UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2023/032
Judgment No.: UNDT/2024/080
Date: 17 October 2024
Original: English

Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

SOPHOCLEOUS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Albert Angeles, DAS/ALD/OHR, UN Secretariat
Sergei Gorbylev, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a staff member of the United Nations Office on Drugs and Crime ("UNODC"), contests the decision imposing on him the disciplinary measure of demotion by one grade, with deferment for three years of consideration for eligibility for promotion.

2. For the reasons stated below, the Tribunal finds that the contested decision is lawful and rejects the application.

Facts and Procedural history

3. The Applicant began his career with the United Nations in May 1994. From 10 May 2010 to 30 September 2019, the Applicant was the Chief of Finance, Financial Resources Management Services ("FRMS"), United Nations Office at Vienna ("UNOV"), at the D-1 level. On 1 October 2019, the Applicant began a two-year secondment assignment at the International Maritime Organization ("IMO") in London.

4. On 20 March 2019, the Office of Internal Oversight Services ("OIOS") received a report of possible sexual harassment implicating the Applicant. Specifically, the report referred to the Applicant's possible unwelcome sexual conduct towards V01, V02, V03 and, potentially, others, as well as the alleged victims' fear of retaliation if they were to speak up.

5. OIOS conducted an investigation that included interviews with 18 witnesses, including the Applicant and six aggrieved individuals, and a review of relevant communications. The Applicant was interviewed on 30 September 2019. However, according to the investigation report, he was unavailable to provide comments or participate in a follow-up interview due to his claims of ill health.

6. On 31 March 2020, OIOS issued its investigation report. OIOS concluded that "the established facts constitute[d] reasonable grounds" to conclude that the Applicant's conduct was "inconsistent with the standards expected of a United

Nations staff member". OIOS then referred the case to the Office of Human Resources ("OHR") for appropriate action.

7. By memorandum dated 12 August 2021 ("Allegations Memorandum"), the Assistant Secretary-General for Human Resources ("ASG/HR") notified the Applicant of formal allegations of misconduct, and requested that he respond to them within one month of receiving the Allegations Memorandum.

8. On 15 January 2022, after receiving several extensions of time, the Applicant submitted his comments on the allegations.

9. By letter dated 15 March 2023 ("Sanction Letter"), the ASG/HR informed the Applicant that based on a review of his entire dossier, including his comments, the Under-Secretary-General for Management, Strategy, Policy and Compliance ("USG/DMSPC") had concluded that it had been established by at least a preponderance of evidence that he had engaged in serious misconduct. The Applicant was informed of the decision of the USG/DMSPC to impose on him the disciplinary measure of demotion by one grade with deferment for three years of consideration for eligibility for promotion, in accordance with staff rule 10.2(a)(vii), as well as the administrative measure of having to undertake gender sensitivity training, in accordance with staff rule 10.2(b).

10. On 8 June 2023, the Applicant filed the present application contesting the decision indicated in para. 1 above.

11. On 11 July 2023, the Respondent filed his reply.

12. On 13 October 2023, the Applicant filed a rejoinder pursuant to Order No. 127 (GVA/2023).

13. Upon the parties' joint requests, the proceedings were suspended from 27 October 2023 until 2 April 2024 pending informal settlement discussions.

14. As the parties could not settle the dispute, the Respondent filed his comments on the Applicant's rejoinder on 16 April 2024 in response to Order No. 19 (GVA/2024).

15. On 2 May 2024, the Tribunal held a case management discussion ("CMD") with the participation of Counsel for the Applicant and Counsel for the Respondent. During the CMD, the parties agreed, *inter alia,* that a hearing was not required and requested the opportunity to file closing submissions.

16. By Order No. 50 (GVA/2024) of 8 May 2024, the Tribunal recapitulated the parties' discussion during the CMD and ordered them to file their respective closing submission, which they did on 12 June 2024.

Consideration

Applicant's request for anonymization

17. Recalling the reasons put forward by the United Nations Appeals Tribunal ("UNAT", or "Appeals Tribunal") in *AAE* 2023-UNAT-1332, the Applicant requests the anonymization of his name in "any publication of judgment" due to the harm this case has caused him.

18. In this respect, art. 11.6 of the Tribunal's Statute states that "[t]he judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal".

19. The Appeals Tribunal held in *AAE*, at para. 155, that:

> [T]here continues to be concerns raised regarding the privacy of individuals contained in judgments which are increasingly published and accessible online. In our digital age, such publication ensures that individuals' personal details are available online, worldwide, and in perpetuity. There are increasing calls for the privacy of individuals and parties to be protected in judgments.

20. It is well-settled case law that "the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality" (see *Buff* 2016-UNAT-639, para. 21).

21. The Tribunal also recalls that in its resolutions 76/242 and 77/260, adopted on 24 December 2021 and 30 December 2022 respectively, the General Assembly reaffirmed the principle of transparency to ensure a strong culture of accountability throughout the Secretariat.

22. It follows that the internal justice system is governed by the principles of transparency and accountability. A deviation from these principles by means of anonymization requires an applicant to meet a high threshold for such a request to be granted. In *AAE*, the Appeals Tribunal granted anonymity as an exception because the case related to sexual abuse (rape), and the Tribunal was mindful of the negative impact of publicizing *AAE*'s name on his family, who were blameless in the matter.

23. The instant case is not comparable to *AAE* as the Applicant only refers to the "harm this case has caused" him and the "sensitive information" referred to in the case without providing further reasons for the Tribunal to deviate from the principles of transparency and accountability. Therefore, the Applicant's motion stands to be denied.

Receivability

24. The Respondent submits that the application is not receivable *ratione materiae* concerning the decision to assign the Applicant to a post reflecting his new P-5 level after demotion. The Respondent indicates that the Applicant was informed of such decision on 31 March 2023 and that the decision was implemented on 29 May 2023. He claims that since the Applicant did not request management evaluation of the reassignment decision, his challenge of it is not receivable.

25. In this respect, the Tribunal recalls that during the CMD, Counsel for the Applicant clarified that the Applicant's reassignment is not contested in the present case. However, he submitted that the reassignment resulted from the disciplinary measure imposed on the Applicant and that its impact should be considered when assessing damages as the post to which he was assigned was not commensurate with his background and qualifications.

26. To the extent the Applicant wishes to refer to the reassignment decision as proof of harm of the contested decision, the Tribunal clarifies that the reassignment is a separate administrative decision for which the Applicant did not request management evaluation. It thus falls outside the scope of the present case. Consequently, any challenge with respect to the reassignment decision is not receivable *ratione materiae*.

The decision not to have a hearing

27. Under the consistent jurisprudence of the Appeals Tribunal, "the assessment of evidence is foremost in the hands and responsibility of the trial judge" who "[has] an appreciation of all the issues for determination and the evidence before it" (see *Karkara* 2021-UNAT-1172 para. 64; *Nyawa* 2020-UNAT-1024, para. 63).

28. In the present case, the parties agreed at the CMD that a hearing was not required and requested to be allowed to file closing submissions instead. The Tribunal's Order No. 50 (GVA/2024) recapitulates the parties' discussion during the CMD.[1]

29. While a hearing is normally conducted in disciplinary cases when the facts are contested, the Tribunal also notes that the Appeals Tribunal has upheld disciplinary measures, including dismissal or separation from service, without the holding of an oral hearing and based exclusively on witness statements and other evidence contained in an investigation report in several cases involving sexually-related misconduct (see *AAN* 2023-UNAT-1366, *Szvetko* 2023-UNAT-1311, *Conteh* 2021-UNAT-1171, *Adriantseheno* 2021-UNAT-1146, *Nadasan* 2019-UNAT-918, and *Khan* 2014-UNAT-486).

[1] The parties discussed at the CMD whether a hearing should be held. On this issue, Counsel for the Applicant requested that all the evidence on record including the Applicant's submissions before the Tribunal be considered in the review of the case. His position was that a "hearing on the merits would not necessarily facilitate the work of the Tribunal" and requested the opportunity to "make closing arguments" around 10-12 pages. When Counsel for the Respondent followed up to clarify Counsel for the Applicant's position on a decision based on the papers, the latter stated "yes". Counsel for the Respondent then submitted that the contested decision was based on the record assembled during the investigation by OIOS, "including the statements by the Applicant during the investigation and his comments during the disciplinary process". He referred to art. 9.4 of the Tribunal's Statute, which provides that in conducting a judicial review, the Tribunal shall consider the record assembled by the Secretary-General.

30. Considering the extensive evidence on record, the parties' positions, and the fact that the Tribunal finds no issues requiring further fact finding and no added value through oral evidence before it, the Tribunal decides to adjudicate the case exclusively based on the written record.

Scope and standard of judicial review

31. According to art. 9.4 of the Tribunal's Statute, in hearing an application challenging an administrative decision imposing a disciplinary measure, the Dispute Tribunal shall pass judgment on the application "by conducting a judicial review". In so doing, the Dispute Tribunal "shall consider the record assembled by the Secretary-General and may admit other evidence" to assess:

a. Whether the facts on which the disciplinary measure was based have been established by evidence and up to the required standard of proof;

b. Whether the established facts legally amount to misconduct;

c. Whether the Applicant's due process rights were observed; and

d. Whether the disciplinary measure imposed was proportionate to the offence.

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

Whether the facts on which the disciplinary measure was based have been established by evidence and up to the required standard of proof

33. The disciplinary measure in the case at hand is demotion by one grade with deferment for three years of consideration for eligibility for promotion.

34. It is well-settled law that the standard of proof applicable to a case where disciplinary measures do not result in separation or dismissal is that of preponderance of evidence, i.e., more likely than not that the facts and circumstances underlying the misconduct exist or have occurred (see sec. 9.1(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) and *Suleiman* 2020-UNAT-1006, para. 10).

35. Moreover, in determining whether the standard of proof has been met, the Tribunal "is not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the Secretary-General". Thus, it will "only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based" (see *Nadasan* 2019-UNAT-918, para. 40).

36. Considering the above and noting that after reviewing the matter, the Administration dropped part of the initial allegations against the Applicant for lack of sufficient evidence, the Tribunal will only focus on the facts that constituted the basis for the alleged misconduct.

37. The Tribunal further notes that the Applicant does not contest the imposition of the administrative measure of having to undertake gender sensitivity training pursuant to staff rule 10.2(b). Therefore, the Tribunal will not address this issue and will only focus on matters relating to the disciplinary measures imposed on the Applicant.

38. As per the Sanction Letter, the USG/DMSPC concluded that the following allegations against the Applicant had been established:

a. By clear and convincing evidence that he made an inappropriate sexual comment to V01 regarding stroking a doll in his office while being naked and crying;

b. By a preponderance of the evidence, that he physically intimidated V02 on 23 December 2015;

c. By a preponderance of evidence, that he would engage in different forms of physical contact with colleagues, including hugging and kissing them, and would invade the personal space of women; and

d. By a preponderance of evidence, that he commented on the physical appearance and attire of women and leered at women in the office.

39. The Tribunal will examine below the above-mentioned incidents in turn.

The inappropriate sexual comment to V01 regarding stroking a doll

40. According to the investigation report, V01 recounted that around the end of 2015, a very busy time for FRMS due to the roll-out of Umoja, the Applicant approached her and commented how "serious" she looked. At the time, V01 was sharing an office with Ms. KC, a Consultant. V01 responded to the Applicant that there was just "a lot of work" to be done. The Applicant then closed their door and shared that when he is stressed, "he closes the door to his office, [gets] naked, [cries] and [strokes] a doll". V01 stated that the Applicant accompanied the remark with a stroking hand gesture and mentioned that he had gotten the doll from the commissary.

41. V01 stated that the Applicant was not laughing when he said this and neither Ms. KC nor she responded to him. V01 was shocked at hearing this comment but was uncertain of its exact meaning as English is not her first language. However, she perceived the comment to have a sexual connotation. She started seeing the Staff Counsellor, a position not related to FRMS, with whom she shared the incident and whose testimony is also on record. According to her interview, V01 considered, after consulting the Staff Counsellor, that she was the doll in the story and was still having a "nightmare" about the incident.

42. In their testimonies to OIOS, V02 and W01 recounted how, during Ms. KC's farewell lunch in January 2016, V01 and Ms. KC shared the Applicant's comment about crying and stroking a doll naked in his office when upset. Both V02 and W01 observed V01's discomfort regarding the comment and were shocked at the comment, which they considered inappropriate and of a sexual connotation.

43. During the investigation, the Applicant stated that he probably made the "doll" remark to V01 but that it was not in the context of a sexual joke but an expression that he got in Chile. In his comments to the Allegations Memorandum, the Applicant confirmed that he made the "doll" remark but clarified that it came from a Chilean expression "peinar la muñeca desnudos y en el rincón", translated as "combing the doll naked and in the corner". The record shows that the phrase,

used in Chile to connote extreme stress, originated from a popular 1980s television series.

44. In the present proceedings, the Applicant argues that a vague or slight recollection of what was said and how it was interpreted by V01, whose English is weak, does not contribute to a preponderance of evidence given that no witness confirmed the alleged incident. Speculation about what was said and its meaning does not constitute evidence that the Spanish expression had any sexual connotation. He also submits that V01 lacks credibility because she did not report the incident earlier.

45. Contrary to the Applicant's argument, Ms. KC confirmed to be present when the comment was made. In her email of 22 October 2019, Ms. KC informed OIOS that the Applicant made an inappropriate comment of a sexual nature to V01 while she and V01 were working together.

46. The evidence shows that V01 provided a credible account of the "doll" incident. The testimonies of V02, W01 and the UNOV Staff Counsellor, to whom V01 recounted the incident, corroborated V01's account. In their testimonies, they also shared V01's perception of the Applicant's comment in that it was shocking, inappropriate and had a sexual connotation.

47. The Tribunal also notes that while the Spanish expression used in Chile may not have any sexual connotation, the Applicant's English translation of it in a work environment in Vienna with colleagues who are not familiar with the popular culture in Chile was inappropriate and led to a different interpretation, which was not unreasonable given the Applicant's reference to nudity and the accompanying stroking gesture. The Applicant, who claims that V01's level of English is limited, neither explained the meaning of his expression nor put it in context by referring to its origin in Chilean culture.

48. Furthermore, contrary to the Applicant's assertion, V01's delay in formally reporting the incident does not affect her credibility. The Respondent rightly submits that no adverse inference regarding V01's credibility may be drawn from a delay given that ST/SGB/2008/5 ("Prohibition of discrimination, harassment,

including sexual harassment, and abuse of authority") does not require V01 to make a formal sexual harassment report within a set period.

49. In light of the above, the Tribunal finds that it has been established by clear and convincing evidence that the Applicant made a comment to V01 regarding stroking a doll in his office while being naked and crying.

The physical intimidation of V02

50. At the time of the incident, V02 was working on the Umoja rollout, which was a period of high stress. On 23 December 2015, there was a centrally imposed deadline for UNOV to submit Umoja documents that she had been working on. At some point during the day, V01 went to the UNOV cafeteria to get some food. The Applicant came into the cafeteria, greeted V02 and V02 greeted the Applicant back but he did not hear her.

51. According to the investigation report, the Applicant "became incensed and accused her of ignoring him and not respecting her boss. He then followed her as she sought to buy her lunch and return to her desk". At some point, the Applicant approached V02 and stood right behind her, close enough so that V02 could feel him breathing onto the back of her neck. V02 stated that despite efforts to explain to the Applicant that she was not ignoring him, the Applicant kept himself at a very close physical distance to her while she moved through the cafeteria and to the elevator, insisting that they speak immediately. The Applicant demanded that V02 not submit documents relating to Umoja by the end of that day unless the Applicant had reviewed them first, together with V02, overnight.

52. The record shows that after the incident with the Applicant, V02 went to UNOV Medical Services because she felt an "effervescent sensation at the back of [her] head". At the Medical Services, her blood pressure escalated and she broke down in tears. The Medical Services then contacted the Staff Counsellor to assist V02 as "V02 [refused] to go home because she had too much work". Both the Medical Services and the Staff Counsellor insisted that V02 not return to work. V02 was then placed on certified sick leave.

53. The Applicant claims that the incident recounted by V02 in the cafeteria lacks credibility as no one witnessed it. He also claims that the accounts, including subsequent hearsay, are contradictory and inconsistent and are not evidence of the alleged physical intimidation. The Applicant indicated in his rejoinder that he did not recall the incident.

54. Contrary to the Applicant's submissions, V02 provided a credible account of the Applicant's physical intimidation towards her. The testimonies of W01, Ms. EW, and the Staff Counsellor corroborate the 23 December 2015 incident and its effect on V02.

55. W01 indicated that he was looking for V02 on 23 December 2015 to wish her well for the holidays and Ms. FC informed him that V02 had gone to UNOV Medical Services. W01 stated that he recalled Ms. FC commenting to him that the Applicant's conduct towards V02 was like "kick[ing] a dog when it was down". W01 also mentioned that V02 informed him about the incident when he called her to wish her a Merry Christmas.

56. Ms. EW stated that V02 shared the incident with her and that V02 felt harassed by the Applicant and was no longer comfortable when in the same space as him. Ms. EW also mentioned that V02 was impacted psychologically by the working environment in FRMS and the Applicant's behaviour.

57. Furthermore, it is not disputed that, after the incident, V02 visited the UNOV Medical Services on 23 December 2015 with high blood pressure and that she was placed on sick leave. The record also shows that the Staff Counsellor directly witnessed the effect of the incident on V02. Indeed, UNOV Medical Services called the Staff Counsellor to help calming down V02 and convince her to leave work despite her reluctance due to her willing to meet a work-related deadline and the Applicant's instructions that he and V02 finish a task together overnight at the time.

58. Therefore, contrary to the Applicant's submission, there is no evidence to conclude that the statements of W01 and Ms. EW were fabricated to support V02's version of the incident or that they colluded against the Applicant.

59. Considering the above, the Tribunal finds that it has been established by a preponderance of evidence that the Applicant physically intimidated V02 on 23 December 2015.

Physical contact with female colleagues and invasion of personal space

60. The evidence shows that the Applicant would greet female colleagues with kisses on the cheek. Some female colleagues accepted this but others felt uncomfortable, particularly V01 and V02.

61. Sometime in 2018, the Applicant was seen hugging Ms. D in the office corridor. At the time, Ms. D was facing some issues that she had shared with the Applicant. However, other colleagues were not privy to this information. V05 brought the incident to the attention of the Applicant's supervisor, Mr. DT, who then had a discussion with the Applicant regarding his physical contact with women in the office.

62. The Applicant claims that customs such as greeting with a kiss on the cheek may or may not be perceived as unwelcome, but there is no evidence that anyone ever objected by indicating at the time that it was unwelcome. Nevertheless, he submits that he became more circumspect in his exchanges with staff as time passed, even before his supervisor spoke with him about it.

63. The evidence shows that the Applicant tended to invade women's personal space. At some point in 2016, the Applicant had another incident with V02. The Applicant was on the same elevator as V02 and he tried to remove a stray thread on V02's blouse just below her neck/upper breast. V02 did not appreciate the Applicant's reaching motion and stepped back. The Applicant told V02 that he meant to remove the thread but V02 replied that she would take care of it herself.

64. V05 mentioned that, on a separate occasion, while smoking outside, the Applicant was standing close to a female colleague and noticed that a cigarette box was about to fall out of her pants pocket. The Applicant approached the colleague and tried to put the box back into her pants invading her personal space.

65. The Applicant's supervisor, Mr. DT, also testified that in 2018, he met with the Applicant to make him aware that "female colleagues were uncomfortable with the way he touched them or looked at them". Mr. DT then advised him to be "extremely sensitive of his behaviour because they work in a multicultural environment". Mr. DT also testified that the Applicant sometimes got "a bit too close" to his female colleagues or "[held] their arms a bit together" when greeting them.

66. Considering the above, the Tribunal finds that it has been established by a preponderance of evidence that the Applicant engaged in different forms of physical contact with colleagues, which was not always welcome, invading their personal space.

Comments on appearance, attire and leering at women

67. The evidence, including the testimonies of V01 and V02 indicates that the Applicant commented on the physical appearance of female colleagues, including their attire, which made them feel uncomfortable. While he claims that such comments are too generic and subjective, the Applicant admitted that he would participate in discussions about efforts to lose weight or diets and occasionally compliment colleagues on their outfits.

68. Furthermore, the evidence on record supports a finding that the Applicant would be leering at women in the office. In their testimonies, V05, V06, Ms. OK and Ms. EW stated that the Applicant would scan women by looking at them up and down, and that his actions made them feel uncomfortable.

69. V06 testified that the Applicant would look at her from head to toe while greeting her, "taking his time" to "undress her with his eyes". V06 also mentioned that she felt "dirty" by the way the Applicant would look at her and that she tried to avoid him.

70. Ms. OK stated that it was "very clear" that the Applicant liked women "a lot" and that he would look at "women's breasts" sometimes. She found it weird that the Applicant would look below the neckline in a professional environment.

71. Ms. EW testified that the Applicant tended to scan people, which was unprofessional and could be considered "sexual harassment," as she had learned a few months earlier from training.

72. The Staff Counsellor confirmed the statements of V05, V06, Ms. EW and Ms. OK and also recalled incidents where the Applicant looked at her breasts.

73. The above evidence contradicts the Applicant's claims that the finding is based on subjective feelings of V01 and V02 and uncorroborated "opinions" of V05, V06, and Ms. OK that appear to be no more than hearsay. The Tribunal finds the testimonies of V01, V02, V05, V06, Ms. OK and Ms. EW credible and consistent concerning the Applicant's behaviour towards female colleagues. There is no evidence supporting that the witnesses had a motive to make false allegations or collude against the Applicant.

74. Furthermore, the Applicant acknowledged that he would stand and wait before speaking to colleagues or inviting them to lunch to avoid interrupting their work. Similarly, the Applicant indicated that it was likely that he had sat in the chair placed at the corner of Ms. FC's office while Ms. FC and V01 were working and that he had commented that he liked watching them work.

75. The Applicant attempts to discredit the witnesses' credibility by submitting that the reasons behind the reporting of his conduct may be linked to their looking for career advancement or resentment over operational issues. However, there is no evidence to support his allegation. Similarly, V02's filing of a complaint against Ms. FC for separate reasons and different grounds is irrelevant.

76. The Applicant claims that even if the subjective impressions of some staff are taken at face value, the alleged actions do not amount to misconduct. He submits that socially awkward behaviour is not misconduct. The Tribunal is not persuaded by this argument. The Applicant's conduct cannot be justified as socially awkward behaviour under the legal framework of the United Nations, particularly when, as the record shows, it causes offense to a number of female colleagues in a professional environment.

77. Concerning the Applicant's assertion that the Respondent's case is the result of a sloppy investigation aimed at a pre-determined outcome, the Tribunal finds that the evidence on record supports the investigation's findings in respect of the incidents reviewed above. The Tribunal recalls that the Applicant was unavailable or unwilling to provide comments or participate in a follow-up interview during the investigation due to his claims of ill health at the material time.

78. Consequently, the Tribunal finds that it has been established by a preponderance of evidence that the Applicant commented on the physical appearance and attire of women and leered at women in the office.

Whether the established facts legally amount to misconduct

79. Regarding whether the established facts legally amount to misconduct, the Tribunal recalls that staff rule 10.1(a) provides that:

> Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

80. Staff rule 1.2(f) 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".

81. ST/SGB/2008/5, which applies to the present case as the investigation initiated prior to the entry into force of ST/SGB/2019/8 ("Addressing discrimination, harassment, including sexual harassment, and abuse of authority"), provides in sec. 2.1 that:

> [E]very 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.

82. ST/SGB/2008/5 further provides in sec. 3.2 that:

> Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct[.]

The "doll" remark

83. Section 1.3 of ST/SGB/2008/5 defines sexual harassment as (emphasis added):

> [A]ny *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*, when such conduct *interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment*. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

84. It thus follows that a behaviour is considered sexual harassment if it is a) of sexual nature, b) unwelcome, c) might reasonably be expected or be perceived to cause offence or humiliation to another, and d) interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment.

85. It has been established by clear and convincing evidence that the Applicant made a comment to V01 regarding stroking a doll in his office while being naked and crying.

86. The evidence shows that V01 perceived the "doll" remark as shocking, inappropriate, and having a sexual connotation, particularly because the Applicant referred to nudity. Her perception was shared by V02, W01 and the UNOV Staff Counsellor. Ms. KC also confirmed the sexual nature of the Applicant's comment. At some point, V01 even considered the Applicant's comment as a euphemism for masturbation.

87. Clearly, such a comment was unwelcome and caused offence and humiliation to V01, who went "for the first time" after this incident to consult the UNOV Staff Counsellor and stated to have nightmares about it. The testimony of W03 indicates that the "doll" remark caused V01 high stress and that she was afraid of retaliation if she was identified as the complainant against the Applicant. Consequently, the Tribunal finds that the Applicant's "doll" remark created an intimidating, hostile and offensive work environment for V01.

88. Considering the above, the Tribunal finds that the Applicant's "doll" remark amounts to sexual harassment as defined in sec. 1.3 of ST/SGB/2008/5. Furthermore, the Applicant failed in his obligation, as a senior manager, to ensure a work environment free of sexual harassment and to act as a role model for others, violating staff rule 1.2(f) as well as secs. 2.1 and 3.2 of ST/SGB/2008/5. As such, the established facts in connection with the incident at stake legally amount to misconduct.

The physical intimidation of V02

89. Section 1.2 of ST/SGB/2008/5 defines harassment as (emphasis added):

> [A]ny *improper and unwelcome* conduct that *might reasonably be expected or be perceived to cause offence or humiliation to another person*. Harassment may take the *form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment*. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

90. It has been established by a preponderance of evidence that the Applicant physically intimidated V02 on 23 December 2015 by keeping a very close physical distance from her while she moved through the cafeteria, insisting that they speak immediately. The Applicant's behaviour was unwelcome, offensive, and humiliating towards V02.

91. The incident occurred during a high-stress period for V02, and the Applicant's actions may have reasonably exacerbated an already stressful situation for her. Following the incident, V02 visited the UNOV Medical Services as her blood pressure escalated and she was placed on certified sick leave.

92. Consequently, the Tribunal finds that the Applicant's actions towards V02 on 23 December 2015 amount to harassment as defined in sec. 1.2 of ST/SGB/2008/5. In so doing, the Applicant violated staff rule 1.2(f) as well as secs. 2.1 and 3.2 of ST/SGB/2008/5.

Physical contact with female colleagues and invasion of personal space

93. It has been established by a preponderance of evidence that the Applicant engaged in different forms of physical contact with female colleagues, which was not always welcome, invading their personal space.

94. The evidence shows that while the Applicant greeted some colleagues with kisses on the cheek, his conduct was not welcome by V01 and V02. They considered that the Applicant's conduct contributed to creating a hostile work environment, particularly in light of the other incidents towards them (see paras. 40 and 51 above).

95. In this respect, the Tribunal finds that in the absence of any indication from V01, V02 or any other colleague that the Applicant's conduct was not welcome, he did not have an opportunity to modify a behaviour considered unwelcome.

96. Furthermore, the record demonstrates that other colleagues had no issue with the Applicant's greetings. Ms. D, for instance, welcomed the Applicant's emotional support and did not consider it inappropriate that he hugged her in the office corridor.

97. The record indicates that the Applicant changed his conduct in 2018 when others alerted him, as mentioned in para. 61 above. However, the Applicant asserts that his reluctance to engage in any personal way with his co-workers resulted from the earlier publicity over the MeToo movement.

98. Consequently, the Tribunal finds that the Applicant's conduct concerning physical contact with female colleagues did not amount to harassment.

Comments on appearance, attire and leering at women

99. It has also been established by a preponderance of evidence that the Applicant commented on the physical appearance and attire of women and leered at them in the office.

100. The Tribunal considers that beyond the comments on the physical appearance and attire of women, which were generally positive but may have contributed to creating a hostile work environment, the fact that the Applicant leered at women is unacceptable.

101. As indicated in the Sanction Letter, "leering entails a measure of objectification of the person being leered at for the viewing pleasure of the leerer, as well as a power imbalance between the leerer and the person being leered at". The female colleagues leered at were clearly offended, and reasonably felt annoyed, demeaned, belittled, or embarrassed.

102. As such, the Tribunal finds that the Applicant's conduct in relation to "leering" at female colleagues amounts to harassment as defined in sec. 1.2 of ST/SGB/2008/5. In so doing, the Applicant further contravened staff rule 1.2(f) as well as secs. 2.1 and 3.2 of ST/SGB/2008/5.

103. In sum, even though the allegation concerning his physical contact with female colleagues was not considered harassment, the Tribunal finds that the Applicant engaged in serious misconduct, including harassment and sexual harassment.

Whether the Applicant's due process rights were observed

104. According to the Appeals Tribunal's jurisprudence, due process entitlements only come into play in their entirety once a disciplinary proceeding is initiated (see *Akello* 2013-UNAT-336, para. 36), whereas at the preliminary investigation stage only limited due process rights apply (see *Powell* 2013-UNAT-295, para. 24).

105. Staff rule 10.3, setting forth rules governing due process in the disciplinary process, provides in its relevant part that:

> (a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

106. The Tribunal is satisfied that the key elements of the Applicant's right to due process in the investigation and the disciplinary process were respected in the present case.

107. Indeed, the evidence on record shows that, during the investigation, the Applicant was interviewed, was provided with the audio recording of the interview, and was afforded the opportunity to provide his comments and send additional evidence as well as to propose witnesses should he wish to do so. He was also invited to participate in a follow-up interview. However, he did not avail himself of this opportunity.

108. Similarly, the evidence on record shows that, during the disciplinary process, the Applicant was fully informed of the charges against him, was given the opportunity to respond to the allegations, was provided with the investigation report and supporting material, and was informed of the right to seek the assistance of Counsel in his defence. He was given several extensions of time to file his comments, which were considered in the Sanction Letter.

109. The Applicant claims that the Respondent's case is the result of a "sloppy investigation aimed at a pre-determined outcome" and that OIOS investigators ignored exculpatory evidence, including his refutation of the charges. The Applicant also alleges that the conclusions are based on witnesses' assertions without corroborating evidence.

110. The Tribunal gives little weight to these arguments as the Applicant failed to cooperate with the investigators by refusing to participate in a second interview and providing no further evidence. The record shows that, in the circumstances, the investigators decided to go ahead and complete the investigation based on the evidence they had collected.

111. The Tribunal notes that the Applicant only provided substantive explanations after the initiation of the disciplinary process, notably in his comments to the Allegations Memorandum. In fact, the record shows that some of the initial allegations were dropped after considering his comments to the Allegations Memorandum.

112. Furthermore, each witness provided testimony about their own experience and relation with the Applicant. As such, the fact that some witnesses may not have experienced some type of behaviour does not automatically negate the experience of those who had.

113. Likewise, there is no evidence to conclude that V01, V02, V04, V05 and V06 coordinated their testimonies or colluded against the Applicant, as he claims. Moreover, the Medical Services and the Staff Counsellor, both unrelated to FRMS, were involved when the incidents occurred and corroborate the accounts of the victims and witnesses.

114. Consequently, the Tribunal finds that the Applicant's due process rights were observed.

Whether the disciplinary measure imposed was proportionate to the offence

115. Staff rule 10.3(b) provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". The Tribunal must therefore verify whether the staff member's right to a proportionate sanction is respected and whether the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct.

116. In this respect, the Tribunal is mindful that "the matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate to the circumstances of the case and for the actions and conduct of the staff member involved". As such, the Tribunal "will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" (see *Iram* 2023-UNAT-1340, para. 86; *Appellant* 2022-UNAT-1216, para. 45).

117. Moreover, "due deference must be shown to the Secretary-General's decision on sanction because Article 101(3) of the United Nations Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard" (see, *Beda* 2022-UNAT-1260, para. 57).

118. In the case at hand, the USG/DMPSC imposed on the Applicant the disciplinary measure of demotion by one grade with deferment for three years of consideration for eligibility for promotion pursuant to staff rule 10.2(a)(vii). The Applicant was also required to undertake gender sensitivity training as identified by UNOV/UNODC pursuant to staff rule 10.2(b).

119. Since the Applicant did not contest the imposition of the administrative measure of having to undertake gender sensitivity training, the Tribunal will only address the disciplinary measure imposed on him.

120. The Appeals Tribunal has consistently held that the Secretary-General "has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose" (see *Nyawa* 2020-UNAT-1024, para. 89; *Ladu* 2019-UNAT-956, para. 40).

121. The Sanction Letter and its annex indicate that the USG/DMSPC considered the mitigating and aggravating circumstances of the case to assess the proportionality of the disciplinary measure.

122. As mitigating circumstances, the USG/DMSPC considered the following:

a. The established facts occurred during a period of undisputedly high pressure on all FRMS staff members, including the Applicant; and

b. Once officially notified in 2018 that his behaviour was causing concerns, the Applicant took measures to adjust it, including by limiting his interactions with other staff members.

123. As aggravating circumstances, the USG/DMSPC considered:

a. The Applicant's role as a senior manager within FRMS, which entailed an increased duty to ensure an environment free of workplace harassment and sexual harassment; and

b. The power disparity between the Applicant, a staff serving at the D-1 level, and the affected individuals, particularly V01 (who had been serving at the G-6 level), as evidenced by the fact that the affected individuals only felt comfortable submitting complaints about him *en masse* and only when he was about to be transferred outside of UNOV and/or they had been transferred out of FRMS.

124. To challenge the proportionality of the sanction, the Applicant submits that there is no example in the Compendium of Disciplinary Measures citing demotion in response to a "disharmonious working environment". However, since the Applicant engaged in serious misconduct, including harassment and sexual harassment, his contention is unfounded.

125. Furthermore, the Applicant submits that his demotion has entailed his removal from a D-1 post and his placement in an insecure temporary assignment for which he is not suited. In this respect, the Tribunal clarifies that while the demotion is the result of the disciplinary process against the Applicant, the placement decision is, in itself, a separate decision for which the Applicant did not request management evaluation.

126. As indicated in the Sanction Letter, the Compendium of Disciplinary Measures shows that the most frequently imposed measure for sexual harassment results in the termination of the employment relationship, while in cases of workplace harassment where the offender is a manager with considerable power over the affected individuals, the most frequently imposed disciplinary measure is that of demotion with deferment of at last one year of eligibility for consideration for promotion. This is also consistent with the zero-tolerance policy for sexual harassment and the jurisprudence of UNAT (see *AAN* 2023-UNAT-1366, para. 19; *Reiterer* 2023-UNAT-1341, paras. 81-85).

127. In the present case, the Applicant engaged in harassment and sexual harassment. However, the Organization considered that the relevant incident was isolated and only entailed an inopportune verbal remark that should not attract the strictest of the disciplinary measures available. Instead, it decided to increase the period of deferment of eligibility for consideration for promotion to three years.

128. Considering the above, and having weighed all factors involved, the Tribunal concludes that the disciplinary measure of demotion by one grade with deferment for three years of consideration for eligibility for promotion was neither unlawful nor arbitrary, and fell within the range of reasonable disciplinary options.

Whether the Applicant is entitled to any remedies

129. In his application, the Applicant requests rescission of the contested decision and compensation for "material and moral losses in the amount of three years' net base pay".

130. Having upheld the disciplinary measure, the Tribunal finds no basis for the remedies pleaded for in the application. Accordingly, the Tribunal rejects the Applicant's request for remedies.

Conclusion

131. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(*Signed*)
Judge Sun Xiangzhuang
Dated this 17th day of October 2024

Entered in the Register on this 17th day of October 2024
(*Signed*)
René M. Vargas M., Registrar, Geneva