UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2024/42
Judgment No.: UNDT/2025/015
Date: 4 April 2025
Original: English

Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Wanda L. Carter

KC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Rodney Mkweza
Ron Mponda

Counsel for Respondent:
Elizabeth Brown, UNHCR
Louis-Phillipe Lapicerella, UNHCR

Introduction

1. On 28 June 2024, the Applicant filed an application challenging his separation from service with compensation *in lieu* of notice and without termination indemnity for sexual misconduct, in accordance with staff rule 10.2(a)(viii) ("the contested decision").

2. The Tribunal heard the case from 18 to 19 March 2025. Oral evidence was adduced from five witnesses including the Applicant.

3. The parties filed closing submissions by 31 March 2025.

Background

4. The Applicant joined the Office of the United Nations High Commissioner for Refugees ("UNHCR") on 9 June 2014.

5. On 18 April 2023, the UNHCR Inspector General's Office ("IGO") received allegations of possible sexual misconduct implicating the Applicant, relating to his conduct towards the Complainant in this case between 27 and 30 January 2023.

6. The IGO opened an investigation on 11 May 2023 and issued its Investigation Report on 28 August 2023. The IGO concluded that the 27 to 29 January 2023 incidents had been established.

7. By letter dated 10 October 2023 (transmitted to the Applicant on 25 October 2023), the Applicant was charged with formal allegations of misconduct for sexual harassment and was given an opportunity to respond to them in writing.

8. The Applicant submitted his response to the allegations on 26 December 2023.

9. By letter dated 26 March 2024, the Applicant was notified of the contested decision.

Applicant's submissions

10. The Applicant challenges the contested decision on several grounds. He argues, *inter alia*, that:

a. there was no clear and convincing evidence of wrongdoing;

b. the contested decision is wholly based on the Complainant's rendition of what happened and her "personal interpretations/rationalisations" and failed to properly consider other evidence;

c. the charges have never been outlined in succinct and comprehensible language but instead repeated, verbatim, what the Complainant had said;

d. the IGO investigator shifted the burden of proof onto the Applicant at various points; and

e. the Respondent placed undue weight and reliance on a different incident as constituting "a pattern of conduct" and that incident was disproved at the hearing.

Consideration

Standard of review in disciplinary cases

11. According to art. 9.4 of the Tribunal's Statute, in reviewing disciplinary cases,

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

12. The Statute generally reflects the jurisprudence of the United Nations Appeals Tribunal ("UNAT"), see e.g., *AAC* 2023-UNAT-1370, para. 38; *Mizyed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024, para. 48.

13. In *Sanwidi* 2010-UNAT-084, para. 40, the Appeals Tribunal clarified that:

> When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.

14. The Appeals Tribunal, however, underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him", or otherwise "substitute its own decision for that of the Secretary-General". *Id.* at para.40. In this regard, "the Tribunal is not conducting a "merit-based review, but a judicial review", explaining that a "judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision". *Id.* at para. 42.

Were the facts upon which the disciplinary measure was based established?

15. At the time of the alleged incident, the Applicant and Complainant had known each other for about two and a half weeks, having met when he arrived at the compound. The key issue in this case is what occurred between the Complainant and the Applicant in her container/room on the night of 27 January 2023.

16. The Complainant says the Applicant forced himself upon her against her will, kissed and licked her forehead, and tried to get her to lay on the bed with him. The Applicant says that nothing improper happened and that the Complainant has invented this story, perhaps because she was disappointed that he had not made sexual advances towards her.

17. Having heard the testimony of both the Complainant and the Applicant, observed their demeanour, and considered all the other evidence in the record, the Tribunal finds that the Complainant is credible, and that the Applicant is not[1]. Accordingly, the Tribunal finds, by clear and convincing evidence, that the facts on which the disciplinary measure was based have been established.

[1] The Tribunal applied the factors set out in *AAC* 2023-UNAT-1370, para. 47, for assessing witness credibility, as well as other related factors. *See*, *Theunens* UNDT/2023/145, footnote 1.

18. The Complainant seemed candid in her testimony and exhibited no bias against the Applicant; her testimony was consistent with both her prior statements and the other evidence; all aspects of her testimony were probable; the calibre and cogency of her performance were better than that of the Applicant; and her recall of the facts was good.

19. The Complainant's testimony was supported by four different "outcry witnesses" who appeared before the Tribunal and were subject to cross-examination by the Applicant's counsel. Each of these witnesses testified that, in the days immediately following the incident, the Complainant came to them very upset and said that the Applicant had entered her container where he kissed and touched her without her consent. Although such testimony is hearsay, it is generally considered to be an exception to the rule that hearsay is inadmissible.

20. Again, having the opportunity to observe the testimony of these witnesses, the Tribunal finds them to be credible. There is no evidence that any of them is biased against the Applicant. In fact, several witnesses stated that they had socialized with him in various settings, and one mentioned that she considered the Applicant to be a friend. Apparently, the Applicant also felt close enough to one of these witnesses that he sought her advice on some personal matters.

21. The Applicant's cross-examination confirmed that none of these witnesses personally observed the encounter in the Complainant's container. The Tribunal understands this and completely agrees that their testimony was based solely on what the Complainant told them. As such, the Tribunal does not accept their testimony as to the truth of the matter (what happened in the container) but only for the purpose of assessing the Complainant's credibility.

22. The Applicant also points out that some of these witnesses allegedly contradicted the Complainant as to what happened. While this is somewhat true, generally, these contradictions were related to extraneous details such as whether the Applicant "barged in" or "banged the door" to the container. In one instance, the witness clearly conflated the evening in question with other evenings (e.g., that, on the night of the incident, the Applicant gave the Complainant a consensual head

massage in public to alleviate her headache, when everyone else agreed that the massage happened on a prior evening). Clearly, these are innocent mis-recollections and do not alter the credibility of either the Complainant or the outcry witnesses. The essential parts of the testimony regarding the 27 January 2023 incident are consistent and not contradictory.

23. By contrast, the Applicant's testimony was at times contradictory and illogical as it seemed he was looking for excuses that made no logical sense.

24. Perhaps the best example of this relates to an email exchange between the Complainant and the Applicant a few days after the incident. The Complainant wrote:

> I have thought over the situation from Friday night. In my view, your behaviour was highly inappropriate. I do not wish to be touched by you in any circumstances anymore. I also ask you to not contact me or talk to me, unless strictly related to work."

In response, the Applicant wrote to her: "Fully acknowledge and my sincere apologies".

25. Confronted with this inculpatory statement, the Applicant prevaricated and tried to explain it away in various ways. Initially, the Applicant testified that, "I was not apologizing for my conduct" but shortly thereafter said, "I did not know what I was acknowledging or apologizing for." Then he testified that he was "acknowledging her request" (not to contact or talk to her) but later said "I wanted to de-escalate and talk to her face to face." Obviously, one cannot acknowledge a request not to talk and simultaneously plan to talk "face to face." Thus, the Applicant's explanations are not believable.

26. When he was confronted with various inconsistencies between his interview and his testimony in court, the Applicant said:

> this interview had taken a lot of time. There was on and off communication, so it's a lot of information that I had to process and try to reference to and this was the information that I could be able to say that it was very confusing for me …

27. The Tribunal does not find that to be an adequate explanation, after having read the interview transcript, and noted the frequent breaks taken during the interview. Moreover, the Applicant was given an opportunity to review and correct the transcript afterward, and he failed to correct these alleged mistakes.

28. Additionally, the Tribunal considered the Applicant's actions after the incident to be inconsistent with his claim that nothing happened that night in the Complainant's home. If, as he asserts, he was only in the container for five minutes and nothing untoward happened, why did he feel the need to go by her container the next morning, "check on her", and ask if she had been comfortable with him in the room the previous night? Yet he admitted doing so. The Applicant also admitted that, even though he acknowledged her emailed request to have no further contact, on Monday, he was hoping to talk face-to-face with her and went to her office looking for her. And two weeks later, he went to one of the outcry witnesses, said he thought a colleague had misunderstood his behaviour, and sought her advice on what to do. All of this demonstrates his "guilty conscious", or at least his recognition that he had overstepped the bounds that night.

29. In sum, the evidence demonstrates that the Applicant is not credible, particularly in his denial of misconduct during the incident in the Complainant's container.

30. The Applicant argues that the evidence of another incident allegedly involving him was improperly admitted to show *modus operandi*. Specifically, this relates to testimony from W4 that, on an occasion prior to the alleged incident, the Applicant followed W4 to her container and would not leave, which made her feel uncomfortable.

31. To be sure, the Sanction Letter states that evidence of this other incident "is exceptionally admissible as similar fact evidence signifying a propensity or impulsive behavioural pattern", quoting from *Mbaigolmem* 2018-UNAT-819, para. 31. The Tribunal agrees that such testimony would have been improper evidence of

modus operandi.[2] The two alleged incidents bear only the slightest similarity regarding the Applicant's conduct - that he followed a female colleague to her container after an informal gathering at the party area. This is far short of a distinctive or particular way of acting. In this case, the act of walking to the container together (whether side by side or one after the other) was not in dispute. Instead, the dispute in this case is what happened after the walk when they entered the container. Resolving this dispute turns on the credibility of the Applicant and the Complainant, but evidence of the prior incident sheds no light on these issues.

32. Although the Respondent did argue that this other incident showed a pattern, the Tribunal did not accept it as such. Instead, the Tribunal considered that evidence for the sole purpose of explaining why W4 had not intervened on the night of the subject incident. In this regard, the context is important.

33. All parties agree that on the night of the incident, the Complainant, the Applicant, and W4 had all been together at the party area and after the get-together, they all walked towards their accommodations. At the point where their paths diverged, W4 went towards her container while the Complainant continued towards her own container, followed (or accompanied, as he describes it) by the Applicant.

34. According to W4, she became a little concerned at this point because the Complainant "looked at me as if 'I am worried that [the Applicant] is following me'." The next day, when the Complainant told her what had happened, W4 "felt a little bad" that she had not intervened. She testified that she did not because she feared that intervening would leave her alone with the Applicant instead. According to her, this concerned W4 because of a prior incident when she and the Applicant had been alone together, and she felt uncomfortable.

[2] The sanction letter states that evidence of this other incident "is exceptionally admissible as similar fact evidence signifying a propensity or impulsive behavioural pattern", quoting from *Mbaigolmem*, 2018-UNAT-819, para. 31. However, the Tribunal views "propensity" to be an unfortunate word as it can wrongly imply that evidence of an accused's character or disposition is admissible to show that he acted in accord with that character or disposition in the subject incident. ("He is a bad person and thus must have committed this bad act?) This is an outmoded view and not accepted by most modern courts. In any event, this Tribunal will not apply any propensity rule in this case.

35. As such, this evidence was properly admitted and considered solely for the purpose of explaining W4's failure to intervene. The Tribunal reaches no conclusions as to the truth of what happened between W4 and the Applicant on that previous occasion and certainly did not consider that evidence in determining the truth of what happened between the Complainant and the Applicant on the night in question. Hence, the Applicant's argument is misplaced.

36. In sum, the Tribunal finds that the facts upon which the disciplinary measure was based have been established by clear and convincing evidence.

Do the established facts amount to misconduct?

37. The Applicant does not argue that the facts upon which the disciplinary measure were based do not amount to misconduct, and it is clear that they do.

> Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behavior of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another (see *Adriantseheno* 2021-UNAT-1146/Corr. 1, para. 44).

38. Indeed, it is readily apparent that entering a female colleague's room late in the evening, hugging, kissing, and licking her forehead without her consent, laying on her bed, and inviting her to join amount to sexual harassment. *See, e.g.*, *Adriantseheno* supra, para. 45 ("physically enveloping a woman without her permission and against her will, as Mr. Adriantseheno did, constituted sexual harassment, even if it was a single incident").

39. As such, it is clear that the established facts about the Applicant's behaviour in the Complainant's container room that evening amount to misconduct.

Were the Applicant's due process rights observed?

40. The Applicant argues that the Administration's investigation into the allegations against him was flawed in various ways: the investigator failed to examine the closed circuit television ("CCTV") recordings for the period in question; ignored inconsistencies in the various statements; permitted a senior

victim care officer to be present during the Complainant's interview; examined the evidence in a biased way; and improperly placed the burden of proof on the Applicant. Although the Applicant never expresses these complaints in terms of a due process violation, that is the proper context in which to examine them.

41. First, the arguments about assessing the evidence and applying an improper burden of proof are moot in light of the Tribunal's independent assessment and findings set forth above. The Tribunal heard all relevant evidence, both inculpatory and exculpatory, and made its own credibility assessments. The Tribunal properly applied the burden of proof by requiring the Respondent to establish the facts by clear and convincing evidence. So, the Tribunal disagrees with the Applicant's contention and argument in this regard.

42. Next, the Tribunal finds no problem with a victim care officer being present during the Complainant's interview. Indeed, the Applicant "acknowledged the rationale for 'peer support'" during questioning of a complainant. Although the Applicant raised the "possibility of coaching the Complainant" by this victim care officer, the Tribunal saw no evidence that this "possibility" was, in fact, a reality. As such, this argument is rejected.

43. The Applicant also complains about the absence of CCTV recordings from the duty station. This issue has been the subject of various motions, responses, and orders during the litigation. The Applicant correctly points out that the Respondent provided different explanations at different times about why the recordings could not be produced. The first was that the recordings had been routinely over-written after 30 days. When the Tribunal pointed out that this explanation was based on an affidavit from a field security officer who arrived at the duty station eight months after the period in question, the Respondent conducted a more extensive inquiry. This resulted in a second explanation that the CCTV system was inoperable during the relevant period.

44. The Tribunal is disappointed with the Respondent for its inconsistent submissions and failure to conduct a full inquiry before filing submissions. However, the upshot of this flurry of submissions and counter-submissions is that

the parties do not contest that the CCTV system was inoperable during the period at issue. Therefore, any failure by the IGO investigator to examine the system would have been fruitless. That resolves the matter as far as the Tribunal is concerned, and there is no evidence of any due process violations.

45. The Applicant also complains that "the charges were not outlined in succinct and comprehensible language but instead repeated, verbatim, what the Complainant had said." Of course, it is obvious that charges should reflect the allegations, so repeating those allegations is perfectly permissible. Indeed, if the charges consisted merely of "succinct" conclusory statements, the Applicant would be justified in complaining. However, there is no merit to the argument that the Respondent provided too much detail as to the allegations and factual conclusions, and the form of the charges certainly does not arise to a violation of the Applicant's right to due process.

Was the sanction proportionate?

46. Here again, the Applicant does not explicitly claim that the sanction was disproportionate. However, he requests, as an alternative to rescinding the entire decision, that he be awarded monetary compensation equivalent to two years' net base salary.

47. According to the Applicant,

> [g]iven all the circumstances of this case, including the fact that the Respondent did not find any aggravating circumstances and only used the generic 'parity' principle in exercising its discretion to apply the sanction in sexual harassment cases, of separation from service; and considering that at most, proof of the allegation was at the lower standard of balance of probabilities, the Tribunal is requested (since the Tribunal may not do so itself) to remand the case to the Respondent to impose an alternative sanction (excepting separation) commensurate with the nature and quality of the alleged wrongdoing in this case.

48. In examining this request, the Tribunal first observes, once again, that the evidence of the Applicant's misconduct was both clear and convincing. Thus, one of his premises for reducing the sanction is incorrect.

49. It is important to note that the Administration "has wide discretion in applying sanctions for misconduct but at all relevant times must adhere to the principle of proportionality" (see *Applicant* 2013-UNAT-280, para. 120). Thus, the Tribunal can only consider the sanction to be unlawful if it exhibits "obvious absurdity or flagrant arbitrariness" (see *Aqel* 2010-UNAT-040, para. 35; *Konaté* 2013-UNAT-334, para. 21; *Shahatit* 2012-UNAT-195, para. 25; and *Portillo Moya* 2015-UNAT-523, para. 22.

50. Next, this Tribunal notes (and completely agrees with) the Appeals Tribunal's observation that:

> Sexual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment. *Mbaigolemem* 2018-UNAT-819, para. 33.

See, also, Szvetko 2023-UNAT-1311, para. 55,

> the Organisation is entitled and obliged to pursue a severe approach to sexual harassment. The message needs to be sent out clearly that staff members who sexually harass their colleagues normally should expect to lose their employment.

51. The sanction letter in this case shows proportionality was analysed in significant detail to determine the appropriate sanction for the Applicant's established misconduct of sexual harassment. This included considering the lack of any aggravating circumstances and the existence of mitigating circumstances such as nine years of work with a previously unblemished disciplinary record, and postings in hardship duty stations and the impact of those postings on his mental health. The Applicant does not challenge any aspect of this analysis.

52. Although the Applicant dismisses application of "the generic 'parity' principle", examining the Organization's past practice in similar cases is an

essential part of determining proportionality. *See, e.g., Rajan*, 2017-UNAT-781, para. 48 ("the most important factors … include … employer consistency").

53. As a result, the Tribunal finds that the sanction was proportionate and declines the request to remand the case for imposition of a lesser sanction.

Conclusion

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

(Signed)
Judge Sean Wallace
Dated this 4th day of April 2025

Entered in the Register on this 4th day of April 2025

(Signed)
Liliana López Bello, for Wanda L. Carter, Registrar, Nairobi