Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Sètondji Roland Adjovi
Anthony Kreil Wilson

Counsel for Respondent:
Elizabeth Brown, UNHCR
Francisco Navarro, UNHCR

Introduction

1. The Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests "the 29 March 2023 decision to impose the disciplinary measure of separation from service with compensation in lieu of notice and with half the termination indemnity pursuant to Staff Rule 10.2(a)(viii) and to enter the Applicant's name in [the United Nations] ClearCheck". UNHCR found that the Applicant had sexually harassed AA.

2. The Respondent contends that the application is without merit.

3. A hearing was held on 11 July 2024 at which the Applicant and AA gave testimony.

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

Facts

5. The Applicant has not disputed the facts stated in the sanction letter dated 29 March 2023 ("the sanction letter") and the investigation report dated 10 August 2022 ("the investigation report") the UNHCR Inspector General's Office ("IGO"). Rather, he submits these facts are to be understood in a broader context of the general communication between AA and him after they became close friends in 2019 when they both joined UNHCR in Caracas, Venezuela. According to the Applicant, AA and he exchanged many jokes and banter, which were not all captured in the sanction letter and the investigation report.

6. The basic facts from the sanction letter were the following:

   a. "Between February and July 2021, [the Applicant] sent multiple WhatsApp messages to [AA], Communications and Public Information Associate, suggesting that [the Applicant and AA] make a bet where, if [the

Applicant] lost, [he] would kiss [AA's] bottom; and repeatedly offering to pay [AA] money if he forced [the Applicant] to fulfil the bet";

b. "The Applicant continued to bring up the matter despite [AA's] multiple requests that [he] drop it";

c. "Even though [the Applicant was] aware that [AA] was not receptive to [his] proposal, [he] kept insisting to provoke a response until 13 September 2021, when [he] sent [AA] a picture of [himself] with [his] face pressed against another man's bare bottom".

7. In the investigation report the relevant WhatsApp messages between the Applicant and AA were summarized as follows (the language translations stated in the report are indicated in {…} in this Judgment for editorial purposes, and all references to footnotes have been omitted):

> … On 17 October 2019, [AA] invited [the Applicant] to an event where [AA] planned to sing in Arabic. [The Applicant] responded on the same day by calling [AA] a "shitshow" and asking, "Seriously? Ha". [The Applicant] also said in Arabic, "[a stipulation in Arabic]" {God wills what}. [AA] told [the Applicant] that it was the first time the venue asked him to sing in Arabic.
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> … On 29 January 2021, [the Applicant] told [AA] that [the Applicant] needed to make a decision on his future in relation to a bet. He continued, "I will have to show the yes/no at the end of the conversation, but without your clear name". [AA] did not understand and responded with a question mark and "What?". The next morning, [the Applicant] said that he no longer remembered what he wrote to [AA].
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> … On 19 February 2021 at 22:40 hours, [the Applicant] wrote to [AA], "*[AA's first name] si encuentras a alguien te doy un beso en el culo y puedes harcerme foto. No vas a poder encontrar a nadie para ir* {[AA's first name] if you find any one I will give you a kiss on the ass and you can take a picture of me. You will not be able to find anyone to go}". At 22:41 hours, [AA] responded, "*El beso se lo puedes dar a* [BB, name redacted for privacy reasons] {You can give the kiss to BB}".
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> … At 21:59 and 22:43 hours, [the Applicant] asked [AA] to accompany him for the weekend and to stay over night, and said they would come back on Sunday. At 23:18 hours, [the Applicant] wrote,

"*[AA's first name] te pago 2k si me obligas a hacer esto* {[AA's first name] I will pay you 2k if you make me do this}". [AA] did not respond.

… On 15 March 2021 at 21:13 hours, [the Applicant] wrote, "*[AA's first name] tengo que pedirte que borres el mensaje de la apuesta o que digas que no lo vas a hacer, al menos* {[AA's first name] I have to ask you to delete the message about the bet or say that you will not do it, at least}". [AA] did not respond.

… On 30 April 2021 at 22:02 hours, [the Applicant] wrote, "*[AA's first name]. Borra el mensaje de los 2000 $* {[AA's first name]. Delete the message about the 2000 $}" and added a laughing emoji. [AA] did not respond.

… On 23 May 2021 at 22:28 hours, [the Applicant] wrote, "*Oye [AA's first name]. Antes de irte tienes que borrar el WhatsApp de la apuesta que perdiste* {Listen [AA's first name]. Before you go you have to delete the WhatsApp about the bet you lost}". [The Applicant] also asked if [AA] was not doing anything later and [AA] responded that he did not think so and expressed that he was already tired.

… On 3 June 2021 at 23:08 hours, [the Applicant] wrote, "*[AA's first name] tienes que borrar el mensaje de la apuesta. Ya caducó* {[AA's first name] you have to delete the message about the bet. It already expired}". [AA] did not respond.

… On 21 June 2021 at 20:19 hours, [the Applicant] wrote, "[AA's first name]. Going to kill you [AA's first name]. *Que quieres, 2000 entonces?* {What do you want, 2000 then?}". [AA] did not respond.

… On 24 July 2021 at 12:50 hours, [the Applicant] asked, "*Haha te acuerdas de la foto que te dije? La del culo en la cara? Tuve que hacerlo y pagar* {Haha do you remember the [photo] I told you about? The one with the ass in the face? I had to do it and pay}". [AA] responded at 12:51 hours, "*Todavía con ese tema tío? Jaja no entendí lo que tuviste que hacer* {Still on that topic man? Haha I did not understand what you had to do}". [The Applicant] responded at 12:52 hours, "*Poner mi cara en el culo de otro porque perdí una apuesta* {Put my face on someone else's ass because I lost a bet}".

… [The Applicant] continued, "*Y pagar lo que te dije* {And pay them what I told you}". [AA] responded at 12:54 with three question marks and a laughing smiley. [The Applicant] reiterated, "*Pero te lo dije. Y pagar 2000. A quien lo hiciese* {But I told you. And pay 2000. To whoever did it}". At 12:56 hours, [AA] responded, "*Sigo sin entender. Le ofreciste pagar $2k por besarle el culo alguien? Estás loco?* {I still do not understand. Did you offer to pay him $2k to kiss someone's ass? Are you crazy?}". At 12:57 hours, [the Applicant] said, "*Es que tuve que hacerlo por una apuesta que hice y perdí. Fue lo que te dije* {It is that I had to do it because of a bet I made and lost.

It was what I told you}". [AA] responded, "*Pagaste $2.000?* {Did you pay $2.000?}".

… [The Applicant] responded, "*Si. Pero como no iba a hacerlo* {Yes. But how could I not}". [AA] responded with three smack-my-head emojis. [The Applicant] continued, "*A ti te lo dije* {I told you}". At 12:59 hours, [the Applicant] said, "*Y que hubiera podido hacer si fue esa la apuesta* {And what could I have done if that was the bet}. *Ahora lo que me preocupa es lo de la foto pero bueno* {Now what worries me is the [photo] but well}". [AA] responded, "*Yo no te obligaría a hacerlo jaja valoro mi dignidad más que $2.000 (aunque no me hubieran venido mal el lunes cuando perdí mi vuelo en Moscú porque nadie en ese bendito aeropuerto hablaba inglés y tuve que comprar un pasaje carísimo a última hora con otra aerolínea para poder venirme)* {I would not force you haha I value my dignity more than $2.000 (although it would not have hurt me on Monday when I missed my flight in Moscow because no one in that blessed airport spoke English and I had to buy a very expensive ticket at the last minute with another airline to be able to leave)}". [AA] added, "*Si todavía te sientes con la obligación de cumplir con tu apuesta en febrero, te puedo mandar mi cuenta UNFCU jajaja* {If you still feel obliged to fulfill your bet in February, I can send you my UNFCU account hahaha}. He then advised [the Applicant] not to bet.

… At 13:01 hours, [the Applicant] said, "*Era para esa apuesta básicamente. Bueno el que la pierda es el que pone cara…*{It was for that bet basically. Well the one who loses it puts the face…}. [AA] told him again not to bet and [the Applicant] said, "*Lo sé. Tu lo hubieras hecho? Me refiero que te hubiese tenido que dar los 2000?* {I know. Would you have done it? I mean would I have had to give you the 2000?}". [AA] responded, "*Yo no apuesto* {I do not bet}. *Me parecío una apuesta super tonta además jaja nunca te obligaría a pagarme, pero me has seguido trayendo el tema 1298548065908 veces. Por eso digo que si sigues con esa carge emocional, te mando mi cuenta UNFCU y listo* {On top, I thought it was a really stupid bet haha I would never [force you to pay] me, but you have kept bringing it up 1298548065908 times. That is why I say that if you continue with that emotional topic, I will send you my UNFCU account and that is it}".

… At 13:05 hours, [the Applicant] responded, "*Haha. Lo que dije era que tú me obligases a besarte el culo y te hubiera pagado. Pero necesitaba la foto* {Haha. What I said was that if you forced me to kiss your ass and I would have paid you. But I needed the photo}". [AA] responded with a smack-my-head emoji. [The Applicant] continued, "*Lo hubiera tenido que hacer de verdad* {I really had to do it}". [AA] did not understand what photo [the Applicant] referred to and asked if [the Applicant] meant a picture of who came with him on the daytrip

in reference to which the bet originated. [The Applicant] clarified that he meant a picture of [AA] forcing him to kiss the latter's ass and that he would have paid [AA]. [AA] asked if [the Applicant] meant a picture of their chat about it and [the Applicant] clarified that he meant a picture of himself "doing that". [AA] did not understand. [The Applicant] then said, "[AA's first name] *todo era que me hubieras obligado a hacer eso. Y te hubiera tenido que pagar* {[AA's first name] it was all about you making me do it. And I would have had to pay you}". [AA] asked if [the Applicant] really kissed someone's ass and paid them USD 2.000 for it and [the Applicant] responded, "*Pero es que yo tenia esa apuesta. Que perdí* {But it is because I had this bet. That I lost}. [AA] told [the Applicant] to drop the topic and he seemed to still not understand this as a joke. [The Applicant] instructed, "*Hazlo y te pago* {Do it and I pay you}" and [AA] did not understand what [the Applicant] wanted him to do.

… On 24 July 2021 at 13:15 hours, [the Applicant] instructed, "*Obligarme* {Force me}", to which [AA] responded, "*Voloro mi dignidad más que $2.000* {I value my dignity more than $2.000}". [The Applicant] said, "*Bueno el que la pierde soy yo* {Well, the one who is losing is me}". [AA] said, "*De todas formas perdiste* {You lost anyway}". [The Applicant] asked if that how so and [AA] responded, "*La apuesta. Ya tío, deja el tema. Ya pasó* {The bet. Now, man, stop the subject. It is over}". At 1:18 hours, [the Applicant] said, "*Hahaha. Quieres la foto?* {Hahaha. Do you want the picture?}".

… At 13:18 hours, [AA] asked, "*De qué bendita foto estás hablando* {What blessed/freaking picture are you talking about?}". [The Applicant] responded, "*Hahaha yo paro. Lo sientoooo* {Hahaha I stop. I am sorry}".

… On 25 July 2021 at 11:19 hours, [the Applicant] said, "[AA's first name]. *De verdad lo siento. Estaba un poco estresado con eso* {[AA's first name]. I am really sorry. I was a bit stressed about this}". [AA] responded at 11:32 hours, "*Nunca terminé de entender, y la verdad creo que mejor así. No apuestes y ya tío* {I never ended up understanding, and I honestly think it is better this way. Do not bet and that is it, man}". [The Applicant] said, "*Si obvio nunca mas. Ahora solo espero que tú no pidas la plata de la colonia Tovar* {Yes obviously never again. Now I just hope that you do not ask for the money from the Colonia Tovar}".

… On 25 July 2021 at 13:10 hours, [the Applicant] responded to a message from [AA] asking, "*O sea tú de pana le besaste el culo a alguien y aparte de eso le pagaste a él/ella $2k?* {So you actually kissed someone's ass and on top of that you paid them $2k?}" which [AA] sent on 24 July [2021] at 13:14 hours. [The Applicant] said, "Oye [AA's first name] no vayas a contar eso {Listen [AA's first name] do not … talk about that}".

… On 9 August 2021 at 13:09 hours, [the Applicant] wrote, "*Yo el viernes voy a España. Y espero poder viajar un poco en esas 3 semanas. No se donde* {On Friday, I am going to Spain. And I hope I can travel a bit in these three weeks. I do not know where}". [AA] did not respond. On 25 August 2021 at 08:19 hours, [the Applicant] asked, "*[AA's first name]! Como vas?* {[AA's first name]! How are things with you?}". [AA] did not respond. On 26 August 2021 at 05:59 hours, [the Applicant] said, "[AA's first name]". [AA] did not respond until 27 August 2021 at 06:17 hours, when he said, "[the Applicant's first name]". [The Applicant] asked, "*Que tal haha. Sigues en Cairo? Eso es no?* {What is up haha. Are you still in Cairo? That is it no?}". [AA] did not respond.

… On 31 August 2021 at 13:02 hours, [the Applicant] sent two laughing smileys and at 13:24 hours, [AA] responded to his earlier question, "*Sí, sigo en El Cairo estudiando* {Yes, I am still in Cairo studying}". [The Applicant] wrote, "*Haha. Pura locura. De hecho iba a ir a Egipto. Casi casi* {Haha. Pure madness. In fact, I was going to go to Cairo. Very nearly.}". The IGO notes that [the Applicant] also deleted one message he initially sent.

… On 12 September 2021 at 11:39 hours, [the Applicant] wrote, "[AA's first name]", after which he called [AA] who did not pick up the call. He continued, "*Estás?* [AA's first name] {Where are you? [AA's first name]}" and he added a sad smiley. [AA] did not respond. On 13 September 2021, [the Applicant] sent [AA] a selfie at 00:03 hours, added two laughing smileys and said, "[AA's first name]". These messages were followed by three deleted messages. At 00:14 hours, [the Applicant] sent [AA] a picture showing [the Applicant] pressing his face into the bottom of another man and wrote, "Please keep it and ask 1k USD for removal".

… On 13 September 2021 at 02:43 hours, [AA] responded, "*Qué es esto [the Applicant's first name]? Ya lo borré yo mismo, me habías dicho que pararías! Ya basta chamo, de pana* {What is this [the Applicant's first name]? I already deleted it myself, you told me you would stop! Enough already man, seriously}".

… At 06:46 hours, [the Applicant] wrote, "*[AA's first name] de pana que lo siento, ya no más con eso. De verdad ha sido experiencia super mala todo eso* {[AA's first name], seriously, I am sorry, no more with that. It has really been a very bad experience all this}". [AA] did not respond. On 9 October 2021, [the Applicant] asked, "*[AA's first name] qué tal! Me dijeron viniste a Venezuela!* {[AA's first name] what is up! They told me you came to Venezuela!}". [AA] did not respond.

Consideration

The issues of the present case

8. The Appeals Tribunal has consistently held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

9. Accordingly, the basic issues of the present case can be defined as follows:

a. Did UNHCR lawfully exercise its discretion when imposing the disciplinary measure of separation from service with compensation in lieu of notice and with half the termination indemnity pursuant to staff rule 10.2(a)(viii) and to enter the Applicant's name in [the United Nations] ClearCheck?

b. If not, to what remedies, if any, is the Applicant entitled?

The limited judicial review in disciplinary cases

10. Under art. 9.4 of the Dispute Tribunal's Statute, in conducting a judicial review of a disciplinary case, the Dispute Tribunal is required to examine (a) whether the facts on which the disciplinary measure is based have been established; (b) whether the established facts amount to misconduct; (c) whether the sanction is proportionate to the offence; and (d) whether the staff member's due process rights were respected. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, for instance, the Appeals Tribunal in para. 51 of *Karkara* 2021-UNAT-1172) The Appeals Tribunal has further explained that clear and convincing proof "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is

highly probable" (see para. 30 of *Molari* 2011-UNAT-164). In this regard, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred" (see para. 32 of *Turkey* 2019-UNAT-955).

Whether the facts on which the disciplinary measure is based have been established?

11. Considering the Applicant's admission of the facts stated in the sanction letter and the investigation report in accordance with his closing statement and his rejoinder of 16 October 2023, the Tribunal finds that these facts as have been duly established. The Applicant's contention that the facts were to be seen in the broader context of the communication between the Applicant and AA, in particular in terms of banter and jokes, will be considered below.

Whether the established facts amount to misconduct and whether the sanction is proportionate to the offence

<u>The parties' submissions</u>

12. The Applicant's submissions may be summarized as follows:

a. The Applicant refers in the application to the following communications between AA and him, which he contends formed part of the broader scope of jokes and banter between them (the Tribunal notes that the contents and translation indicated in parenthesis are not disputed by the Respondent):

i. AA to the Applicant—"*Y te conseguiré una princesa egipcia*" ("And I'll get you an Egyptian princess" and "Or more than one, depending on your religion"), which "was quite clearly a sexual offer initiated by [AA] without any solicitation by the Applicant".

ii. AA to the Applicant—"*Ya te exhibiste por la ventana saliendo de la ducha?*" ("Have you exposed yourself out the window getting out of the shower yet?").

iii. AA to the Applicant—"*Eso crees tú, pero las que te quieran ver lo lograrán jaja*" ("You think so, but those who want to see you will make it haha (emoji fist hand)".

iv. AA to the Applicant—"*Vete a dormir a las 11:00am, duermes NUEVE horas, te despiertas a las 8am y tienes una hora para exhibirte en tu ducha y desayunar*" ("Go to sleep at 11:00am, sleep for NINE hours, wake up at 8am and have an hour to show off in your shower and eat breakfast").

v. The Applicant to AA—"*[AA's first name], te aseguro que nadie puede verme*" ("[AA's first name], I assure you that no one can see me").

vi. The Applicant to AA—"*Tienes una obsesión con esa ducha*" ("You have an obsession with that shower").

b. The Respondent "does not contest that other allegations concerning [CC, name redacted for privacy reasons] were dropped due to the long previous banter and informal exchanges with him" (emphasis in the original omitted). It is "against this backdrop that the Applicant submitted that the totality of the communications between him and [AA] should also be viewed".

c. The Applicant "re-iterates his testimony" before the Dispute Tribunal that AA "continually switched topics to bring up sexually charged conversations which set the bar of communications very low".

d. During AA's direct testimony, he "claimed that he was 'in shock' when he received the photograph", and "yet, he admitted on direct testimony

that he had offered to find the Applicant an Egyptian princess, then characterized it as a joke, and a culturally insensitive one at that about religion". He "then confirmed it was 'just a joke' several times".

e. On cross-examination, AA "admitted that he initiated the conversation about getting the Applicant an Egyptian princess, but that he was not serious, it was a joke and that he did not consider it to be offensive". Counsel for the Applicant highlighted [AA's] blatant double standard ("So you make joke[s], but he cannot make jokes").

f. Then "with respect to [AA's] 'have you exposed yourself out of the window getting out of the shower yet' statements, [AA] on direct also admitted that he made inappropriate jokes in the office with other colleagues about 'our senior protection officer' who had previously occupied the apartment that the Applicant lived in, and that 'Like all of Venezuela can see, [DD, name redacted for privacy reasons], you know private parts and you just run into your apartment from her. So it's kind of like joking like, I mean, you're the, you're the one who's exposing yourself now by using this bathroom for the city".

g. On cross-examination about this "joke", AA's "palpable double standard about jokes was once again exposed and he admitted that he continued to tell it more than twice, even when the Applicant had clearly tried to stop this line of conversation ('[AA's first name], I assure you that no one can see me', 'You have an obsession with that shower')".

h. With respect to the Applicant's messages "which prompted [AA] to raise a complaint, the Applicant testified that he considered this exchange to be a joke also, comparable to the standard set by [AA] ("So I was just talking the thing. So, it was just a joke basically')".

i. It is "also worth recalling that the WhatsApp conversation adduced in evidence was just part of the exchange between the Applicant and [AA]".

They "interacted one to one on [numerous] occasions" and "also exchanged messages on numerous other platforms including another WhatsApp line". Even though "the exchanges elsewhere could not be adduced into documentary evidence, both the Applicant and [AA] confirmed them in their respective testimonies". The Applicant "also submitted that the sexual 'jokes' of [AA] were everywhere". This is "important to counter the constant statement by the Respondent that [AA] did not respond to the Applicant's joke about the bet: the two were communicating through different platforms, and a lack of response in this single recorded communication does not mean that there was never any response".

j. Regarding "recorded evidence of his apology, the Applicant submits that [AA] had set him up while he failed to record the totality of the conversation". Indeed, AA "initiated the call and decided to record it, without any notice to the Applicant". AA "maliciously led the Applicant to express an apology as a friendly gesture with a plan to use it as evidence of confessions". This was "an abuse of their friendship to serve his own purpose and hidden agenda" and "a violation of the right to privacy of the Applicant while the statement of the Applicant in those circumstances cannot be used against him: any confession must be voluntary and informed".

k. The Respondent "argued that the Applicant does not appear remorseful anymore, and that the disciplinary sanction imposed on him bearing in mind his remorse as mitigating circumstances should have been more serious". However, "the Respondent is fully aware that the Applicant had an attitude that had nothing to do with guilt" and had he "understood the extent of the investigations, he would not have been so naïve in the interactions with the investigators". He was "remorseful that a private exchange is exposed in isolation, portraying him as a sexual harasser on his own friend". With "the passing of time and the hypocrisy of [AA], the Applicant had no choice than fighting for his rights". He "has never changed his stand on whether he sent the messages or not", but has "rightfully argued

that those messages within the context of their relationship and all exchanges should not have [landed] him in any hot water".

l. Indeed, the Respondent "has applied two different binoculars on the jokes from both individuals", and "contrary to the Respondent's statement, [AA] did not make the two jokes only once or twice for each". The "joke about the bathroom (the Applicant exposing himself naked to the world including [AA]), was repeated on more than two occasions even though the Applicant clearly told him to stop". The "similarity with what the Applicant has been sanctioned for is extensive, even without considering the totality of their relation".

m. The "two witnesses exchanged on two different lines of WhatsApp and on other platforms, including in person". Only "the interaction on one single WhatsApp line was presented in this case because the Applicant does not have access to the archives on the other platforms anymore". AA "never presented the totality of the exchange on this single line" and "did not try to introduce any evidence from other platforms that they exchanged on". AA "has done his best to frame the Applicant and the Respondent fully fell into the trap".

n. The Applicant "knew about AA's sexual orientation and never intended his joke to be a sexual advance of any kind". AA "never stated the same". Despite "the repeated jokes from both ends, their friendship [remained] strong throughout until the promotion". For instance, AA "sought the involvement of the Applicant to help another common friend". AA "testified that he did not mind sharing room with the Applicant in Colonia Tower: how could [AA] have not [minded] sharing a room with someone who made a sexual advance to him and not just a joke that was indeed repeated to someone else ([CC])?".

o. In "his desperation, the Respondent misled the Tribunal in his closing: it is worth stating that the Applicant was never the supervisor of [AA] even though he was a professional and [AA] a local staff".

p. Throughout the Respondent's closing submission, he "failed to consider the responses from [AA] to the joke which included emojis and a voice message that was not available for anyone to hear".

13. The Respondent summarized his own submissions as follows in his closing statement:

a. UNHCR "separated the Applicant from service because there was clear and convincing evidence that he made an unwelcome sexual proposal to [AA], that he kept insisting on the proposal, and that he shared a sexually explicit photo even though he knew that it would be unwelcome". The Applicant's conduct "amounts to sexual harassment, and the disciplinary measure is proportionate to the gravity of the misconduct".

b. There is "no merit to the Applicant's submissions that his actions were merely expressions of banter in a context where [AA] had 'set a low bar'". Nothing in AA's "behaviour excuses the Applicant's misconduct", and AA "put the Applicant on notice that his actions were unwelcome". The Applicant has "consistently admitted that he persisted in his conduct even though he knew that it was making [AA] upset". The Applicant has "further admitted that he committed misconduct as charged".

c. A "judicial review of the record assembled by [UNHCR] and the evidence produced during these proceedings can only lead to the conclusion that [UNHCR's decision] was lawful and should stand".

The relevant legal framework in UNHCR on sexual harassment

14. In the sanction letter, UNHCR refers to the Applicant's "basic obligations" under staff regulations 1.2(a) and (b), staff rule 1.2(f), and paras. 4.1 and 4.2 of

UNHCR's Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority', HCP/2014/4 ("the UNHCR Policy").

15. Staff regulations 1.2(a) and (b) regarding basic rights and obligations of staff provide that:

> (a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;
>
> (b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

16. Staff rule 1.2(f), also on basic rights and obligations of staff, provides that "[a]ny form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited".

17. Paragraphs 4.1 and 4.2 of the UNHCR Policy reads, as relevant to the present case, that (emphasis in original):

> **4.1 General Principles**
>
> 4.1.1 In accordance with the provision of Article 101 (3) of the Charter of the United Nations, and the core values set out in Staff Regulation 1.2 (a) and (b) as well as Staff Rule 1.2(e), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, any form of discrimination, harassment, including sexual harassment and abuse of authority is prohibited and may lead to administrative or disciplinary action.
>
> 4.1.2 The Organization has a duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibitive conduct, through preventive measures and the provision of effective remedies when prevention has failed.

> 4.1.3 In implementing the present policy, the Organization shall act consistently and take the appropriate administrative, investigative, and disciplinary action required regardless of the function, title, length of service or contractual status of the Alleged Offender. Applicable standards on confidentiality will be respected. UNHCR's partners shall be informed of the policy.
>
> …
>
> **4.2 Duties of UNHCR Personnel**
>
> UNHCR Personnel, including Staff Members and Affiliate Workforce, are expected to:
>
> a) maintain a harmonious working environment for other colleagues by behaving in a manner which is free of disrespect, intimidation, hostility, offence and any form of discrimination, harassment, sexual harassment or abuse of authority;
>
> b) not to condone discrimination, harassment, sexual harassment and abuse of authority;
>
> c) familiarise themselves with this policy, the Code of Conduct and educate themselves through mandatory as well as optional training;
>
> d) be aware of the various options and internal channels available to them for addressing discrimination, harassment, sexual harassment or abuse of authority;

18. The Tribunal further notes that "sexual harassment" is defined as follows in para. 5.3 of the UNHCR Policy (emphasis in the original):

> … **Sexual Harassment** is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another. Sexual harassment is particularly serious when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. Sexual harassment may be unintentional and may occur outside the workplace and/or outside working hours. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between or amongst persons of the opposite or same sex.

Did the Applicant's conduct qualify as sexual harassment?

19. In *AAT* 2024-UNAT-1412, para. 99, the Appeals Tribunal made a number of findings in another a sexual harassment case from UNHCR, which are relevant to the present case. The Tribunal must follow these findings under the doctrine of *stare decisis* (see, for instance the Appeals Tribunal in *Igbinedion* 2014-UNAT-410, paras 23 and 24).

20. Generally concerning "a finding of sexual harassment" under the UNHRC Policy, the Appeals Tribunal held in *AAT* that this requires four "elements" to be present (see, para. 99). Each element is stated in quotation marks in the following sub-headings and reviewed individually as relevant to the present case:

"[T]he conduct in question occurred"

21. The Tribunal notes that the Applicant fully admits that the conduct in question, namely the WhatsApp exchanges, occurred—the content and translation of these exchanges follow from the above facts.

"[The conduct] falls within the legal understanding of sexual harassment and is of a sexual nature"

22. In *AAT*, para. 102, the Appeals Tribunal underscored (with reference to *Gonzalo Ramos* 2022-UNAT-1256, para. 68) that sexual harassment "can encompass numerous types of conduct, some overtly sexual in nature and others more subtle", and there "is a wide spectrum of conduct that can be defined as sexual harassment and its determination is entirely context specific". Whether "a particular type of conduct constitutes sexual harassment will depend on a number of factors and the circumstances of each case".

23. In this regard, the Appeals Tribunal highlighted that "a determination of whether a particular type of conduct is sexual in nature does not turn on the intentions of the perpetrator but on the circumstances surrounding the conduct, the type of conduct complained of, the relational dynamics between the complainant and the

perpetrator, the institutional or workplace environment or culture that is generally accepted in the circumstances, and the complainant's perception of the conduct".

24. The Appeals Tribunal also held in *AAT* that, depending on the circumstances, sending inappropriate texts and photos through WhatsApp may amount to sexual harassment (see, paras. 92 and 93, reference to footnotes omitted):

> … As for the 9 August 2020 WhatsApp messages, AAT recognized it was "wrong" to write that he wished that the Complainant was sleeping by his side. Furthermore, when asked why he sent inappropriate photos and a video of a baby sucking on a doll's breasts to the Complainant on that same date, he agreed that it was a "senseless act" on his part, admitting that he made a "mistake of judgment", but could not explain why he sent them except attributing it to "having too much to drink".
>
> … We find that these messages, by themselves, are clear and convincing evidence establishing the facts underlying [two counts] of misconduct. The WhatsApp messages are inappropriate and amount to unsolicited sexual advances.

25. The Applicant submits that his WhatsApp messages to the Applicant did not constitute sexual harassment as per the legal definition under the UNHCR policy. Rather than an expression of a sexual advance, the Applicant alleges that these messages were meant as jokes and banter and formed part of their regular communications in different WhatsApp chats, and not only the one referred to by the Respondent, and also elsewhere, including in person.

26. The Tribunal disagrees with the Applicant. The photo that the Applicant shared with to AA on WhatsApp is, as a matter of fact, of explicit sexual and even pornographic character. Whereas, in the sanction letter, the situation in the photo was described as that the Applicant had his face "pressed against another man's bare bottom", it more precisely follows from the actual picture, which was submitted in evidence, that, as also stated in the investigation report, it showed the Applicant "pressing his face into the bottom of another man".

27. In this context, the WhatsApp texts leading up to the Applicant sending this photo in which the Applicant started out by offering AA USD2,000 to let him "give

[AA] a kiss on the ass and [AA] can take a picture of [the Applicant]" unambiguously infer that the Applicant's intention was for AA and him to engage in the same sexual act as displayed on the photo.

28. In the interview, which IGO recorded in the investigation report, the Applicant admitted this by stating that, "I was trying to provoke him to say: oh, yes, I will do the bet. And obviously he was, like: I do not understand what bet. He was, like, doing— going around that—that—that thing with that bet" (emphasis in the original omitted). He further stated that "… I mean, it started like a super bad joke. Actually, I mean, I should not have—I should not have engaged in that thin[g] because it was stupid pushy". He also said that, "So it is obviously clear that my insistence was from me he was coming, because he was not giving an answer on that really bad thing I created [sic]. And I am obviously ashamed of myself because that is—I—I really—I mean, when he stopped talking to me, unlike—like, I lost a friend, actually and that was very, very, very worse [sic] for me". (Emphasis in the original omitted.)

29. To the Tribunal, considering the totality of the circumstances, the Applicant's WhatsApp messages, including the photo, can only be characterized as him attempting to make a sexual advance on AA for which he even offered AA money. In light of thereof, the Tribunal also finds that the Applicant's texts leading up to him sharing the photo via WhatsApp, and in particular, the photo itself fall within the legal definition of sexual harassment under UNHCR's policy in accordance with *AAT*.

30. At the same time, the Applicant submits that AA's comments regarding the Applicant exposing himself in his bathroom window and offering him an Egyptian princess showed that AA had also made sexual advances, or at least, references to him. According to the Applicant, AA had therefore inflicted the situation upon himself by setting a low standard for acceptable behaviour.

31. As for the comments on the Applicant exposing himself in his bathroom window, AA testified that the previous tenant of the Applicant's apartment had been

AA's UNHCR supervisor and that the bathroom had a large window from where one could look down to the road. AA therefore only made a joking comparison between his supervisor and the Applicant. The Applicant, on the other hand, testified that AA's remarks, which he had also often made in person, had surprised and offended him. As such, the Applicant felt that AA's comments were of similar standard, if not lower, than his remarks concerning kissing AA's bottom and sending the photo.

32. Concerning the comments on an Egyptian princess, AA testified that since he had previously been studying in Egypt, it was a joke among UNHCR colleagues in Caracas that he would find himself a princess when returning there. When inviting the Applicant to visit him in Cairo, AA had therefore, also as a joke, offered to find him an Egyptian princess. The Applicant's testimony was that this proposal had caught him by surprise as AA would otherwise never speak about the men and women, and the Applicant had therefore tried to change the topic.

33. The Tribunal notes that the testimonies of the Applicant and AA are in line with the documentary record, which the Tribunal reviewed in accordance with art. 9.4 of its Statute. Unlike the Applicant's photo and his WhatsApp texts leading up to it, the Tribunal finds that none of the Applicant's various comments, as described above, were of a sexual character or had any such undertone. Rather, they constituted, as testified by AA, jokes and banter, inappropriate or not, as the Applicant's subsequent text responses also confirm (as set out above under the summary of the Applicant's submissions). The Applicant's testimony on being offended by AA's comments does not therefore seem credible.

34. Consequently, as the Applicant acknowledged himself, his acts, in particular making several times proposals of kissing AA's bottom and sending the photo, therefore cannot be excused, or even explained, by other circumstances.

"[The conduct] was unwelcome and reasonably expected or perceived to cause offence or humiliation"

35. In *AAT*, the Appeals Tribunal held that the burden was on the alleged perpetrator to ensure that sexual advances are "welcomed before engaging in such conduct" (see, para. 10). The Appeals Tribunal further specified that "a close and friendly relationship between colleagues does not excuse unwanted and inappropriate sexual advances [and] the Dispute Tribunal correctly found that the Complainant rejected AAT's sexual advances and invitations on several occasions" (see para. 81).

36. It consistently follows from AA's responses, or lack thereof, to the Applicant's many texts on the proposed "bet" that he found these messages unwelcome. For instance, AA wrote to the Applicant that: "Still on that topic man?"; "I value my dignity more than $2.000"; "I do not bet"; "I thought it was a really stupid bet haha I would never [force you to pay] me, but you have kept bringing it up 1298548065908 times. That is why I say that if you continue with that emotional topic, I will send you my UNFCU account and that is it"; "The bet. Now, man, stop the subject. It is over". Despite this, the Applicant kept coming back to the topic, culminating with him sending AA the relevant photo.

37. In the Applicant's interview recorded in the investigation report, it is stated that the Applicant said that he was "super pushy with—with [AA] on that, and I am not very—I am not feeling good, because actually [AA] was my—was my friend, and—and I do not know how I come up with that stupidity to push him on—on that stupid thing like I—I asked. Like, sorry, I am frustrated with myself. Sorry" (emphasis in original omitted).

38. AA explained in his testimony to the Tribunal that when receiving the photo, he was shocked and felt disgusted and disappointed as he considered the Applicant a good friend. AA responded that he had to stop and expressed indignation. This statement is confirmed by the written record.

39. Accordingly, the Tribunal finds AA's testimony to be credible that he indeed found the Applicant's WhatsApp messages, in particular the photo, unwelcome. Further, due to the obscenity of the photo, the messages should reasonably be expected or perceived to cause offence or humiliation in the circumstances.

"[The conduct] interfered with work or created an intimidating, hostile, or offensive work environment".

40. The Tribunal notes that under the UNHCR Policy's legal definition of harassment, impact on work or the work environment is stated as an aggravating circumstance rather than requirement for a finding of sexual harassment. This is evident from the reference: "is particularly serious".

41. In the present case, when the Applicant was sending AA many of the relevant WhatsApp messages, including the photo, they were not working together as AA was on special leave in Egypt for several months in 2021.

42. According to AA's investigation interview (as recorded in the investigation report), he was, however, supposed to return to UNHCR Venezuela in January 2022 at which time "he did not feel comfortable seeing [the Applicant] at work without confronting him and … he did so in a phone call, where he spoke to [the Applicant] very bluntly". Subsequently, in March 2022, the Applicant, AA and other UNHCR colleagues participated in a workshop on sexual exploitation and abuse delivered by a Protection Officer. When the Applicant asked how and where he could report him being a victim of sexual harassment, this left in AA in disbelief. In return, AA asked "whether someone offering money to engage in sexual activity would be considered sexual harassment and if someone sent a picture depicting them in sexual activity with someone would be considered sexual harassment". What finally prompted AA's complaint, which was encouraged by other UNHCR colleagues, was that "at the end of June 2022 … [the Applicant] was appointed Protection Officer at the UNHCR Caracas Office". AA could "not believe [the Applicant] would be the one who delivered the trainings on sexual misconduct in the future, in addition to putting [the Applicant] in direct contact with beneficiaries".

43. Accordingly, as an aggravating circumstance, the Tribunal finds that the Applicant's WhatsApp messages, in particular the photo, interfered with work and created an intimidating, hostile, and offensive work environment.

Did the Applicant's behavior amount to misconduct?

44. The Appeal Tribunal has repeatedly endorsed the Administration's zero tolerance policy on sexual harassment, which it has stated is "a scourge in the workplace which undermines the morale and well-being of staff members subjected to it" (see, *Mbaigolmem* 2018-UNAT-819, para. 44, *Applicant* 2022-UNAT-1187, para. 47, and also, for instance, *Conteh* 2021-UNAT-1171).

45. Accordingly, as the Respondent clearly and convincingly has established that the Applicant's WhatsApp messages, in particular the photo, qualified as sexual harassment under staff regulations 1.2(a) and (b), and staff rule 1.2(f), the Tribunal finds that the Applicant's behavior amounted to misconduct.

Was the sanction proportionate to the offence?

46. It is well-established in the jurisprudence of the Appeals Tribunal that the Administration has "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere" when imposing a sanction in its judicial review (see, *Ladu* 2019-UNAT-956, para. 40 and also, for instance, *Osba* 2020-UNAT-1061, para. 56, and *Halidou* 2020-UNAT-10, para. 34). At the same time, the "discretionary authority of the Administration is not unfettered" (see, *Mancinelli* 2023-UNAT-1339, para. 60).

47. The Appeals Tribunal has further stated that "the 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", which "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" (see, *Sanwidi* 2010-UNAT-084, para. 39).

48. In cases of sexual harassment, despite the zero tolerance policy, the Appeals Tribunal has recognized that "there are degrees of severity to sexual harassment

misconduct". Zero tolerance "merely refers to the attitude of the Organization to promptly and seriously react towards harassment". The principle of proportionality "therefore obliges the Administration to give full and proper consideration to less drastic and the most suitable means to achieve the objectives of the disciplinary policy". The requirements of the zero-tolerance policy may well be adequately met in a particular case involving a lesser infringement (a passing inappropriate remark for instance) by the imposition of another penalty such as demotion, suspension, a fine etc.". Accordingly, the "ultimate penalty … does not apply in every case". (See, *Szvetko* 2023-UNAT-1311, para. 48.)

49. In *Szvetko*, the Appeals Tribunal also found that "[s]howing a colleague a picture of a penis can cause offence or humiliation, and whether it was shocking, prurient, or pornographic, although relevant, is not decisive". It further found that "the behaviour was puerile and offensive; and offence was taken", that "making unwelcome, suggestive, sexual comments or innuendos to colleagues and showing them photographs of genitalia is unbecoming and disregarding of sensibilities, it violates the obligation of an international civil servant to uphold the highest standard of integrity and naturally would undermine professional confidence", that "[p]ersons of mature character would know this", and that "[t]he two women confirmed to the investigators that they felt uncomfortable, shocked, and disgusted by the prohibited conduct". (See, para. 53.) In *Szvetko*, the Appeals Tribunal affirmed the Administration's decision to separate the staff member from service with compensation in lieu of notice and without termination indemnity pursuant to staff rule 10.2(a)(viii).

50. The Tribunal finds that similar considerations apply in the present case. Whereas no genitals were displayed in the photo of the present case, it was, unlike *Szvetko*, indeed shocking, prurient, and pornographic. Even worse, the photo in the present case involved the Applicant in an explicit sexual act with another man and not just a photo depicting "a blurred out naked man in the background with a large gold watch prominent in the foreground" apparently from a watch advertisement (see, *Szvetko*, para. 6). Rather than displaying an unknown person, this made the photo

personal to AA, because in the WhatsApp messages leading up to the Applicant sending it, he proposed AA, his otherwise close friend but of a different sexual-orientation, to engage in the same sexual act. Adding to the repulsiveness, the Applicant even offered AA money for doing so.

51. Consequently, the Tribunal finds that UNHCR acted lawfully within its scope of discretion when imposing the sanction of separation from service with compensation in lieu of notice and with half the termination indemnity (less severe than in *Szvetko*) pursuant to staff rule 10.2(a)(viii) and to enter the Applicant's name in the United Nations's ClearCheck database.

Conclusion

52. The application is rejected.

(Signed)

Judge Joelle Adda
Dated this 30th day of September 2024

Entered in the Register on this 30th day of September 2024
(Signed)
Isaac Endeley, Registrar, New York