't want to live with me, should I know that you are cheating on me, I will slaughter/kill you like a chicken."

55. At that point, JM reminded him again about the limits of confidentiality when there is a threat to life. The wife then moved closer to JM "just to be a bit more safe" as the Applicant was hitting her on her side.

56. JM said she could see that the Applicant was very agitated and very angry so she used some relaxation techniques to calm him down in order to learn what the anger and frustration was all about.

57. Immediately after engaging in the relaxation techniques, the Applicant said "tell me what I can do for us to maintain the marriage. Even if it takes like killing anyone in the Organization for us to have the marriage, I will do it for you. Just let me know what and I will do it for you."

58. Once again, JM reminded him that threatening to kill someone would negate the confidentiality of the counselling session. As the Applicant started pulling out copies of emails he had written requesting permission to live together, his anger

erupted again. JM then told him “let’s concentrate on your psychological health, ... on having ourselves to calm down and maybe see how I can best support you two.”

59. At that point, the Applicant stood up and started cursing. He looked at his wife and again repeated “Should I suspect that you are cheating on me, I will actually kill you like a chicken.” Then he pulled his shirt with his right hand and “demonstrated how to shoot.”

60. Again, JM said “this is another time when you are mentioning about killing [which] is very not good for you in a counselling session as this is a threat of killing.” JM then took the couple through relaxation techniques before all agreed that they would end this first session and follow up the following day.

61. Afterward, JM called her technical supervisor in New York to debrief about the Applicant’s threats and her concerns for the wife’s security. Together they wrote the report that was sent to the PSA. Then JM went to the PSA’s office so he could go through the report and she could explain it to him.

62. Later, she learned that the Applicant was sent for psychiatric evaluation and that follow up counselling was done with another UNMISS Staff Counsellor because the Applicant and his wife were angry that JM had reported the threats to the PSA.

63. When asked about the Applicant’s weapon, JM said she only had a quick look so she only saw a black holster and was unsure if the gun was in it or not. He pulled up his shirt to show it, then he pointed as if to shoot but only using his fingers. “He just did like pah, pah, pah, pah” from side to side.

64. When the investigator asked JM if she could evaluate from the Applicant’s behaviour whether he could be dangerous, she said “dangerous will be an extreme word. But what I’ve observed was that he was quite agitated, nervous, very nervous and not calm. Stand, smoke another cigarette, stand again, go around, hold the wife, that kind of behaviour and so on.”

65. The Tribunal finds JM's statements to be credible. She had no motive to lie about the Applicant making threats, having never met the Applicant before. Indeed, reporting those threats entailed professional risks to her for breaching the general confidentiality of counselling discussions. In addition, JM consulted her technical supervisor half-way around the world to discuss the threats and the appropriate way to handle them. Once it was agreed that she should disclose these threats to protect the life of those threatened, JM met with the PSA to make sure that he understood the gravity of her concerns. This seems like a lot of effort to go through in order to lie about threats from someone she did not know.

66. To rebut this evidence, the Applicant directly denied that he had made any threats during the session. He also implied that JM was lying because she was recommended to the Applicant by his close protection coordinator, JD, who he claims did not like the Applicant.

67. To support this theory, he called his former PSA who testified that JD "was a difficult person under my command ... I understand from my memory that he got himself a little bit involved in this for reasons I don't believe were purely professional. I believe it was because he had a bad relationship with [the Applicant]. In fact, he had a bit of a bad relationship with a number of people on the mission."

68. As noted above, the PSA's hearing testimony and recent statements are contradicted by the contemporaneous records. Those records are clear that JD got involved when the Applicant called him asking to be relieved of duty because he was too stressed to work. It is completely professional, in reaction to such a call claiming disabling stress, for a coordinator/supervisor to refer the staff member to a stress counsellor. It was also professional for JD to report the matter to the PSA and later to recommend that the Applicant be removed from duty pending further medical assessment and have his access to weapons restricted. The PSA adopted those recommendations.

69. If, as he now says, the PSA believed that JD was acting unprofessionally because he had a bad relationship with the Applicant, he was free to disregard the recommendations. He did not. And if, as the PSA testified, JD had a bad relationship

with a number of people on the Mission, why was the Applicant singled out for this treatment?

70. Curiously, the PSA told the OIOS investigator that “[t]here was a discussion, I asked [the Applicant] to see [a] Stress Counsellor which he did. The Stress Counsellor told me that he was quite aggressive in his interview and he actually said ‘I will kill, I will kill’. He did not actually say whom, his wife or whom, and he put his hand where his holster would be. And he did have a holster.”

71. The PSA also testified that, after he met with JM, he spoke with the Applicant about her allegations. According to the PSA, the Applicant “swore black and blue and said absolutely he did not have any weapon with him whatsoever, and I believe that.” Yet, the PSA relieved the Applicant from duty and withdrew his weapons. If the actual presence of a weapon at the counselling session was dispositive, as his testimony implies, and he believed that the Applicant was truthful in denying that he had a weapon, then why did the PSA implement JD’s recommendation?

72. The answer to these rhetorical questions is that, contrary to his recent testimony before the Tribunal, the PSA believed the Applicant was capable of making threats and carrying out at that time. He never told the OIOS investigator that he believed the Applicant’s denial. Instead, the PSA said that “the fact that he put his hands [where he had a holster] and said that will kill him it was a final point where I said ‘I am taking your weapon from you.’”

73. Indeed, in his hearing testimony, the PSA conceded that the Applicant at this point in time “was not quite the guy that I could remember ... He was quite tense.” When the Applicant and his wife came to his office during this period, the Applicant “pushed her quite hard in the back into the office and which took me aback a little bit and it certainly took her aback a little bit ... It seemed like the relationship between them on that particular day was a bit cold.”

74. He further testified to another incident when the Applicant came to the PSA’s office and “he was unshaven and he looked bedraggled and it just was definitely not the same guy that I knew as my close protection team leader ... At one point he got really angry at me, quite aggressive in his tone and I said ‘don’t you dare talk

to me'... After that I thought, you know, this guy is not in the right psychological frame of mind that I need him to be and that he should be in if he was carrying a firearm.”

75. In sum, the Tribunal finds that the PSA's recent statement and hearing testimony are not worthy of credibility. Clearly, he has either suffered a great lapse of memory or is slanting his testimony to assist his former subordinate in the case.

76. In addition, the Applicant directly denies making threats during the counselling session, as does his wife. However, their testimony is not consistent with the other evidence or even with each other.

77. It should be noted that, although the Applicant's filings claim he speaks English with difficulty, the Tribunal observed that to not be the case. In a Case Management Discussion, the Applicant said there was no need for interpretation and, at the hearing both he and his wife, AT, spoke English fluently.

78. The Applicant just flatly denies that he made any threats. He denies that he had a weapon with him during the counselling session and also denies having a holster with him.

79. AT both supports and contradicts her husband by saying that “my husband was not carrying a weapon that time. Probably I saw the belt there, I thought it was a weapon. But my husband did not have any weapon with him.”

80. When asked “he did have a holster as per your OIOS interview record?”, AT said “Probably, probably.” She also testified that she was not sure whether the Applicant pointed to his holster during the counselling session. When asked whether the Stress Counsellor was in a position to know whether the holster was empty or not, AT said “I really don't know because I was in a state of mind not thinking of this.” Her testimony is consistent with JM's statements that the Applicant had his holster at the session and is contrary to the Applicant's testimony that he did not.

81. In her statement to OIOS, AT was more definite saying “he was having just holster, it was empty there.” The reason she was so clear that his holster was empty is that she recalls the Applicant telling her that his weapons were taken before the counselling session. However, the record clearly shows that is not the proper chronology of events. The Applicant’s weapons were taken after, and as a result of, the counselling session and not earlier.

82. However, it is noteworthy that the testimony of both the Applicant and his wife confirm JM’s statements that the Applicant was angry during the counselling session, also nervous, walking around and repeatedly smoking cigarettes. And interestingly, they both contradict the PSA’s testimony that the Applicant pushed his wife “quite hard in the back”.

83. As a result, the Tribunal concludes that neither the Applicant nor his wife are credible and reliable witnesses. Further, the Tribunal finds that the evidence is both clear and convincing that the Applicant did make threats to kill his wife and others during the course of his counselling session with JM.

84. The Applicant also challenges the Organization’s finding that, in 2017, he threatened a co-worker (“FB”). Specifically, the Under Secretary-General found, by a preponderance of the evidence, that:

- a. In February or March 2017, [the Applicant] engaged in a verbal altercation with [FB] during a barbecue at [AC’s] accommodation;
- b. During that altercation, [the Applicant] left and came back half an hour later and beckoned [FB] from the dark some 10 meters from the gathering;
- c. Some time later, [the Applicant] ran into [FB] and told him that if [FB] would have come when [the Applicant] beckoned him from the dark, [the Applicant] would have stabbed him;
- d. Afterwards, one day when [FB] was picking [the Applicant] up at [his] accommodation to change cars for service the next day, [the Applicant] told him: “*ok, just remove your things cause otherwise I am going to drag you behind the car*”.

85. The Respondent called no witnesses to testify regarding these alleged threats, and the Applicant’s testimony on the topic consists of a simple and blanket denial

that he ever threatened to shoot or stab anyone in UNMISS. Thus, determining whether there was evidence to support the finding must be found primarily in the administrative record.

86. The USG's finding was based on FB's "credible statement", as corroborated by AC, VB, JD, and the Applicant's admission that he had argued with FB one night at AC's house.

87. On 6 August 2020, FB was interviewed under oath by OIOS. FB said he was a Close Protection Officer in UNMISS and at the time he was working on the Applicant's team. There was a lot of tension between them, with the Applicant accusing FB of trying to have sex with his wife, and other things. This occurred especially when the Applicant was drunk. According to FB, the Applicant "had something with everyone, like everyone wants to make him a fool or something like that."

88. There was a point when the Applicant told FB "my brother, if you would have come at that time in the shadow, it was nighttime, I would have stabbed you." FB said that he did not see a knife. "He just told me that he would stab me."

89. After that FB avoided the Applicant "because if somebody [...] threaten[s] you, you must be careful. Th[ese] guys, when they are drunk, you never know, [carrying] weapons [is] not for everyone." FB said he told the Applicant they should only talk about their job and avoid each other. "I was just trying to take care for myself and not be exposed for the threat. It was not realistic, but it was what [the Applicant] told me. When someone is telling you this, it definitely puts you on guard. I took it serious."

90. FB said that another time, when they had to exchange cars in preparation for the next day, the Applicant said, "just remove your thi[n]gs cause otherwise I will drag you behind the car." Eventually, FB asked JD to transfer him from the Applicant's team, and that was done.

91. When asked about any other incidents when someone faced trouble with the Applicant, FB said "he is well known in CDT [Conduct and Discipline Team], has

a few cases, ... He had many issues ... He had a problem with alcohol ... He's very versatile. Now he's saying he is killing you, tomorrow he's saying 'hey m[y] brother, I love you.' So you cannot take it for good what he's saying. But threat is a threat; you take it for what it is ... Actually, everybody knows him and everybody tries to avoid him ... I was just staying to the safe side. 'you don't deal with crazy people.'"

92. AC was also a colleague of the Applicant working in UNMISS. AC told OIOS that he had hosted a party to bring all the Romanians together, which both the Applicant and FB attended. The Applicant "had more than enough drinks." At some point the Applicant told FB that he would beat him, and FB responded, "you can try if you want but I won't give you any chances." The Applicant then threw something and left.

93. Half an hour later the Applicant returned and from the dark called FB to "come here." FB refused. A few days later, the Applicant told FB that, if FB had come when called, the Applicant "was going to put a knife on you ... I wanted to stab you." AC did not witness this later conversation but heard about it from FB. AC also said that the Applicant had a drinking problem at that time.

94. VB was interviewed by OIOS on 25 November 2021. He was a Close Protection Officer at UNMISS, thus a colleague of both the Applicant and FB, and they were all from Romania. VB said that he was generally aware that the Applicant and FB had never been good friends and that there was some animosity between the two, although he had never directly observed it himself. VB recounted that one morning, FB told him that the previous evening the Applicant said "he would have stabbed him" if FB had met him a few evenings before. FB also told VB that he did not see any knife nor was he directly threatened by the Applicant, but that it had been a verbal threat. VB also said that he thinks "that nowadays their relationship is much better" since FB and the Applicant only interact on a professional basis.

95. JD, the Close Protection Team Coordinator, told OIOS that FB came to him and said he did not want to work with the Applicant anymore because he had a

problem with him. FB said that he had an encounter with the Applicant, but he did not go into any detail about it. So, JD moved FB to another team.

96. In his interview with OIOS, the Applicant said that he could not recall an incident with FB and never threatened him. However, he did recall that, one night in the home of “[AC], one of my other colleague, our other colleagues, also Romanian ... but I remember we have argued, but long, long ago.” The Applicant went on to say that he and FB are “like brothers.... [FB] speak[s] with me every day ... We are even close, sir, this is issue of ... even brothers, blood brothers.” He said they had general arguments “but it doesn’t mean I hate you.”

97. Based on the record, the Tribunal agrees that it is more likely than not that the Applicant threatened FB. FB, AC, and the Applicant all agree that there was an incident at AC’s accommodation where the Applicant argued with FB. The Applicant has no other recollection of that night, but AC remembers the Applicant having a lot to drink and threatening to beat FB. He also recalls that the Applicant threw something, then left for awhile before returning and calling FB to come into the dark where he was.

98. FB says that, a few days later, the Applicant told him that he would have stabbed FB if he had come into the shadows when beckoned. AC and VB both said FB reported this statement to them soon thereafter. In addition, JD corroborates FB’s story that he asked to be removed from the Applicant’s team because of an unspecified incident.

99. Thus, the Tribunal is persuaded by the preponderance of the evidence that the Applicant threatened FB, as was found by the Organization.

Whether the facts amount to misconduct

100. The Applicant argues that “stories about isolated arguments or becoming depressed and angry over family matter or having private arguments outside work can [not] legitimately be considered serious misconduct in the absence of any official record, complaint or reprimand.”

101. First, this argument mischaracterizes the conduct in this case. This is not a situation of mere arguments or becoming depressed and angry. To the contrary, the Applicant made serious threats against coworkers and his wife. He also repeatedly and knowingly violated the rules by having his wife stay overnight in a non-family duty station.

102. Second, there is no legal requirement that misconduct be committed by means of an official record. Indeed, most misconduct is not done in writing. Nor is there any requirement for a specific written complaint in order for misconduct to have occurred. And, of course, a reprimand or other disciplinary sanction is penalty for misconduct, not a required element to prove serious misconduct.

103. To be clear, the Tribunal finds that the Applicant's threats and repeated violation of the housing rules amounts to serious misconduct.

Proportionality

104. According to the sanction letter in this case,

a. In determining the appropriate sanction, the [Organization] has considered the nature and gravity of your misconduct, the past practice of the Organization in matters of comparable misconduct, as well as any mitigating or aggravating factors. The [Organization] has considered that the following are aggravating factors in your case: (a) your compound misconduct; (b) your repeated misconduct; (c) your role as a close protection officer; and (d) the fact that you issued a threat to kill your wife in relation to potential infidelity given the violence against women context. The [Organization] has considered that your long service in mission environments is a mitigating factor.

105. The record indicates that the Organization considered prior practice in similar cases, and the Applicant does not take issue with this analysis. Instead, he argues that termination was not a proportionate sanction because any threat was actually just a "conditional statement." He also claims that his long record of service and "full cooperation" with the investigation were ignored, as was the lack of any pattern to the various incidents of misconduct. He further argues that his role as a

close protection officer with access to firearms should not have been considered as an aggravating factor.

106. The claim that the Organization ignored the Applicant's long record of service itself ignores the case record. As noted above, the [Organization] expressly considered his service record as a mitigating factor.

107. In addition, the claim that the Organization ignored his full cooperation with the investigation is factually unsupported. Staff rule 1.2(c) obligates staff members to cooperate with duly authorized audits and investigations. Full cooperation involves more than merely submitting to an interview since that is required. The Tribunal views full cooperation as answering questions truthfully and completely. The record is clear that the Applicant was less than truthful and forthcoming in responding to the allegations. Thus, he was not entitled to any mitigation for full cooperation

108. The argument that his statements were not actual threats is also belied by the record. On each occasion where a threat was made, the Applicant was in an agitated state - angry, nervous, and sometimes intoxicated. In this context, it is unreasonable to argue that the threats were merely conditional. Saying "I would have stabbed you if you had come when I called" is a statement of one's past intention to kill. On the other hand, when the Applicant was angry about not being able to keep his wife in the compound, threatening to kill anyone that interferes with his marriage (as he sees the decision not to let his wife live in the non-family duty station) is a real threat to kill in the future. The "condition" was already met in the Applicant's mind by the decision not to let AT live at UNMISS. As FB succinctly put it, "if somebody threatens you, you must be careful."

109. These repeated threats, to various people under various circumstances, do seem to exhibit a pattern of behavior by the Applicant. And it is appropriate to consider this pattern of behavior since the Applicant's job involves him carrying firearms and being authorized to use deadly force. Again, as FB pointed out, "carrying weapons is not for everyone."

110. Indeed, the severity of the threats is inextricably linked with the Applicant's role as a close protection officer with access to firearms. The threat of "I will kill you" coming from an armed close protection officer is much more serious than coming from an office clerk whose access to weapons may be limited to a letter opener or stapler.

111. Similarly, the Applicant's pattern of knowingly and continuously violating the rules on restricted access to housing on the compound should be considered. The jurisprudence is clear that the sanction should be no more than necessary to deter the misconduct. (See *Mubashara Iram* 2023-UNAT-1340, paras. 86 and 87; *Kenneth Conteh* 2021-UNAT-1171, para. 50; *Samandarov* 2018-UNAT-859, para. 23).

112. However, the record is clear that the Applicant was not deterred by the rules, a prior reprimand, and clear direction of the DMS on this subject. He simply was determined to have his wife live with him in the non-family compound. In the face of such wilful refusal, along with the serious nature of threats by a staff member whose job entailed access to weapons, the sanction of termination was appropriate and proportionate.

Due Process

113. The Applicant argues that "charging him again at this stage with the same allegation of misconduct for a different time period when it could have laid those charges in the First Allegations of Misconduct is improper and in violation of the fundamental legal principle of *ne bis in idem*." Latin for "not twice for the same," *ne bis in idem* is generally a criminal law principle. In common law jurisdictions it is commonly referred to as the double jeopardy doctrine; in civil law jurisdiction it may be referred to as *autrefois acquit/autrefois convict*. The Applicant has cited no authority for applying this doctrine in the present context, nor is the Tribunal aware of any case in which it was applied in the modern United Nations Internal Justice System.

114. Indeed, it appears that the only time that the *ne bis in idem* principle was examined in the modern United Nations system, the Dispute Tribunal found it did

not apply. (*Benamar* UNDT/2017/025, paras. 101-103). Specifically, the Tribunal noted that

this rule is a principle of criminal proceedings, which applies only in the event of a new prosecution and punishment which is initiated and implemented following a final and enforceable decision against the same person in relation with the same facts (see *Horciag v. Romania*, ECHR Decision No. 70982/01, 2005). If this principle can be applied in disciplinary matters, provisions to that effect are established at the national level (see, for example, article 1332-5 of the French Labour Code). *Id.* at para. 102.

115. Even if it were to be applied by this Tribunal, the *ne bis in idem* principle would not preclude the Organization from bringing any of the allegations in this case. There is no *idem* or same circumstances in this case because the historical facts giving rise to the two cases cover different time periods.

116. The first investigation was initiated following a complaint dated 5 September 2019 alleging that the Applicant allowed his then-girlfriend to stay overnight in his UNMISS provided compound. That investigation obtained a spreadsheet of the overnight stays “which covers the period 01/09/2019-08/12/2019”, and the allegations of misconduct were limited to the period up to 2 September 2019.⁴

117. By contrast, the allegations in this case clearly cover a different period of time, after the marriage. Specifically, the allegations and findings are limited to “[o]n at least 105 different times, between 8 October 2019 and 11 April 2020 [and] [o]n 114 nights, between 25 January 2021 and 19 May 2021”. Thus, the historical facts in the two cases are different.

118. Since the facts giving rise to the two cases cover a different period of time (although they are similar in nature), the second case would not be barred by the principle of *ne bis in idem*.

⁴ Apparently, that case was closed with a Letter of Understanding setting forth agreed sanctions.

Conclusion

119. In view of the foregoing, the Tribunal DECIDES to deny the application in its entirety.

(Signed)

Judge Sean Wallace

Dated this 25th day of September 2024

Entered in the Register on this 25th day of September 2024

(Signed)

Wanda L. Carter, Registrar, Nairobi