



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

DE MELO CABRAL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Christopher Bollen

Michel Reymond

Counsel for Respondent:

Miryong An, DAS/ALD/OHR/UN Secretariat

Wei Zhuang, DAS/ALD/OHR/UN Secretariat

Introduction

1. On 5 April 2022, the Applicant, a former staff member of the Office of the Special Adviser on Africa (“OSAA”), filed an application contesting the decision dated 6 January 2022 to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity. In his application, the Applicant also challenges the decision of 19 July 2021 to place him on administrative leave with pay, (“ALWP”), and to subsequently extend this status twice thereafter, the latest until 19 December 2021, “or until the completion of the disciplinary process, whichever is earlier”.

2. On 5 May 2022, the Respondent filed a reply submitting that the disciplinary measure imposed on the Applicant was lawful. The Respondent further submitted that the Applicant did not request management evaluation of the initial placement on ALWP within the deadline of 60 days, and in any case the extension of the ALWP was lawful.

3. On 7 May 2024, a hearing was held via MS Teams at which the Applicant and KJ (name redacted for privacy reasons) gave testimony.

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

Facts

5. In response to Order No. 062 (NY/2023) dated 28 July 2023, the parties submitted the following joint statement of agreed facts (emphasis in original):

[...]

In January 2018, [BG (name redacted for privacy reasons)], was appointed Under-Secretary-General ... and Special Advisor on Africa to the Secretary-General [the “USG/OSAA”]. [DH (name redacted for privacy reasons)], thus ceased his activities as Acting USG.

[...]

Prior to the arrival of the USG/OSAA, OSAA was comprised of two branches, each headed by a Chief of Service at the D-1 level. The Coordination, Advocacy and Programme Development Branch (CAPDB) was headed by the Applicant and the Policy Analysis and Monitoring Branch (PAMB) was headed by [MP (name redacted for privacy reasons)]. All OSAA staff reported directly to their respective D-1 level Chiefs as First Reporting Officer (FRO) and to the Director, DH, as Second Reporting Officer (SRO). Both Chiefs reported to [DH], who reported to the USG/OSAA as both his FRO and SRO.

[...]

On 11 and 12 September 2018, OSAA held a retreat during which the USG/OSAA described her proposed reorganization of the Office. Instead of being divided between two branches, work would be based on seven workstreams (later changed to four workstreams [...]).

[...]

On 14 December 2018, a fact-finding panel was convened to investigate the multiple complaints of harassment filed by the Senior Managers and [VN (name redacted for privacy reasons)], against the USG/OSAA. On 27 June 2019, the Applicant received the outcome of his complaint.

[...]

On 21 December 2018, pursuant to the USG/OSAA's instruction, [MA (name redacted for privacy reasons)], published through Inspira [an online United Nations job and employment site] a [temporary job opening ("TJO")] of Senior Programme Management Officer at the P-5 level.

[...]

On 27 March 2019, via signed memorandum copying the Chef de Cabinet, the Applicant, together with [MP] and [DH], sought urgent guidance from [ML (name redacted for privacy reasons)], Assistant Secretary-General for Human Resources, on completing the staff performance appraisal for the 2018/2019 cycle, and stated that the new "flat structure" - where staff at the P-3 and P-4 levels report to P-5 level staff as their new FROs and the P-5 staff report directly to the USG/OSAA without the involvement of the Director [DH] or that of the two Chiefs [MP and the Applicant] - and "persisting exclusion by the USG/OSAA of all the three top most senior staff makes it impossible for those concerned to accurately assess and provide adequate appraisal and supervision". The USG/OSAA was not copied on the memorandum. The Senior Managers stated in the memorandum:

- a. “As we are fast approaching the end of the performance cycle this month of March 2019, we continue to receive queries from colleagues about how to complete their respective performance appraisal process for the period April 2018-March 2019”.
- b. “This new structure does not abide by the [United Nations] nomenclature, and the *modus operandi* attached to it or the lack of thereof is not in conformity with applicable [United Nations] rules and regulations[.] Moreover, functions and responsibilities as well as supervisory and managerial roles of the Director and Chiefs were stripped away through this new process. [...] Furthermore, these changes are neither reflected in nor commensurate with the colleagues’ job description or relevant personnel actions”.
- c. “While some individual staff members have endeavored to keep us informally posted about their respective work assignments, the persisting exclusion by the USG/OSAA makes it impossible for those concerned to accurately assess and provide adequate appraisal and supervision”.

[...]

On 12 April 2019, the USG/OSAA reminded all OSAA staff to complete their performance documents by 30 April 2019. She noted that for the 2018/2019 reporting period, the FRO and SRO would remain the same as during the previous reporting period, and that for the period of November 2018 to March 2019, the P-5 level functional team leaders would be additional reporting officers (AROs) for those staff members under their supervision. The USG/OSAA also indicated that guidance would soon be provided on how to prepare the 2019/2020 [electronic performance appraisal system report (“e-PAS”)] and work plan.

[...]

On or around 26 April 2019, based on the recommendation of the interview panel, the USG/OSAA selected [KJ (name redacted for privacy reasons)] for the temporary P-5 level position advertised on 21 December 2018].

[...]

On 19 August 2019, via e-mail copying [MT (name redacted for privacy reasons)], the USG/OSAA advised OSAA staff members that an extension had been approved for the 2018/2019 e-PAS to 30 September 2019. The USG/OSAA also provided specific guidance on how the e-PAS should be completed. In her message, the USG/OSAA wrote, *inter alia*, that:

- a. “the concept of work streams/functional teams introduced in November 2018 may have resulted in questions on how to reflect the changes in goals and FRO/SRO roles for the performance appraisal, as was previously indicated in my memo of 12 April. I hope the guidance below will bring some clarity in order to conclude the 2018-2019 reporting cycle”;
- b. Goals: “All goals as of 1 April 2018 should be reflected in one’s work plan,” “If a goal was valid for only a portion of the reporting cycle, please indicate. A staff member will still be assessed for this period subject to any extenuating circumstances”, “Any additional goals as of 1 November 2019 must also be reflected”;
- c. “FROs and SROs:
- Staff up to the P-4 level*:*
- FRO Branch Chief
- SRO Director
- Additional supervisor Functional Team Leader
- * Please note that different arrangements may be applicable for those reporting directly to the USG and those with special circumstances [e.g. members of the assessment team].
- Staff at the P-5 level*
- FRO Branch Chief
- SRO Director
- The USG will provide inputs to the FRO in order to reflect performance during the period November 2018 to March 2019
- Staff at the D-1 level*
- FRO Director
- SRO USG
- Staff at the D-2 level*
- FRO USG
- SRO USG”
- d. “I encourage staff to use the rest of the month of August to complete their self-assessments in order to provide the FROs, SRO and Additional Supervisors adequate time to complete their parts in September”.
- e. “Please note that ePAS arrangements for the cycle 2019/2020 may be different as they are subject to the outcome of the

administrative interventions as outlined in the OSAA staff meeting on 23 July 2019”.

- f. “I hope to receive your full cooperation and should you have any queries please do not hesitate to contact me or the Executive Officer, [MT] who provided the necessary input and advice on the completion of the ePAS.”

[...]

Between 5 and 6 September 2019, a management retreat took place, which was facilitated by a consultant [...].

[...]

On 27 September 2019, via e-mail copying the Applicant [...], the USG/OSAA requested [DH] to ensure that the e-PAS of all staff members be completed by 30 September 2019. USG/OSAA stated, inter alia, that:

- a. “As you are aware, the Office for Human Resources has exceptionally approved the extension of the completion of 2018-2019 ePAS for OSAA staff to 30 September 2019. This has been recently confirmed by the Executive Office. The ePAS process was also discussed during our recently concluded management retreat”.
- b. “In the interest of all the staff, it is important that we conclude this process. I am therefore requesting you, in your capacity as the Director of the Office, to ensure that the ePAS of all OSAA staff members are completed by 30 September”.

[...]

On 7 October 2019, ten OSAA staff members raised concerns with the USG/OSAA about noncompletion of the 2018/2019 e-PAS being detrimental to their career development.

[...]

On 1 November 2019, [CP (name redacted for privacy reasons)], Under-Secretary-General for Management Strategy, Policy and Compliance [“the USG/DMSPC”], convened a town hall meeting with OSAA staff. [MT] shared with all OSAA staff a summary of the key messages delivered by [CP] during the town hall, including that:

- a. “An independent comprehensive review of OSAA will be undertaken by external consultants and will be led by [a] former [United Nations/United Nations Development Programme] staff member”;

- b. “The Knowledge Management and Monitoring (KMM) and Policy Analysis and Coordination (PAC) functional teams will report to [the Applicant]”;
- c. “The Intergovernmental Support (IGC) and Communications (COM) functional teams will report to [MP]”;
- d. “These reporting lines are transitional and will be re-considered based on the outcome of the independent functional review”;
- e. “ePAS for the reporting cycles 2018-2019 and 2019-2020 for all OSAA staff members are suspended until the outcome of the independent review is completed. In case OSAA staff members apply for regular or temporary job openings, [the Office of Human Resources (“OHR”)] will certify staff member’s satisfactory performance to Hiring Managers concerned”;
- f. “As an exceptional measure, appointments of staff on fixed term appointments that are expiring soon will be extended for the regular duration, without the need for completed ePAS. Extensions will not be shortened because of the on-going independent review”.

[...]

On 4 November 2019, via e-mail to all OSAA staff and [MT], the USG/OSAA thanked [MT] for the note of key messages and wrote: “However, a key message was also the importance of following instructions of supervisors and failure will be treated as insubordination”.

[...]

As of 1 August 2020, the USG/OSAA separated from the Organization due to expiration of her appointment.

6. On 28 October 2020, the Office of Internal Oversight Services (“OIOS”) transmitted an investigation report concerning the Applicant to OHR. In the report, OIOS stated that in September and October 2019, it had received multiple and interrelated reports of possible unsatisfactory conduct by staff members of OSAA. OIOS assessed the matter and determined that the reports implicated the Applicant, MP and DH (collectively “Senior Managers”). OIOS investigated the concerns raised against the Senior Managers, that they, in opposition to proposed reforms of OSAA and the USG/OSAA, engaged in possible misconduct.

7. Following a review of the investigation report, and by memorandum dated 19 July 2021 (“Allegations Memorandum”), the Applicant was informed that in accordance with sec. 8 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) and Chapter X of the Staff Rules, it had been decided to issue formal allegations of misconduct against him. The Applicant was further informed that, should the allegations against him be established, his conduct would constitute a violation of staff regulations 1.2(b), 1.2(e), 1.2(g), 1.2(i), staff rules 1.2(a), 1.2(f), 1.2(g) and sec. 3.5 of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

8. On 19 July 2021, in accordance with the decision of the USG/DMSPC, the Applicant was placed on ALWP for three months, pursuant to staff rule 10.4 and sec. 11.3 of ST/AI/2017/1.

9. On 24 August 2021, the Applicant submitted comments on the allegations of misconduct.

10. On 18 October 2021, the USG/DMSPC extended the Applicant’s ALWP for an additional month, or pending the completion of the disciplinary process, whichever would be earlier.

11. On 18 November 2021, the USG/DMSPC again extended the Applicant’s ALWP for an additional month, or pending the completion of the disciplinary process, whichever would be earlier.

12. On 29 November 2021, the Applicant requested management evaluation of his placement on ALWP.

13. On 18 December 2021, the USG/DMSPC once more extended the Applicant’s ALWP for an additional month, or pending the completion of the disciplinary process, whichever would be earlier.

14. By letter dated 6 January 2022, the Applicant was informed of the decision by the USG/DMSPC that, on the basis of the entire record before her, the allegations of misconduct were factually established to the requisite standard and that the conduct warranted the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity (“the Sanction Letter”).

Consideration

Receivability

15. The Respondent challenges the receivability of the part of the Applicant’s application which relates to his placement on ALWP on 19 July 2021. The Respondent states that the Applicant did not request management evaluation of the initial placement on ALWP.

16. The Tribunal notes that the Applicant challenges the decision of 19 July 2021 to place him on ALWP, and to subsequently extend this status three times thereafter, on 18 October 2021, 18 November 2021 and 18 December 2021.

17. Pursuant to staff rule 11.2(c), which sets out the deadline for a staff member’s request for management evaluation, this request shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

18. The record shows that the Applicant requested management evaluation of his placement on ALWP on 29 November 2021. The Applicant’s contest to the decision of 19 July 2021 to place him on ALWP is therefore time-barred as the Applicant did not request management evaluation of that decision within the stipulated deadline.

19. The Applicant’s challenge of the 18 October 2021 and 18 November 2021 decisions to extend his placement on ALWP is receivable as he submitted a timely

request for management evaluation of those decisions on 29 November 2021. The Applicant's challenge of the 18 December 2021 decision is also receivable as it is only a new extension of his placement on ALWP for the same reason. The Tribunal will therefore proceed to adjudicate the merits of these decisions below.

Review of the decision to extend the Applicant's placement on ALWP

20. The Applicant states that the decisions to extend his ALWP were unlawful. He further states that the decisions were not justified as he did not present any risk to any staff or any witness in the ongoing investigation. The Applicant further submits that the extensions of ALWP were an abuse of process.

21. The Respondent, on the other hand, submits that the decisions were lawful as there was a significant risk of retaliation by the Applicant against those who provided evidence against him during the investigation. The Respondent states that many witnesses were still serving at OSAA during the investigation, and these witnesses expressed fear of reprisal if their identities were revealed to the Applicant. This risk of retaliation by the Applicant also raised significant concerns that his presence at the office could have a negative impact on the preservation of a harmonious work environment at OSAA.

22. The Tribunal notes that the Applicant was placed on ALWP after the OIOS concluded its investigative report on 28 October 2020 and determined that the "established facts constitute reasonable grounds to conclude that [his] conduct is inconsistent with the standards expected of a United Nations civil servant". According to the report, the evidence revealed that, *inter alia*, the Applicant refused to implement the instructions of the USG/OSAA, concerning the new office structure and reporting lines, and that he refused to complete e-PAS documents as leverage to obtain his demands concerning the new OSAA structure. The investigation further determined that the Applicant had engaged with other staff members of OSAA and/or external parties, including representatives of Member States, in building opposition to the

instructions, directives and authority of the USG/OSAA, thereby frustrating or delaying their implementation.

23. In these circumstances, the Tribunal considers that it was reasonable for the Administration to conclude that sec. 11.3 of ST/AI/2017/1, which lists the conditions upon which a staff member can be placed on ALWP, had been met.

24. In particular, the Tribunal notes that the Applicant was a senior staff member at the Director level with everyday functions that included the supervision of several staff members, and thus was in a position of authority over them. The Applicant had also been provided with a copy of the investigation report and was therefore aware of the identities of staff members who provided evidence against him. The Administration therefore had a legitimate concern that, under the circumstances, there was a risk that the Applicant would be unable to properly carry out his supervisory functions and maintain a harmonious work environment. It was reasonable for the Administration to assess that, until the disciplinary process was concluded, it would be appropriate to extend the Applicant's placement on ALWP.

25. Based on the above, the Tribunal finds that the 18 October 2021, 18 November 2021 and 18 December 2021 decisions to extend the Applicant's placement on ALWP were lawful.

Judicial review of the disciplinary measure of separation from service

26. Under the recently adopted art. 9.4 of the Dispute Tribunal's Statute and the settled jurisprudence of the Appeals Tribunal, 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.

27. 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 para. 51 of *Karkara* 2021-UNAT-1172, and similarly in, for instance, *Modey-Ebi* 2021-UNAT-1177, para. 34, *Khamis* 2021-UNAT-1178, para. 80, *Wakid* 2022-UNAT-1194, para. 58). 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 sanction is based have been established

28. The Sanction Letter stated that the Applicant’s actions amounted to misconduct in violation of staff regulations 1.2(b), 1.2(e), 1.2(g), 1.2(i), staff rules 1.2(a), 1.2(f), 1.2(g) and section 3.5 of ST/SGB/2019/8. In particular, the Sanction Letter stated that it had been established by clear and convincing evidence that the Applicant, between 2018 and 2019, together with other staff members, in opposition to the proposed reform and the USG/OSAA, engaged in insubordination and created a hostile work environment by one or more of the following:

- a. The Applicant refused to implement and took steps to act against the USG/OSAA’s instructions and/or directives or otherwise engaged in conduct in order to oppose the new office structure and the reporting lines that the USG/OSAA put in place for the OSAA reform by: (i) refusing to process OSAA staff members’ e-PAS; and (ii) refusing to engage with KJ and to assume administrative responsibilities as her FRO.
- b. The Applicant engaged with other staff members of OSAA and/or external parties, including representatives of Member States, in building

opposition to the instructions, directives and authority of the USG/OSAA or those working under or in furtherance of her instructions thereby frustrating or delaying the implementation of the USG/OSAA's instructions or directives.

29. The Tribunal will examine whether the underlying facts of each of the charges are established by clear and convincing evidence.

Refusing to process OSAA staff members' e-PAS

30. The Sanction Letter states:

...

i. Although requested to do so by the USG/OSAA, the Applicant did not complete the 2018/2019 e-PAS cycle for staff members for whom he was the first reporting officer (FRO), and he continued to refuse, together with [MP] and [DH], to act on the staff members' 2018/2019 e-PAS until their demand for the OSAA structure and reporting lines be addressed.

...

31. The record establishes that between April 2019 and October 2019, the USG/OSAA repeatedly instructed the Applicant to process and complete the 2018/2019 e-PAS for staff members for whom he was the designated FRO. The Applicant refused to do so saying that he had no supervisory functions or reporting lines regarding the staff in his branch and could not evaluate their performance.

32. The Tribunal notes that the Applicant does not dispute that he did not process the OSAA staff members' e-PAS for the 2018/2019 cycle. The Applicant, however, argues in his defense that there was no clarity on the reporting lines due to the USG/OSAA's decision to change the structure of OSAA.

33. The Applicant submits that immediately after the USG/OSAA took her new role in January 2018, she rescinded the existing workplan for OSAA and started to dismantle the existing reporting lines. She established Management Committee Meetings ("MCM"), in which she directly distributed assignments to P-5 level staff

members and asked them to report directly to her. The Applicant states that this contravened the then established reporting lines, according to which these staff members reported to their respective Branch Chiefs as FRO and to the Director, DH, as SRO. The Applicant submits that due to the USG/OSAA's actions, the Senior Managers *de facto* lost their supervisory functions over the P-5 level staff members and stopped acting as their reporting officers starting from January 2018. The Applicant states that, while formally still Chief of CAPDB, he was in truth little more than a figurehead who had no effective supervision or oversight over his subordinates. The Applicant contends that it is therefore incorrect to state that he "refused" to complete the evaluations for the 2018/19 e-PAS cycle given his lack of effective supervisory functions since January 2018 which made it impossible for him to evaluate staff for that cycle. The reform announced by the USG/OSAA on 9 November 2018 and implemented later that month essentially confirmed that the P-5 level staff members were to answer directly to the USG/OSAA. The Senior Managers were formally relegated to other tasks such as resource mobilization, partnerships and planning. They were consequently excluded from their supervisory functions. The new office structure also lacked clarity and foreseeability. The Applicant states that the 9 November 2018 announcement mentioned that this structure was "transitional" but provided no information as to the eventual final structure for the Office and as to the timeline or milestones for this so-called transitional period.

34. The Respondent states that the Applicant's claims have no merit. The Respondent submits that for the period from April 2018 to October 2018, before the USG/OSAA introduced the functional teams as part of OSAA reform in November 2018, the Applicant was responsible as FRO for OSAA staff members who were in his branch and under his supervision. To reflect the functional teams, the USG/OSAA divided the 2018/2019 e-PAS reporting period into two—one from April 2018 to October 2018 and the other from November 2018 to March 2019, during which a functional team leader should be added as an additional supervisor or additional

reporting officer (“ARO”) as applicable. The USG/OSAA’s decision accorded with sec. 5.2 of ST/AI/2010/5 (Performance management and development system), which recognized that additional supervisors may be designated when a staff member had more than one supervisor for more than 25 percent of his/her time or for assignments of at least 30 working days, provided such arrangements were put into place with the agreement of the FRO at the work planning stage or at the beginning of the additional assignment or when the staff member’s supervisor changes during the cycle.

35. The Tribunal finds the Applicant’s claims that he could not know which staff members he was supervising as an FRO to be baseless for the following reasons. First, during the 2018/2019 performance cycle, the Applicant was the designated FRO for OSAA staff members who were in his branch, which is documented by the official record, including Inspira, and confirmed by his testimony before the Tribunal. The memorandum of 9 November 2018 announcing OSAA’s new structure did not outline any changes to the reporting lines, including those of the Applicant.

36. Second, prior to the introduction of the functional teams in November 2018, the Applicant served as FRO for OSAA staff members in his branch. Nothing on record shows any change to reporting lines between the Applicant and the OSAA staff members for whom he was the designated FRO for the 2018/2019 performance cycle.

37. Third, the record establishes that there were several correspondence in which instructions were given to the Applicant as to how to finalize evaluations for the 2018/2019 e-PAS cycle in OSAA. In particular, the USG/OSAA on numerous occasions reiterated that the Applicant was the FRO for OSAA staff in his branch, by repeatedly instructing him to complete the 2018/2019 e-PAS evaluation for them as FRO, for instance, by email of 19 August 2019 and during the 5/6 September 2019 retreat. During the cross-examination, the Applicant acknowledged those instructions from the USG/OSAA that had been conveyed to him after consultations with the OHR and the Department of Economic and Social Affairs (“DESA”) Executive Office.

38. Fourth, during the hearing, the Applicant failed to explain why he could not evaluate performance for the 2018/2019 period, including the period of 1 April 2018 to 31 October 2018 when no functional teams were in place. The Applicant also acknowledged his interview statement that he “queried” Human Resources, who informed him of using an ARO as a lawful solution. Introduction of the functional teams cannot change the Applicant’s role as FRO for OSAA staff members in his branch for the 2018/2019 performance cycle. Saliiently, the Applicant’s alleged inability to complete the 2018/2019 e-PAS is contradicted by the position of Senior Managers that they could and would process the 2018/2019 e-PAS when the USG/OSAA reversed her reform and returned to the old office structure to their satisfaction after the closure of the 2018/2019 reporting period.

39. Finally, the Tribunal finds that even if the Applicant experienced some confusion in the reporting lines due to the change of OSAA’s structure, this alleged confusion was resolved by the issuance of a memorandum dated 12 April 2019 from the USG/OSAA to all OSAA staff including the Applicant. The memorandum clarified that for the reporting period from 1 April 2018 to 31 March 2019, the FROs and SROs would remain the same as during the reporting period from 1 April 2017 to 31 March 2018. Furthermore, the Applicant attended a management committee meeting on 7 May 2019, during which the reporting lines were yet again clarified and documented in writing in the meeting summary note. The reporting lines were again clarified by an email sent on behalf of the USG/OSAA by her Special Assistant on 19 August 2019.

40. The Applicant was well aware of the reporting lines, at least, by 7 May 2019. Even if the Applicant did not agree with the reporting lines, he was required to fulfil his functions as an FRO. However, the Applicant still did not complete the e-PAS evaluations by 30 September 2019, as requested.

41. Based on the above, the Tribunal is satisfied that the record establishes that there is clear and convincing evidence that the Applicant repeatedly refused to process the e-PAS evaluations of OSAA staff members for whom he was the FRO.

Refusing to engage with KJ and to assume administrative responsibilities as her FRO

42. The Sanction Letter further states:

...

ii. Although requested to do so by the USG/OSAA, [the Applicant] refused to engage with [KJ], Senior Programme Management Officer, OSAA, upon her recruitment, and [he] refused to assume administrative responsibilities as her FRO related to her conditions of service.

43. The Applicant denies that he refused to engage with KJ and to assume administrative responsibilities as her FRO. In essence, the Applicant's defense is that he was not involved in KJ's recruitment and was not her FRO and therefore he could not engage on any work-related exchange pertaining to KJ when the USG/OSAA was the only one giving instructions to KJ and overseeing her work.

44. The Tribunal finds that the case record and the testimonies of the Applicant and KJ establish that the Applicant refused to professionally engage with KJ and to assume administrative responsibilities as her FRO, even when he was repeatedly directed by the USG/OSAA to do so. In particular, it is established by clear and convincing evidence that:

a. During the 19 June 2019 meeting, the Senior Managers told KJ that they would not work with her, that there were problems in her recruitment, and that none of the Senior Managers were her supervisor. Particularly, the Applicant told KJ that he would not discuss "work" with her;

b. On 11 July 2019, via email, the Applicant said to KJ that he had no supervisory role in relation to her;

c. On 17 July 2019, the USG/OSAA sent an email instructing the Applicant to sign KJ's request for telecommuting, stating:

[a]s a manager you cannot shirk your responsibilities to review and decide on a request from a staff member that in the JO was reflected under your branch and direct supervision. Contrary to

your assertion the post was never taken from the Branch just like all other posts existing in the Office. The belief that you must be able to choose staff members before you would supervise them is not borne out by the experience of most managers, including myself, who have to work with the existing staff. [...] As professionals, managers cannot pick and choose what they can work on. We cannot also deny staff members to exercise their rights or making use of their entitlements li[ke] any other staff member. Based on the above and as your programme manager, I am once again requesting you to sign [KJ's] request for telecommuting. [...].

d. Despite the clear directive from the USG/OSAA, the Applicant maintained his refusal to supervise KJ or sign her request to telecommute by replying to the USG/OSAA on 17 July 2019, stating: "I would like to reiterate my position as expressed to you several times verbally and in writing to no avail. Regrettably I will not be able to sign [KJ's] request until further notice";

e. When, on 18 July 2019, KJ asked the Applicant to approve her workplan, and the Applicant forwarded the email to MP and DH for information. On 19 July 2019, via email, copying DH, among others, the Applicant asked KJ to "redirect" her email to the USG/OSAA "until further notice" and to "address all issues work related to the USG or any other colleagues"; and

f. At the hearing, KJ testified that the Applicant told her he would not engage with her professionally but was available to discuss non-work-related matters such as music.

45. The Tribunal finds that the Applicant was clearly aware that he was required to engage with KJ and to assume administrative responsibilities as her FRO. His evident disagreement with the role does not counter the fact that he refused to engage with KJ.

46. Based on the above, the record establishes that there is clear and convincing evidence that the Applicant refused to engage with KJ and to assume administrative responsibilities as her FRO.

Engaging with other staff members of OSAA and/or external parties in building opposition to the USG/OSAA's instructions and reform

47. The Sanction Letter states:

... [The Applicant] engaged with other staff members of OSAA and/or external parties, including representatives of Member States, in building opposition to the instructions, directives and authority of the USG/OSAA or those working under or in furtherance of her instructions thereby frustrating or delaying the implementation of the USG/OSAA's instructions or directives.

48. The case record establishes that the Applicant, on multiple occasions, engaged other staff members of OSAA and/or external parties in opposition to the USG/OSAA's instructions and proposed reforms. However, as set out in paras. 73 to 76 below, the Tribunal finds that the Applicant's engagement with other staff members of OSAA does not amount to misconduct.

49. The Tribunal finds that it is established that:

a. On 27 March 2019, the Applicant, together with other OSAA managers, sent a memorandum to the Assistant Secretary-General for the Office of Human Resources (the "ASG/OHR"), copying the Chef de Cabinet, raising concerns with the USG/OSAA's proposed reforms,

b. On 3, 8 and 13 May 2019, the Senior Managers, including the Applicant, issued a memorandum criticizing the USG/OSAA's new office structure which, according to them, did not conform with the United Nations Rules and Regulations;

c. On 1 and 2 July 2019, the Applicant, MP and DH exchanged emails with VN, MA and [MW] (name redacted for privacy reasons) with respect to a draft communication seeking "administrative action in relation to the USG/OSAA". The Applicant, DH and MA provided comments on VN's draft.

The Applicant, using his private email account, said: “I would suggest that we be very careful not to give personal or singular tone ... each one of us can personalize his/her own case if needed otherwise we’ll be having a something that would be more of individual cases ... But this is only a view point”. On 3 July 2019, the Applicant, together with other OSAA managers, sent a memorandum to the Chef de Cabinet reporting on continued issues within OSAA stating that “[t]he situation has not improved; [...] an atmosphere of chaos, anxiety and uncertainty continues to prevail in OSAA [...], the lack of clarity about the roles, functions and reporting lines, created by the unilateral actions of the USG/OSAA, continues to plague the Office. This has further entrenched an atmosphere of mistrust and hostility [...]”;

d. On 16 and 17 May 2019, the Applicant discussed with other Senior Managers about the USG/OSAA’s memorandum of 15 May 2019, and the Applicant said to them: “[b]y stating firmly our position, and by remaining calm and united as ever, we shall prevail” and suggested further brainstorming;

e. On 4 January 2019, the Applicant emailed a Permanent Representative of a Member State to the United Nations, providing details on the initiation of a recruitment exercise within OSAA, and the Applicant wrote: “Dear Ambassador, the below email is for your information. With me there are already at least 3 cases in which she is clearly abusing her authority against me and [she] even do[es] it with a smile. It is becoming increasingly difficult not to react or even to remain neutral. In continuing like this I will be the next to take her on stage. Someone has to inform her that she is taking my solidarity with her to reach her limit” (informally translated by OIOS). On the same day, the Permanent Representative replied: “Thank you. This environment is harmful. Really worrying”; and

f. On 21 January 2020, an Ambassador of a Member State to the European Union, informed the Applicant that the USG/OSAA was travelling to Brussels and asked the Applicant if he could share any concerns or recommendations to be brought to the attention of the USG/OSAA. The Applicant replied: “From what I could read I think it was opportune to have contacted me as there is a lot of controversy with the African Group here regarding the theme. I will prepare something and send it to you. If you share your cell phone, I will be happy to call you at your convenience and give you some details and talk” (informally translated by OIOS). The Ambassador gave the Applicant the contact details and he replied “*chamando*” (“calling”—informally translated by OIOS).

50. Based on the above, the Tribunal finds that the record establishes that there is clear and convincing evidence that the Applicant did engage with other staff members of OSAA and/or external parties in building opposition to the instructions, directives and authority of the USG/OSAA.

Whether the established facts amounted to misconduct

51. Staff regulation 1.2(b) provides that “[s]taff 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”.

52. Staff regulation 1.2(e) provides that “[b]y accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants”.

53. Staff regulation 1.2(g) provides that “[s]taff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those

they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour”.

54. Staff regulation 1.2(i) provides that “[s]taff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service”.

55. Staff rule 1.2(a) provides that “[s]taff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors”.

56. 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”.

57. Staff rule 1.2(g) provides that “[s]taff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization, including activity in connection with the administration of justice system, nor shall staff members threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions. Staff members shall not threaten, retaliate or attempt to retaliate against such individuals or against staff members exercising their rights and duties under the present Rules”.

58. ST/SGB/2019/8 provides (emphasis in original):

Obligations of staff members

3.5 Staff members shall:

(a) [...]Demonstrate commitment to zero tolerance of any prohibited conduct and treat all people in the workplace courteously and

with dignity and respect, as well as with an awareness of their own behaviour and how it may be perceived and/or received by others;

[...]

(g) Report possible prohibited conduct and cooperate with investigations, audits and reviews.

Refusing to process OSAA staff members' e-PAS evaluations and refusing to engage with KJ and to assume administrative responsibilities as her FRO

59. The Tribunal finds that Applicant's persistent refusal to complete the 2018/2019 e-PAS evaluations for staff members for whom the Applicant was the FRO and engage with KJ constitute misconduct.

60. The Applicant, a senior official of the Organization, was required to uphold the highest standards of conduct and adhere to the United Nations staff regulations and rules cited above. The Tribunal finds that the Applicant failed to do so by repeatedly disobeying the USG/OSAA's directions with respect to the OSAA staff members' e-PAS evaluations and professional engagement with KJ. As established above, the Applicant was aware of his duties as FRO and his disagreement with the reporting lines does not mitigate the established fact that he refused to carry out his duties as a manager. The Applicant's active insubordination violated multiple staff regulations and rules cited above. His conduct exhibited a serious lapse of integrity and competency and breached the Organization's trust in him as a senior manager.

61. In terms of the alleged unlawfulness of the USG/OSAA's structural reform as a defense to the Applicant's conduct, the Tribunal finds little merit in this defense. The record shows that the Administration engaged with the Applicant's concerns or disagreements with the reform and attempted to provide further clarity or instructions on the reporting lines. The USG/OSAA on numerous occasions reiterated that the Applicant was the FRO for OSAA staff in his branch, by repeatedly instructing him to complete the 2018/2019 e-PAS evaluations for them as FRO, for instance, by email of 19 August 2019, and during the 5/6 September 2019 management retreat. Further, it was established at the 23 July 2019 meeting, chaired by then Under-Secretary-General

and Special Advisor on the Prevention of Genocide, that OSAA staff could not use lack of clarity regarding reporting lines as an excuse for not following the USG/OSAA's instructions.

62. The Tribunal acknowledges that the context of this situation was difficult in that the USG/OSAA as the new head of OSAA brought in reform without consulting the Senior Managers in her team or working to build healthy professional relationships with them. This resulted in the Applicant, together with other senior managers feeling sidelined by the USG/OSAA and the creation of two camps in OSAA. The Applicant stated in his testimony that this situation made him feel humiliated and powerless, as he was unjustly excluded from doing his work as Branch Chief despite his years of excellent service for the United Nations; it also impacted his mental health and well-being.

63. The Tribunal notes that the situation in OSAA was suboptimal and that the USG/OSAA, as a new head of office, could have navigated her role more skillfully in the circumstances. However, the Tribunal finds that the Applicant as a senior official did fall short of the expected standard of conduct within this situation. His disagreement with the USG/OSAA's reform did not grant him leave to ignore her work instructions or to completely refuse work with a colleague in OSAA.

64. The Tribunal notes, in particular, that during the 2018/2019 performance cycle, the Applicant was the designated FRO for OSAA staff members who were in his branch. The memorandum of 9 November 2018 announcing OSAA's new structure did not outline any changes to the reporting lines, including those of the Applicant. There was therefore no excuse for him to refuse to assess staff members' performance for that period, as he was well aware of the reporting line.

65. The record shows that the Applicant used his refusal to complete the e-PAS evaluations as leverage to oppose the structural reform in OSAA. The Applicant maintained that he would only perform his duties as FRO when the USG/OSAA agreed to reverse her proposed reforms. This behavior is not only unprofessional but also itself

contributed to the creation of disharmony in OSAA. The Applicant used his office position of an FRO as leverage in furthering his goal to undermine the USG/OSAA's authority and to undo her reform at the expense of OSAA staff. The Respondent submitted that the Applicant's refusal to complete the e-PAS evaluations resulted in OSAA staff having no e-PAS evaluations for two years, which could potentially negatively impact those staff members.

66. In terms of the Applicant's refusal to engage with KJ, the Applicant stated at the hearing, although without providing any evidence, that he believed the recruitment of KJ on a TJO may have been irregular and that he was not consulted in the recruitment process. The Applicant submitted that he was not associated with the drafting of the TJO and in KJ's recruitment. He submitted that the USG/OSAA only invited him to sit on the recruitment panel later, on 18 February 2019, and only because one of the proposed external panel members declined to participate. The Applicant testified that he therefore could not have known what his role was in regard to her position. The Tribunal acknowledges that it would have been ideal for the Applicant as her FRO to be consulted in KJ's recruitment and the lack of consultation by the USG/OSAA contributed to the Applicant feeling sidelined. However, this does not justify the Applicant's persistent refusal to work with KJ once she had joined OSAA.

67. At the hearing, KJ testified about meeting with the Applicant on the first day and the third day of her joining OSAA that, in both instances, the Applicant told her that he could not work with her due to problems in her recruitment. This shows that even prior to KJ's work on substantive matters, the Applicant already decided not to engage with her on work and administrative matters as her FRO. The Applicant himself also directed KJ to the USG/OSAA on all administrative requests and refused to process those requests despite the explicit instructions from the USG/OSAA.

68. Moreover, contrary to the Applicant's contention, KJ did not testify that she had received regular guidance from the USG/OSAA. KJ testified that she sought instructions and collaboration with other P-5 level staff members as well as the USG/OSAA. Further, KJ told the Tribunal that because of both the Applicant's and DH's refusal to supervise her, the USG/OSAA helped KJ in setting her work priorities. KJ also made it clear that the USG/OSAA wanted KJ to first ask the Applicant and DH before coming to her with her requests. From KJ's testimony, no assumption can be made that the USG/OSAA had informed KJ of any different reporting lines.

69. From the above, it is evident that the Applicant victimized KJ in his disapproval of the USG/OSAA's reforms, as he did with the general OSAA staff in the case of the 2018/2019 e-PAS. At the hearing, KJ was visibly upset in recalling feeling frustrated and confused from the Applicant's refusal to engage with her professionally. KJ stated that she eventually consulted the front office, the Ombudsman and the USG/OSAA on the situation. KJ also recalled feeling abused by all those "negative" responses from the Applicant "shutting [her] out", and how "stressful" and "frightening" it was for her "from the first week on feeling excluded by most people in the office", including her FRO. The Applicant did not treat KJ courteously or with dignity and respect, but rather used his role as her manager to try to leverage pressure on the USG/OSAA to reverse her reforms. As a senior manager, the Applicant failed to uphold the professional standards of conduct required of him in his interactions with KJ.

70. The Tribunal finds that the Applicant's conduct constituted insubordination and a violation of staff regulations 1.2(b), 1.2(e), 1.2(g), 1.2(i), staff rules 1.2(a), 1.2(f), 1.2(g) and sec. 3.5 of ST/SGB/2019/8.

Engaging with other staff members of OSAA and/or external parties in building opposition to the USG/OSAA's instructions and reform

71. As noted above, the record establishes that the Applicant engaged with OSAA staff members and external parties, including representatives of Member States, in building opposition to the instructions and reform of the USG/OSAA. The Respondent submits that the Applicant's interactions constituted misconduct. The Respondent argues that the Applicant's interactions with those staff members and external entities were not in the context of routine work, but in the context of his insubordination against the USG/OSAA, for instance, by drafting complaints against the USG/OSAA, or other documentation denouncing the authority of the USG/OSAA, refusing to follow the USG/OSAA's instructions to the Applicant and the Senior Managers. The Respondent states that the Applicant's actions delayed the implementation of the USG/OSAA's instructions. The Respondent states that a number of those interactions were via private emails, to avoid detection. The Respondent argues that such conduct cannot be characterized or justified as "routine" work collaboration in the office. The Tribunal will examine whether the Applicant's actions amounted to misconduct below.

Engaging with other staff members of OSAA

72. The Applicant denies that his engagement with other staff members of OSAA amounted to misconduct. During his testimony, he stated that the Senior Managers routinely work together as part of their respective functions at OSAA. In this respect, it is not out of the ordinary for them to correspond with each other, exchange views and adjust their arguments before submitting co-signed memoranda or other communications to either the USG/OSAA or other stakeholders. The confusion surrounding the ongoing reform furthermore required them to set a unified tone and provide clear proposals, which they did by collaborating with each other. The Applicant submits that consequently, it is incorrect to state that they acted in concert to "build opposition" against the USG/OSAA. In terms of the charge that he improperly involved several subordinates in his communications with the Senior Managers, the Applicant stated that this manner of proceeding was dictated by the work reform initiated by the USG/OSAA, which had removed his formal reporting lines and promoted *de facto* the said subordinate staff members as being directly answerable to

the USG/OSAA. As a matter of fact, the P-5 level functional team leaders all sat on the MCM along with the Applicant and the USG/OSAA. The Applicant stated that consequently, it is incorrect to state that the Applicant engaged with these staff members to “build opposition” against the USG/OSAA; in fact, he involved them given their upgraded functions further to the reform.

73. The Tribunal has reviewed the correspondence exchanged between the Applicant and other staff members at OSAA and does not deem the Applicant’s actions as misconduct. First, it is not exceptional that the Applicant as a senior manager of the Organization engaged other managers and staff members to make his views of the USG/OSAA’s reforms known—especially in a situation where he suspected that a supervisor, the USG/OSAA, through illegal acts of reorganization, created confusion regarding reporting lines.

74. Second, the Applicant, together with other managers, felt marginalized and harassed by the USG/OSAA. It is natural for staff members who all share the same misgivings to discuss such a situation and support each other until the situation is appropriately addressed. The use of private emails between the staff members does not indicate any wrongful conduct, especially in the context where they were feeling harassed by a high-level official of the United Nations and seeking to find a way to report this. It is understandable that the staff members took steps to keep their correspondence confidential and supported each other at a time they found particularly difficult in their workplace. The Tribunal takes note that the Senior Managers were vindicated by the conclusions of a fact-finding panel appointed on 14 December 2018, which found that the USG/OSAA “took a series of decisions that had the effect of marginalizing her senior managers, and that her actions exhibited poor judgment and lacked the managerial sensitivity that was required in the circumstances”. Therefore,

the Tribunal finds that their exchanges to make their grievances heard and offer support to each other were appropriate.

75. Third, the Organization actively encourages staff members, of all levels, to speak up when they consider a situation to be misaligned with the United Nations values and legal framework. The Tribunal will remind the Respondent that sec. 3.5(f) of ST/SGB/2019/8 states that it is the obligation of staff members to “[t]ake action if they witness prohibited conduct, provided they feel comfortable doing so and, where possible, after consulting the affected individual, as well as supporting those impacted, as appropriate and to the best of their ability”. Section 3.5(g) of ST/SGB/2019/8 further states that it is the obligation of staff members to “[r]eport possible prohibited conduct and cooperate with investigations, audits and reviews”. It follows that it is entirely unreasonable for the Administration to then attempt to claim that a staff member’s engagement with other staff members on the issue of possible prohibited misconduct is unlawful. This is especially so in the case of reporting against a supervisor where there are unequal power dynamics at play, and supervisees may need to seek each other’s support to be able to address a problematic issue with a supervisor. In such a context, there is no justification for the Organization to classify as misconduct communications between staff members on a problematic issue with a supervisor.

Engaging with external parties

76. As noted above, it is undisputed that the Applicant sent an email to the Permanent Representative of a Member State to the United Nations on 4 January 2019. On 26 April 2019, the Permanent Representative sent the Applicant an email sharing with him a press article titled “With Scandals Rife Across the UN, Managers are at Fault?” dated 24 April 2019 critical of the Organization’s internal management, to which the Applicant replied: “What worries me is that in the next article, OSAA and

all the rot that has been occurring, will be the subject ... Hopefully not” (informally translated by OIOS).

77. The other exchange with an external party is dated 21 January 2020. An Ambassador to the European Union informed the Applicant that the USG/OSAA was travelling to Brussels and asked if the Applicant could share any concerns or recommendations to be brought to the attention of the USG/OSAA. The Applicant replied, “From what I could read I think it was opportune to have contacted me as there is a lot of controversy with the African Group here regarding the theme. I will prepare something and send it to you [...]”.

78. The Applicant states that the above-mentioned communications were not unlawful as the Applicant “was both (a) targeted by [the USG/OSAA’s] side-lining and inappropriate conduct, [and] (b) aware that her reorganization of the Office violated the applicable [United Nations] rules and regulations and would substantially damage its operation. Consequently, he contacted [the external parties] by virtue of sec. 4 [Reporting misconduct through external mechanisms] of ST/SGB/2005/21 [(Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations)]”.

79. Upon review of the above exchanges, the Tribunal finds that the Applicant did share inappropriate or confidential information with the third parties. The Tribunal considers the Applicant’s emails to be an exercise of poor professional judgment. The Applicant’s conduct demonstrated that he was willing to put OSAA’s partnerships and operations at risk if it would accommodate his attempt to undermine the USG/OSAA. The Tribunal therefore finds that the Applicant’s exchanges with external parties constitute misconduct.

Whether the disciplinary measure applied was proportionate to the offence

80. The principle of proportionality in a disciplinary matter is set forth in staff rule 10.3(b), which provides that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”.

81. The Administration has the discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behavior of the staff member involved, and the Tribunal should not interfere with administrative discretion unless the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity (see, for instance, *Kennedy* 2024-UNAT-1453; *Abdrabou* 2024-UNAT-1460; *Portillo Moya* 2015-UNAT-523; and also *Sall* 2018-UNAT-889, *Nyawa* 2020-UNAT-1024).

82. The Appeals Tribunal has held that the Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose (see, for instance, *Toukolon* 2014-UNAT-407). The Appeals Tribunal has further stated in *Samandarov* 2018-UNAT-859 at para. 24 that “due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the [Dispute Tribunal] to objectively assess the basis, purpose and effects of any relevant administrative decision”.

83. In the Sanction Letter, the Administration imposed on the Applicant the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity, in accordance with staff rule 10.2(a)(viii). In determining the appropriate sanction, the Administration considered the nature of the Applicant’s actions, the past practice of the Organization in matters of comparable

misconduct, as well as whether any mitigating or aggravating factors apply to the Applicant's case. The Administration decided that there are no mitigating factors applicable to the Applicant's case, since it considered that his "long service of 30 years and the senior position achieved as a result thereof were integral to [his] ability to take the actions constituting [his] misconduct".

84. The Applicant submits that the sanction is disproportionate to the alleged offence. He argues that the dysfunctional situation at OSAA and the USG/OSAA's own conduct should have been taken into account. The Applicant states that the sanction was unlawful as "his abuser [the USG/OSAA] was only subject of administrative measures. The allegations against the Applicant were all 'management issues' [...]".

85. The Respondent submits that the sanction imposed on the Applicant was not blatantly arbitrary, or absurd in severity. All relevant circumstances were considered in reaching the contested decision. While there were no mitigating factors, the Administration considered that the following circumstances constitute aggravating factors: (a) the Applicant was at the D-1 level and one of the most senior managers at OSAA; (b) the Applicant's conduct was repeated over a period of time and he did not correct his course of action despite having been given multiple opportunities to do so; and (c) the Applicant displayed a marked disregard for the clear and repeated instructions to carry out his managerial duties to the detriment of OSAA staff.

86. As discussed above, the Tribunal has found that the Applicant's actions in respect of refusing to process OSAA staff members' e-PAS evaluations; and refusing to engage with KJ and to assume administrative responsibilities as her FRO amounted to misconduct.

87. The Tribunal considers that the finding of misconduct has to be assessed within the context of the situation at hand. The context of the Applicant's misconduct is relevant to assess the seriousness of his misconduct, particularly given that the fact-

finding panel appointed on 14 December 2018 found that the USG/OSAA “took a series of decisions that had the effect of marginalizing her senior managers, and that her actions exhibited poor judgment and lacked the managerial sensitivity that was required in the circumstances” and that “it has been decided to take administrative action in relation to [the USG/OSAA]”. Furthermore, on 19 February 2020, the Inspection and Evaluation Division of OIOS published the results of its survey and evaluation of the workplace culture at OSAA. In relevant part, it found the following:

... “In November 2018 the Under-Secretary-General implemented a revised organizational structure with four functional teams. However, the lack of a common understanding and guidelines on its implementation resulted in unclear roles, responsibilities and reporting lines. [...] As a result, many staff were uncertain what was required of them, how to proceed with their work, and from whom they would take instructions. [...] Review of the reform documents indicated that change management efforts were not supported by a clear reform roadmap with a framework of supporting documents, information notes, guidelines and standard operating procedures, which could have helped to clarify roles and responsibilities for implementation”.

88. In *Kennedy* 2021-UNAT-1184, the Appeals Tribunal stated that “a decision on the appropriate sanction for misconduct involves a “value-judgment and the consideration of a range of factors. The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency” (see, para. 68). The Appeals Tribunal further clarified what considerations may be relevant as follows (emphasis added):

69. What factors are relevant considerations will necessarily depend on the circumstances and nature of the misconduct. Some considerations can include:

a) *the staff member’s intent or whether the action was accidental, careless, reckless or deliberate*. Factors relevant to this are whether the staff member made full, timely disclosure to a direct or indirect supervisor, the staff member’s self-awareness of the conduct, whether the staff member followed

operational procedures in connection with the misconduct, whether the staff member engaged in the misconduct despite prior warning, whether the misconduct was fraudulent, manipulative or deceptive, whether the staff member acted alone or with others resulting in differing degrees of knowledge, participation and responsibility, whether the staff member organized and planned the conduct or whether it was the result of a rash action or temporary lapse of judgment, and whether the staff member concealed or attempted to conceal the misconduct or otherwise deceive or mislead the employer from discovering the misconduct;

[...]

c) the harm or damage to the Organization, employer, colleagues and other staff members, and clients and the public, which can range from none to significant. Factors relevant to this are whether there was actual harm that can be tangible or intangible, the number of persons harmed, *whether the harm affected the Organization's operations and productivity, whether the harm includes loss of finances, loss of trust or integrity in the Organization;*

d) the disciplinary history or future of the staff member, namely whether the staff member has a history of disciplinary violations or other misconducts and sanctions. Factors relevant to this are whether the misconduct in question is the first violation or part of a history or pattern of violations and the nature of the prior violations, whether there are mitigating factors present in the staff member's employment history, and *whether the staff member has committed to taking steps to ensure there will be no repetition or continuation of the misconduct.*

70. In conclusion, we find the sanction letter and record provided inadequate reasons for judicial review leading to the finding that no rational connection or relationship between the evidence and the objective of the disciplinary action has been established. As a result, we are unable to assess the proportionality and lawfulness of the imposition of the disciplinary sanctions.

[...]

89. The Tribunal will assess the Applicant's conduct with reference to the guidance in *Kennedy*:

a. "Whether the action was accidental, careless, reckless or deliberate." The Tribunal finds that the Applicant's actions in this case were deliberate. He was aware that he was acting in opposition of the USG/OSAA's instructions and he was aware that his deliberate refusal to act as FRO for OSAA staff members and work with KJ would be damaging for the work of the OSAA.

b. "Whether the staff member made full, timely disclosure to a direct or indirect supervisor; whether the staff member followed operational procedures in connection with the misconduct; whether the staff member was self-aware of the conduct." The Tribunal finds that the Applicant was self-aware of his conduct as misconduct. He was a senior manager, with considerable experience at the United Nations. There was therefore no excuse for his persistent refusal to act as FRO for OSAA staff members and work with KJ, even if he disagreed with the USG/OSAA's reform. The Tribunal notes that the Applicant continued the misconduct until the departure of the USG/OSAA.

c. "Whether the staff member's misconduct was the result of a rash action or temporary lapse of judgment". The Tribunal finds that the Applicant's conduct was not a temporary lapse of judgment, but in fact his misconduct continued over a considerable length of time. For example, as the Tribunal noted above, the Applicant was well aware of the reporting lines in OSAA by the issuance of a memorandum dated 12 April 2019 from the USG/OSAA to all OSAA staff. Furthermore, the Applicant attended a management committee meeting on 7 May 2019, during which the reporting lines were yet again clarified and documented in writing on the meeting summary note. The reporting lines were again clarified by an email sent on behalf of the USG/OSAA by her Special Assistant on 19 August 2019. Despite these, the

Applicant continued his misconduct until the USG/OSAA left the Organization on 1 August 2020.

d. “Whether the misconduct was minor or technical, or substantive or severe, or involves a minor misstep or honest mistake or is the result of a lack of expertise or experience; whether the conduct is contrary to the express or implied duties and obligations of the staff member”. The Tribunal considers that the Applicant’s misconduct could not be qualified as minor or technical. The Applicant’s conduct also was contrary to his express or implied duties and obligations as a staff member, especially as a senior manager who had a duty of care towards his supervisees and an obligation to promote a harmonious working environment. Instead, the Applicant’s misconduct contributed to the disharmony within OSAA.

e. “Whether the conduct involves a single act or numerous acts and/or a pattern of misconduct; whether the conduct involves multiple violations, either related or unrelated to each other”. The Tribunal considers that the Applicant engaged in a pattern of misconduct that consisted of multiple violations. The Applicant’s refusal to process OSAA staff members’ e-PASes and his refusal to act as KJ’s FRO lasted many months, even after the reporting lines were clarified.

f. “Whether there was harm or damage to the Organization, employer, colleagues and other staff members, and clients and the public, which can range from none to significant; whether a number of persons were harmed.” The Tribunal has established that the Applicant’s misconduct harmed the supervisees of the Applicant and KJ. As noted above, the Applicant’s refusal to complete the e-PAS evaluations resulted in OSAA staff having no e-PAS evaluations for two years, which could potentially negatively impact those staff members. In addition, KJ testified to the harm and stress she experienced due to the Applicant’s misconduct.

g. “Whether the staff member has a history of disciplinary violations or other misconduct and sanctions; whether the misconduct in question is the first violation or part of a history or pattern of violations; whether the staff member has a record of prior violation”. The Tribunal notes that the Applicant had no history of disciplinary violations prior to the USG/OSAA’s arrival.

h. “Whether the staff member has committed to taking steps to ensure there will be no repetition or continuation of the misconduct”. The Applicant has demonstrated no remorse for his conduct, even when confronted at the hearing with the testimony of KJ who was visibly upset recalling the impact the Applicant’s actions had on her.

90. Based on the above, the Tribunal finds that although there were some mitigating circumstances in the Applicant’s case, due to the USG/OSAA’s mismanagement, the sanction imposed upon the Applicant was proportionate. The Applicant engaged in a pattern of actions, as set out above, which amounted to misconduct. Therefore, his conduct not only displayed a failure to uphold the standards of conduct required of an international civil servant, but it also displayed a disregard for the rules of the Organization. The Applicant’s conduct undermined the trust and confidence placed in him by the Organization. Such trust and confidence are essential for the continuation of an employment relationship. In these circumstances, the Tribunal considers that it was within the Organization’s administrative discretion to decide to end its employment relationship with the Applicant.

Whether the Applicant’s due process rights were respected

91. The Applicant submits that “the procedure has been marred with violation of [his] rights, including, critically, the non-disclosure even after formal request of the

relevant information and protective measures following disciplinary procedures taken against the USG”.

92. Upon review of the record, the Tribunal finds that the Applicant’s due process rights were respected throughout the investigation and disciplinary process. The case file shows that the Applicant was informed of the allegations of misconduct, and he had opportunities to respond before the disciplinary action was taken. The Applicant was interviewed by OIOS and asked about material aspects of the matter. Following the interview, the Applicant was given the audio-recording of his interview and was given an opportunity to submit written statements on the topics discussed during the interview. In the Allegations Memorandum, the Applicant was provided with all supporting documentation, was informed of his right to seek the assistance of counsel and was given the opportunity to comment on the allegations against him. The Applicant had an opportunity to provide witness testimony at the hearing before the Tribunal.

93. In terms of the Applicant’s claim that he suffered prejudice from the non-disclosure of the fact-finding panel’s report in respect of his complaints against the USG/OSAA, the Tribunal notes that the Applicant, as a complainant under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), is not entitled to a copy of the fact-finding panel’s report or its supporting materials.

94. Based on the above, the Tribunal finds that the Applicant’s due process rights were respected.

Conclusion

95. In view of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Joelle Adda

Dated this 29th day of October 2024

Entered in the Register on this 29th day of October 2024

(Signed)

Isaac Endeley, Registrar, New York