UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2022/007/R1
Judgment No UNDT/2025/111
Date: 12 December 2025
Original: English

Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: Liliana López Bello

SOOBRAYAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Alister Cumming, UNICEF

Introduction

1. The Applicant, a former Regional Adviser, Education, Europe and Central Asia Regional Office ("ECARO"), United Nations Children's Fund ("UNICEF"), is contesting the decision of the Deputy Executive Director, UNICEF, to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity.

2. For the reasons set forth below, the Tribunal partially grants the application.

Procedural Background

3. By Judgment *Soobrayan* UNDT/2023/063, this Tribunal adjudicated Case No. UNDT/GVA/2022/007. The Respondent appealed said Judgment before the United Nations Appeals Tribunal ("UNAT" or the "Appeals Tribunal").

4. By Judgment *Soobrayan* 2024-UNAT-1469/Corr.1, the Appeals Tribunal partially reversed the above UNDT Judgment and remanded the case for a hearing *de novo* in relation to two allegations of misconduct raised against the Applicant.

5. On 14 August 2024, the remanded case, registered under Case No. UNDT/GVA/2022/007/R1, was assigned to the undersigned Judge.

6. By Order No. 114 (GVA/2024), the Tribunal decided to hold a hearing on 10 and 11 October 2024 via Microsoft Teams.

7. On 23 September 2024, the parties were notified of a change to the tentative schedule due to time constraints of one of the witnesses.

8. On 4 October 2024, the Applicant filed a motion to adduce additional evidence. On the same day, the parties filed a joint bundle of documents for the upcoming hearing.

9. On 7 October 2024, the Respondent filed a motion for protection measures of a witness.

10. In Order No. 127 (GVA/2024), the Tribunal granted the Respondent's motion for witness protection measures and directed him to file a response to the Applicant's 4 October 2024 motion.

11. By response filed on 8 October 2024, the Respondent did not object to the Applicant's motion to adduce additional evidence.

12. Between 10 and 11 October 2024, the Tribunal virtually held a hearing on the merits.

13. By Order No. 131 (GVA/2024), the Tribunal confirmed its ruling during the hearing and granted the Applicant's motion to adduce additional evidence. It further instructed the parties to file their respective closing submission, which they did on 5 November 2024.

Facts related to the specific issues that UNAT remanded

14. By Judgment UNDT/2023/063, the Tribunal made the following relevant findings:

> a. It was incumbent on the Office of Internal Audit and Investigations ("OIAI"), UNICEF, to explore the allegations of ulterior motive and countervailing evidence provided by the Applicant. The alleged retaliatory motive of V01's complaint merited consideration. By choosing to ignore the timeline of events and relevant facts that immediately preceded her complaint, the investigation seriously breached the Applicant's due process rights, failed to demonstrate the relevance or irrelevance of the evidence, and failed to properly establish the reliability of V01's testimony. The combination of failures tainted the whole investigation process;
>
> b. Since investigators are under a duty to act impartially and independently and should collect both inculpatory and exculpatory evidence, the fact that they have failed to do so renders the entire investigation flawed;
>
> c. The facts on which the disciplinary measure was based have not been established through clear and convincing evidence except for the incidents of

11 September 2019, when the Applicant entered V01's hotel room, and March 2020, when the Applicant gave V01 a "neck massage". None of these incidents relied exclusively on the complainant's account, and the Applicant partially recognized both;

d. The evidence on record did not support a finding of misconduct with respect to the incidents of 11 September 2019 and March 2020, as the established facts did not reach the threshold of sexual harassment; and

e. The disciplinary sanction was rescinded, and the Applicant was to be reinstated, with all his benefits and entitlements from the date of separation, at the level he held before being separated. Should the Respondent elect to pay compensation in lieu of reinstating the Applicant, the Applicant shall be paid a sum equivalent to 11.5 months of net-base salary at the same grade and level he held at the time of his separation.

15. The Respondent partially appealed Judgment UNDT/2023/063 by challenging the Tribunal's finding that the two incidents of 11 September 2019 and March 2020 did not constitute misconduct. Consequently, the Respondent also opposed the rescission of the disciplinary sanction.

16. By Judgment *Soobrayan* 2024-UNAT-1469/Corr.1., the Appeals Tribunal determined that the Dispute Tribunal erred by not hearing any oral evidence related to the two instances of alleged misconduct. Having found that the investigation report was flawed and having raised issues pertaining to the reliability of V01's version without hearing from V01, the Appeals Tribunal further determined that it was not clear the basis on which the Dispute Tribunal reached its decision on the disputed facts.

17. Accordingly, the Appeals Tribunal instructed the Dispute Tribunal to conduct a hearing *de novo* on the following allegations of misconduct:

a. Harassment in that on 11 September 2019, while on mission to Ashgabat, Turkmenistan, the Applicant entered V01's hotel room while she

was sleeping, touched her, and stood over her when she woke up (Incident 1); and

b. Sexual harassment in that in March 2020, while within the ECARO offices in Geneva, the Applicant gave a neck massage to V01 without asking for her permission (Incident 2).

18. As a result, the Dispute Tribunal virtually held a hearing on the merits on 10 and 11 October 2024, and heard from the testimony of five witnesses related to the aforementioned Incident 1 and Incident 2. Namely, the Applicant, V01, Ms. C, Ms. B, and Ms. K. A sixth witness, Mr. G, was scheduled to appear but had to cancel due to an unforeseen work conflict. Both parties agreed to accept the witness statement of Mr. G in place of his oral evidence, which had already been filed with the Applicant's original application.

Consideration

Standard of review and burden of proof

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

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

20. The Tribunal's Statute reflects the jurisprudence of the Appeals Tribunal (*AAC* 2023-UNAT-1370, para. 38; *Mizyed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024, para. 48).

21. The Tribunal recalls that apart from the two incidents mentioned in para. 17 above, the other findings of Judgment UNDT/2023/063 were not appealed and, therefore, stand as settled caselaw. Namely, the other seven incidents that formed the allegations of misconduct against the Applicant were not established by clear and convincing evidence; there were several work-related disagreements between

the Applicant and V01 in 2020 that should have been investigated but were not; and the investigation report was fundamentally flawed.

22. The ensuing analysis will, therefore, limit itself to the examination of the facts related to Incident 1 and Incident 2 that were remanded by the Appeals Tribunal, to determine whether (a) the facts in relation to these two incidents are established by clear and convincing evidence, and (b) legally rise to the level of harassment and sexual harassment and, therefore, amount to misconduct.

Whether the facts related to Incident 1 and Incident 2 are established by the applicable evidentiary standard

23. In disciplinary cases, "when termination is a possible outcome", clear and convincing evidence is required. UNAT has ruled that the Administration is required to prove the alleged misconduct with "clear and convincing evidence", meaning that the truth of the facts asserted is highly probable. This standard of proof requires more than a preponderance of the evidence, but less than proof beyond a reasonable doubt (*Molari* 2011-UNAT-164, para. 30).

24. This implies that the asserted facts are highly likely to be true. UNAT further clarified that clear and convincing evidence could either be "direct evidence of events" or "evidential inferences that can be appropriately drawn from other direct evidence" (*Kennedy* 2021-UNAT-1184, para. 48). In this context, the Administration is responsible for proving that the alleged misconduct, which led to disciplinary action against a staff member, indeed occurred.

25. The Respondent submits that the facts were established to the clear and convincing evidence standard. In contrast, the Applicant submits that the investigation ignored his countervailing evidence, did not properly investigate all of the facts and, by doing so, illegitimately found V01's testimony more credible than his.

26. Accordingly, the Tribunal will examine said two incidents to determine whether they have been established by clear and convincing evidence.

Incident 1

27. V01 complained that, during a business trip to Turkmenistan on 11 September 2019, the Applicant entered her hotel room uninvited, touched her, and stood over her when she woke up, scaring her and invading her "personal space".

28. V01 testified that her hotel room door was not locked but closed because the carpet was very thick. When Counsel for the Applicant asked what her action was after waking up to see the Applicant in her room, she stated that she saw the Applicant standing over her, around half a meter away; that she was scared and jumped out on the same side the Applicant stood. While she was shocked, the Applicant started laughing.

29. The Applicant testified that he entered V01's hotel room on said occasion but submitted that the door had been left open, which V01 acknowledged, and that he was only trying to check up on her because they had dinner plans for which V01 was late. Upon realizing that she was asleep, he called her to wake her up but denied touching her or leaning over her.

30. When Counsel for the Respondent questioned how many times he knocked on the hotel door, the Applicant stated that he initially knocked softly and then increased the volume a bit. He described that when he entered the room, the curtains were drawn, and light was coming from the corridor because the door was open. He explained during the investigation phase that he went in and called V01 out because the arrangement was that she would come to his hotel room, and he had left his door open for her. The reason he went to her room was that they had dinner plans and were running late. He expected to find her in her room.

31. When Counsel for the Respondent asked how many times the Applicant called V01's name, the Applicant explained he could not say precisely the number of times he called, but that he remembered calling her a few times. He testified that the bedding was ruffled and that he was unable to see her at first. It was only when she jumped up that he realized that she had been under the blankets. He stated that both were startled by the situation.

32. Afterwards, the Applicant and V01 went down to the lobby to meet with Ms. K, who was waiting for them for the dinner plans. The Applicant further testified that he joked about the situation to Ms. K, that V01 seemed initially upset, but that they went out for dinner anyway. He further submitted that V01 behaved normally with him throughout the evening and that they even took a picture together on the way to dinner. The picture in question is part of the case record and was exhibited during the hearing.

33. This incident was corroborated by the testimony of Ms. K, who was waiting for the Applicant and V01 in the hotel lobby and heard about it from both parties immediately after the incident occurred.

34. Furthermore, the Applicant submitted that V01 continued to act friendly with him after Incident 1. At the end of the mission programme, they went out "carpet shopping" with other colleagues, and V01 even asked the Applicant to carry her carpets in his suitcase. He submits that V01's friendly behavior towards him, both immediately after the Incident 1 and in the following days and weeks, is inconsistent with a claim of harassment.

35. According to the testimony of Ms. K, the Applicant acknowledged entering V01's hotel room because "the door was open" and he found it strange and walked in to call for V01. When she asked him what had happened, he joked about V01 screaming. When V01 arrived a bit later, Ms. K asked her what had happened. V01 stated that she was asleep when she suddenly saw the Applicant in front of her and became scared, but did not comment at the time. The witness described the situation as very strange to her because the door was open and the Applicant walked in.

36. When Counsel for the Respondent asked whether she talked with V01 about this accident, Ms. K stated that they went for a walk around the hotel after dinner. She found that V01 was very nervous, with her voice shaking. V01 told her that she felt very uncomfortable and may need some time to calm down.

37. When Counsel for the Applicant cross-examined Ms. K and questioned her about not mentioning the "talk after dinner" to the investigators, she replied that she was not asked about that. When asked about the "carpet shopping" of the following

day, the witness stated that many people bought carpets during the mission and that she could not recall whether the Applicant carried V01's carpets back to the duty station. She further explained that, in her view, V01 and the Applicant had an unusual close relationship, which seemed "quite strange" to her. In her culture, a supervisor-supervisee relationship would have more distance.

38. The Tribunal also heard from Ms. C, who was an intern at the time of Incident 1 and shared an office with V01. The witness started her internship with ECARO when both V01 and the Applicant were on mission to Turkmenistan, and she met them for the first time when they returned. Ms. C testified that a couple of days after V01 and the Applicant came back from the mission, the Applicant came to their shared office and briefly talked about Incident 1 in a joking manner, mimicking V01's reaction when he entered her hotel room and scared her while she woke up. Ms. C further stated that when V01 heard the Applicant's brief story, she did not react. Ms. C explained that, based on that memory, she thought they had a strong joking relationship, which she considered relatively unusual.

39. When questioned about her opinion on the type of relationship V01 and the Applicant had over the course of her six-months internship, Ms. C stated that they had a good relationship in the beginning, but that by the time she left, it had deteriorated a lot due to some work-related disagreements.

40. The Tribunal finds that it is uncontroversial that the Applicant entered V01's hotel room unannounced, which scared V01 at the time. The controversy lies in whether there was a valid reason for the Applicant to enter the room, whether the Applicant "stood over V01" and/or "touched her", and whether his action could be reasonably perceived as harassment.

41. Considering the two contradictory versions of the incident and the undetailed and indirect testimony of two witnesses who only heard a "joking" version of the event, the Tribunal cannot make a finding in relation to the details of the incident, thus leaving doubt as to the extent of what really happened that day. It thus follows that with respect to Incident 1, it is only established by clear and convincing

evidence that the Applicant entered V01's hotel room unannounced, which, at the very least, startled her.

Incident 2

42. In her complaint, V01 stated that in March 2020, the Applicant gave her an unsolicited neck massage during a conversation in her office, and which made her feel uncomfortable.

43. During the hearing, V01 testified that the Applicant talked a lot about wellness to everyone, and that they talked about her own body posture and what exercises she could do to feel better about her back pain, including going for a massage. At some point in this conversation, the Applicant approached her and tried to massage her neck. She moved away from him immediately as he invaded her personal space.

44. When Counsel for the Applicant questioned the duration of the neck massage, she estimated that it lasted about 50 seconds.

45. When asked about the eyewitness, who shared an office with V01 and whose desk was two meters away, opposite hers, V01 explained that the foregoing conversation with the Applicant about posture, his approach, and the neck massage happened before Ms. B came into the room. Afterwards, the Applicant left.

46. In his submissions, the Applicant argues that he often gave colleagues advice in relation to their postures, and that V01 had complained to him a few times about some "back pain". He denies giving V01 a "neck massage", but conceded to having had conversations with her around the subject of massages and back pain.

47. When Counsel for the Respondent asked about massaging or touching V01, the Applicant testified that it was possible that he touched her on the neck or shoulder area, which he would not define as a "neck massage". He further stated that he did not deny it in his interview with OIAI.

48. This massage episode is corroborated by the testimony of Ms. B, who testified that the Applicant came to their office quite often for a break or to check-in on V01.

She stated that he and V01 would mainly discuss non-work-related matters, including V01's back pain, and that she once saw the Applicant giving V01 a brief massage with both his hands on her back or shoulder area. She recalled that V01's reaction was neutral to the alleged massage.

49. Ms. B's testimony before the Tribunal is consistent with the testimony she gave to OIAI during the investigation, when she stated that she did not react when seeing a massage, that she heard the Applicant explaining to V01 that it was for her tension in the back, and that she thought she heard "some discussion around aches" between them. She further stated that she did not notice any reaction from V01 to the "neck massage", that the incident "[did not] stand out to her but was also [something] not typical", and that she was in the office for the entire duration of it.

50. The Tribunal notes that V01's testimony is inconsistent with the one from Ms. B, a direct eyewitness to Incident 2. V01 testified that Ms. B was not in the office when the Applicant gave her the "unsolicited neck massage" and that Ms. B only entered the room when said massage was over. Furthermore, V01 testified that the "neck massage" was unwelcome and made her feel uncomfortable; that she immediately reacted and moved away from the Applicant.

51. As indicated above, however, Ms. B witnessed the alleged "neck massage". She was in the room for the entire duration of it and testified that neither she nor V01 had any reaction to it. She further testified that the "neck massage" happened in the context of a conversation between V01 and the Applicant about "aches" and back pain.

52. The testimony of the eyewitness, therefore, partially supports the allegations of both V01 and the Applicant.

53. Based on the evidence on record, the Tribunal finds that the alleged "neck massage" indeed occurred and, thus, that Incident 2 is established by clear and convincing evidence.

54. The Tribunal furthermore highlights that the Applicant conceded that he may have touched V01 in the context of a conversation surrounding back pain. Indeed,

the controversy lies in whether the "neck massage" was indeed "unsolicited" and "unwelcome", and whether the Applicant's action could be reasonably perceived as sexual harassment.

Whether the established facts legally amount to misconduct

55. The Tribunal will now assess whether the established facts pertaining to Incident 1 and Incident 2 legally amount to misconduct. To that effect, the applicable legal framework and the most recent jurisprudence from UNAT will be considered.

56. The Tribunal is mindful that, as the Respondent indicated on appeal and as is described in the Sanction Letter, the Administration found that Incident 1 amounted to harassment. Thus, the Tribunal agrees that whether there was a sexual component to Incident 1 is irrelevant.

57. The Tribunal also notes the Respondent's argument in closing submissions that, if the Tribunal is not satisfied that Incident 2 was of a sexual nature, it should still be regarded as unwelcome conduct that could reasonably be perceived to cause offense or humiliation and, thus, would amount to harassment.

58. Since almost all the evidence in support of the finding of misconduct comes from V01's complaint, establishing her credibility is an essential exercise for a proper adjudication of the case.

59. The foregoing was echoed by the Appeals Tribunal in *Soobrayan*, which ruled that "a proper assessment of the credibility, reliability, and probabilities of the account of one witness over another is fundamental to an assessment of the veracity or otherwise of distinct versions" in matters involving harassment or sexual misconduct. Thus, assessing the reliability of V01's version after hearing from her is of utmost importance, especially in the present case, in which the Tribunal found that the investigation report was flawed (*Soobrayan* 2024UNAT1469/Corr.1, paras. 85 and 89).

60. Therefore, the Tribunal will examine the reliability and credibility of V01 before determining whether the two incidents could amount to harassment or sexual harassment.

Reliability and credibility of V01

61. In general, the Applicant contends that V01's complaint was ill-motivated and that she either fabricated or exaggerated the incidents in her complaint to support a narrative of harassment and sexual harassment. In support, the Applicant identifies the excessive disagreements he had with V01 over the LearnIn project, his opinion that she had engaged in possible misconduct in relation to said project, the fact that he had warned her that he would file a complaint against her for possible misconduct, and the total disintegration of their professional and allegedly friendly relationship during the course of 2022, before V01 filed the complaint against him.

62. The Respondent submits that both in the disciplinary process and before the Dispute Tribunal, the evidence in the instant case predominantly comes from V01. In assessing her evidence, along with evidence from other sources since November 2018, the decision-maker considered several factors applicable to all the allegations against the Applicant. Namely, V01's limited authority in the LearnIn project, the fact that the Applicant did not report his suspicions of V01's misconduct to OIAI, and a well-established negative relationship between the two. The Respondent further submits that the Dispute Tribunal should take the same approach.

Relationship between V01 and the Applicant prior to her complaint

63. During the hearing, V01 testified, under oath, that the relationship between her and the Applicant was unpleasant from November 2018 onwards because he commented on her appearance. She submitted that the Applicant made her feel uncomfortable from the beginning of her move to Geneva. When asked about her relationship with the Applicant over the course of 2020, V01 submitted that it started to deteriorate after the Turkmenistan mission or September 2019.

64. The Applicant testified that he had a good professional and friendly relationship with V01 from the moment he joined UNICEF in February 2018, and after V01 transferred from Istanbul to Geneva around September 2018. They both worked in the same Office, in person, and developed a very good professional relationship and a strong friendship up to the first half of 2020.

65. Counsel for the Applicant further submits that the contemporaneous WhatsApp exchanges between the Applicant and V01 support the Applicant's testimony. Those messages show, *inter alia*, that V01 shared jokes and amusing anecdotes with the Applicant, teased him, shared personal information, discussed personal and family-related issues, and arranged to meet outside of work. They further show that the Applicant knew about V01's husband's health situation, and that the Applicant and V01 had created nicknames for colleagues that they would only use together. The evidence further demonstrates that the Applicant and V01 talked about their colleagues in detail through direct messaging and during real-time presentations, often using derogatory terms.

66. In this connection, the Tribunal will examine some seminal episodes of the communications between the Applicant and V01 that constitute the case record.

67. Upon return to Geneva from the Turkmenistan mission, the Applicant and V01 exchanged WhatsApp messages on 14 September 2019, which read as follows, in their relevant part:

> **Messages from V01:**
>
> The carpets are so beautiful.
>
> Thank you for carrying them.
>
> And supporting me in my decision.
>
> **Messages from the Applicant:**
>
> They are indeed very beautiful. To me the big thing is that they bring you joy.
>
> No problem at all...totally my pleasure.
>
> Thanks for a super awesome mission.

Messages from V01:

[Three smile emojis]

68. The messages mentioned above support the Applicant's testimony that, following Incident 1, he and V01 went out shopping together for carpets in Turkmenistan. The messages further show that the Applicant not only assisted V01's decision to purchase a rug, which he then carried back to Geneva for her, but also that V01 expressed a very positive mood and friendly demeanour towards the Applicant in the immediate aftermath of Incident 1.

69. Furthermore, the WhatsApp messages dated 14 to 16 November 2019 corroborate the Applicant's testimony with respect to the mission to Paris.

70. After they shared a train ride from Geneva to Paris on official duty, arriving in Paris in the afternoon, the Applicant went to his Airbnb, and V01 went to her son's apartment. Then, at around 7-8 p.m. on 14 November 2019, V01 invited the Applicant to her son's apartment, where they would meet for dinner. The respective exchange of messages reads as follows:

V01: Bobby don't sleep.

V01: We are waiting.

The Applicant: I'm waiting for you to tell me when to come! Have you finished cleaning?

V01: Almost.

V01: But you can come.

The Applicant: Ok. Will tell you when I leave...in about 20[]minutes.

V01: When you get out of your building just cross the avenue and you go straight [R]ue [S]pontini to the end and then to the right.

V01: Don't forget the charger.

The Applicant: I'm here at front door.

V01: Wait.

71. Roughly three hours later, the Applicant and V01 exchanged the following:

> The Applicant: I'm home. Thanks for great dinner!
>
> V01: Great! Sleep well.
>
> The Applicant: Thanks...you too.

72. On the following evening, the Applicant and V01 had another scheduled dining out with V01's son and a friend. In its relevant parts, the exchange of messages reads:

> V01: We didn't manage to get a table at that restaurant. They have availability at 10 only. The other option is a famous pizza place, but they don't take reservations, we should go there [and] probably wait 10-15 [minutes].
>
> V01: We could go around 7.30-8.
>
> The Applicant: Sounds good.
>
> V01: We meet here at 7.15.
>
> The Applicant: Where is the restaurant? Maybe it is easier for me to go there directly?
>
> V01: Will pick you up.
>
> V01: As soon as we get in the [U]ber will let you know.
>
> The Applicant: About what time you calling the Uber? Need to get out from under duvet [a lol emoji].
>
> V01: I'll start at 7:20.
>
> The Applicant: [ok]
>
> V01: Uber takes too long.
>
> V01: We are walking towards your place.
>
> The Applicant: Must I meet you somewhere?
>
> V01: And we'll get metro line 2 [P]ort [D]auphine stop.
>
> V01: 3 min walk from you.
>
> The Applicant: Cool.

V01: You can wait at [P]ort [D]auphine.

V01: You can leave now if you are ready.

The Applicant: Ok.

V01: we are here.

The Applicant: 2 [minutes].

The Applicant: I'm at the ticket machines at [the] entrance. Where [are] you?

73. On the morning of Saturday, 16 November 2019, the Applicant and V01 went out to brunch together:

The Applicant: Hi. Leaving my place at 11:30. See you at your place.

V01: I'm in the shops won't be there before 12.30.

The Applicant: No problem. I will go to the coffee shop nearby so don't rush.

V01: Ok. See you soon.

V01: Hi where are you?

74. On the same messages of 16 November 2019, V01 told the Applicant that her son told her not to "stress [the Applicant] again, it was enough to have one weekend with the [surname]", to which the Applicant responded: "I really enjoyed spending time with the [surname]!".

75. On 18 December 2019, V01 called the Applicant twice and sent him a message complaining about her period.

76. The aforementioned messages reveal that two months after the alleged harassment in Turkmenistan, V01 invited the Applicant to her son's apartment in Paris, introduced her son to him, dined out together two nights in a row and, on the third day, which was Saturday, had brunch together.

77. On 2 April 2020, the Applicant and V01 exchanged the following WhatsApp messages:

V01: the Balkan guy decided to remove the catheter ... just like that.

V01: it bothered him and then of course.

V01: you can imagine what followed.

The Applicant: Wow!

…

The Applicant: Do they have output for [Section] education? She just said they do.

V01: Yes.

V01: They do.

V01: But specifically for youth.

The Applicant: Ok.

V01: You happy with that?

V01: I cannot listen to her.

V01: So annoying.

V01: Stupid.

V01: Parrot.

The Applicant: (a vomiting emoji).

V01: So this slide is a make-up.

The Applicant: Yes...to neutralize us.

V01: But it is stupid.

V01: This one is so confident.

V01: She even put lipstick.

The Applicant: False confided.

Trust you to notice that [a laughing emoji].

V01: Of course she has slim lips.

The Applicant: [six laughing emojis].

78. The aforementioned messages reveal that, a few weeks after Incident 2, V01 and the Applicant shared personal messages about colleagues who were giving a presentation at that point.

79. During the hearing, Counsel for the Applicant asked V01 to explain the three episodes above, which showcased a relationship of trust between her and the Applicant. V01 testified that the Applicant imposed on her that kind of communication all the time, and he insisted on dining out two nights in a row. When questioned whether she could have declined him to spend some time with her son, considering that she had allegedly suffered sexual harassment by him in Incident 1 and in the day before (*i.e.*, incident which was found not to be established in UNDT/2023/063 and not appealed), V01 explained that their second dinner included other people as well.

80. The Tribunal is not persuaded by V01's testimony and the Respondent's arguments that the Applicant effectively compelled V01 to share jokes, invite him to social gatherings outside the workplace and working hours, and that she was only trying to maintain a positive working relationship with the Applicant considering the incidents of alleged harassment and sexual harassment.

81. First, a plain, ordinary, and literal reading of the WhatsApp messages between V01 and the Applicant showcases a friendly relationship of trust between the two, including before and after all of the allegations of harassment and sexual harassment made by V01 against the Applicant in her complaint. The foregoing supports the Applicant's testimony that they shared a close friendship prior to the disagreements surrounding the LearnIn project.

82. Second, the testimony of Ms. K and Ms. C also supports the Applicant's version of a very close relationship between him and V01 at the time of Incident 1. Specifically, Ms. K described their supervisor-supervisee relationship as "unusual", and Ms. C assumed the Applicant and V01 had a close relationship based on the interactions that she observed.

83. Third, the Tribunal agrees with the Applicant that V01's behaviour with him is not consistent with her allegations of harassment and sexual harassment against

him. While the Tribunal recognizes that harassment and sexual harassment may take multiple forms, and that victims should not be expected to respond to it in any specific manner, in a case where the investigation so poorly established the reliability of the victim, the context and the consistency of testimony are key.

84. Indeed, the fact that V01 arranged plans for dinner with the Applicant two nights in a row and meet with him for brunch on the weekend is questionable. Even more so, considering that V01 and the Applicant were in Paris, the city where her son lives, and whom she cannot see often. The justification for not meeting with the Applicant on a Saturday was obvious. Therefore, the natural conclusion is that, at least at the time of events, V01 did not feel that she had been harassed or sexually harassed by the Applicant.

85. Fourth, around a couple of weeks after Incident 2, V01 shared with the Applicant some personal medical information about her husband. In these messages, she also referred to a female colleague as a "stupid parrot" and "slim lips". The Tribunal finds it unreasonable that a victim of harassment and sexual harassment would voluntarily offer personal information to her harasser, much less confide in him. It is also unlikely that a victim of harassment or sexual harassment would be so trusting of her alleged harasser as to gossip with him about colleagues in a private chat.

86. Fifth, while the Respondent contends that the Applicant effectively compelled V01 to share jokes and act in a friendly manner towards him because he was her supervisor, no evidence was produced to substantiate this contention except for V01's testimony during the hearing. However, V01's testimony is contradicted by the testimony of the witnesses who observed V01 and the Applicant having an "unusual" and close friendship. Likewise, the Tribunal cannot observe any "compelling" reason from the fact that V01 voluntarily chose to introduce her son to the Applicant, and spend time with him outside of working hours and workdays while on a mission in a city where her son resides.

87. The Tribunal also notes that the apparent friendship between the Applicant and V01 may have fluctuated at the beginning of 2020, as demonstrated by the

testimony of Ms. C and the Applicant's 27 January 2020 email to Human Resources complaining, *inter alia*, about numerous misunderstandings with V01 on work-related matters.

88. In the Tribunal's view, the totality of the evidence on record shows that, during the same period when V01 claimed she was harassed and sexually harassed, she seemed comfortable traveling, dining out, discussing private matters, and frequently confiding in the Applicant. It is clear, therefore, that during the period under scrutiny, the nature of the relationship between the Applicant and V01 was one of a very close nature, beyond the standard supervisor-supervisee relationship.

LearnIn project and possible conflict of interest

89. It is undisputed that the investigation report was fundamentally flawed and that several work-related disagreements between the Applicant and V01 which preceded her complaint. These disagreements derived from V01's actions vis-à-vis the LearnIn project, and the alleged insubordination.

90. During the hearing, the Tribunal heard extensive evidence from both the Applicant and V01 on this matter. Since the Tribunal's task here is to determine whether V01 had any improper motivation for her complaint against the Applicant, and whether such motivation taints her credibility vis-à-vis the allegations of harassment and sexual harassment, the Tribunal will examine the most relevant evidence as follows.

91. The Applicant argues throughout the investigative and judicial processes that V01 made the complaint against him to prevent any negative consequences to her as a result of her "corrupt practices" in relation to the LearnIn project. Practices that he threatened to report her for formally.

92. The Respondent submits that V01 did not have the authority that the Applicant suggested in the LearnIn project and the Applicant produced no evidence to substantiate her engagement in corrupt practices. Furthermore, the fact that he did not report his suspicions to OIAI suggests that he did not honestly believe V01 was involved in a scheme to benefit from UNICEF.

93. The Tribunal notices that the Respondent's arguments do not consider the various efforts made by the Applicant to resolve the disagreements with V01, including by contacting and scheduling meetings between himself, his First Reporting Officer, V01, and the Human Resources representative. In this respect, the Applicant's email dated 30 June 2020 to the ECARO Deputy Regional Director (and the Applicant's direct supervisor), escalating the aforementioned disagreements in relation to the LearnIn project, is of particular relevance:

> I write to solicit your intervention in resolving a difference of perspective between [V01] and [the Applicant] on the vision, formulation and execution of LearnIn. This disagreement has played out for many months and it is proving extremely difficult to work with common purpose on the ongoing formulation and implementation of LearnIn. I have tried many times to discuss the matter, but these attempts have not ended well and failed to deliver the desired outcome; of reaching a common understanding as a platform for continuing with the work. Given the strategic importance of this work and the visibility it is currently enjoying, I believe that these differences in perspectives is negatively impacting our ability to work as a team on the initiative. I am therefore requesting urgent intervention to seek a resolution to this matter and to agree on a way to proceed.

94. Of even more relevance, is the email dated 19 November 2020, thirteen days before V01's complaint of misconduct against the Applicant. In it, the Applicant informed the people involved in the LearnIn project, including V01 and a founding member of the Alpha Foundation ("Mr. T"), of his intention to have the issues surrounding LearnIn subjected to an investigation. He stated:

> …
>
> I will be referring the various claims and actions, which I deem to be of concern, to independent and formal adjudication using mechanisms established for this purpose within UNICEF.

95. Prior to the aforementioned "last threat", the Applicant had already requested that an investigation be open into the matter. In an email dated 14 August 2020, he wrote to V01, his supervisor and the HR representative about the issues and potential conflicts of interest he was observing within the LearnIn project, and stated: "I also request, should we have another occurrence of this behaviour, that

formal processes – as discussed at our meeting yesterday – be launched to address this issue".

96. The record shows that on 13 August 2020, the Applicant had a meeting with V01 and his FRO, in the presence of the HR representative, to discuss the issues around the development of the LearnIn project and the working relationship problems between them. An audio recording of said meeting, which was also mentioned by the Applicant in the email above, was reviewed by this Tribunal. In it, it is possible to identify that the Applicant questioned the fact that V01 was sending updates on the project to the Applicant's FRO without going through the Applicant first, that V01 was insubordinate, bypassed him several times, and made decisions that were in contradiction with the Applicant's instructions. The Applicant also highlighted that he suspected dishonest conduct by V01 regarding the Alpha Foundation, which was a possible implementing partner to LearnIn.

97. Furthermore, an email exchange between the Applicant and the HR representative between 8 and 14 September 2020 shows the HR representative stating the following to the Applicant:

> …
>
> As such, with the view to address the current challenges which are being experienced, the HR's recommendation is the following:
>
> …
>
> Avail from available support mechanisms in place such as RO HR or ombudsman (if needed) as a body who can support to navigate and identify productive and collegial ways of working together moving forward. The ombuds office and the Ethics office are independent and confidential resources to also provide advice should any of the parties with to pursue a formal complaint through the office of internal investigations. Given the context as per above and the experience so far, we note that a number of cases have been referred back to offices as [OIAI] noted that the case would fall under the purview of performance management, however you are kindly encouraged to consult with the Ombuds and the Ethics office for an informed advice about this".

98. To the above, the Applicant responded: "[…] the reference to 'performance management' here is concerning, as it appears to reinforce the earlier implied

conclusion without any justification provided. I submit respectfully that it is unusual and inadvisable for HR, I or any official to second guess the response of the [OIAI] to the concerns I raised […]".

99. The Tribunal is of the view that the documentary evidence on record contradicts the Respondent's stance that the Applicant did not act on his suspicions with respect to V01 and the LearnIn project. The evidence rather supports the Applicant's allegation that V01 had personal reasons to misrepresent their interactions to the investigators.

100. Notwithstanding the foregoing, the Tribunal will not make any determination with respect to V01's role vis-à-vis the LearnIn project and the Applicant's allegations of potential misconduct against her, as her conduct in relation to that project is not part of the current exercise of judicial review.

101. Hence, it is unnecessary for the Tribunal to check whether V01 was insubordinate and/or was involved in any suspicious activity. Nor is it necessary to examine why the Applicant did not report his suspicions to the proper channels in UNICEF. There is enough on the record to assert that there were many serious disagreements between V01 and the Applicant with respect to the LearnIn project; that the Applicant tried to resolve said disagreements amicably through mediation with the support of his FRO and an HR representative; that the attempts to deescalate the situation between the Applicant and V01 all failed; and most relevant that, shortly before V01 complained against the Applicant, he had finally indicated, in writing, that he would pursue a formal investigation into the LearnIn project.

102. However, for the purpose of determining whether the Applicant's suspicions against V01 were grave enough to provoke her, as the Applicant alleges, into misrepresenting a series of interactions between them to fit into a narrative of harassment and sexual harassment, the Tribunal must examine the evidence provided by the Applicant during the investigative and judicial processes vis-à-vis a potential conflict of interest between V01, Mr. T and the Alpha Foundation.

103. In this regard, evidence about the founding of the Alpha Foundation and the slide decks prepared by V01 for a presentation give some insights into the possible conflict of interest.

104. The record shows that while Mr. T established Alpha Foundation on 9 June 2020 in Switzerland, Mr. T was involved in establishing the criteria by which a Foundation was to be selected to fundraise in UNICEF's name. When the Programme Review Committee ("PRC"), which consisted of members from UNICEF and its partner, the Zurich University of Teacher Education, established criteria, Mr. T, a member of the Committee from the University, did not disclose that he was the President of the Alpha Foundation. At the same time, V01 developed a budget for an unidentified "Swiss Foundation", as indicated in her slide presentation of early July 2020, without approval from the Applicant, who was the *de facto* project leader of LearnIn in UNICEF.

105. The Alpha Foundation's brochure on the LearnIn Initiative published in October 2020 also reveals that "[Mr. T] is the leading power behind LearnIn, including designing, planning, organizing and managing the core team of experts and technology providers".

106. In this connection, when Counsel for the Applicant asked why V01 did not discuss the budget with the Applicant as her supervisor, V01 responded indirectly and testified that the amount had been envisaged at the onset of the LearnIn Initiative. Nevertheless, she explained that the proposed budget was for a very big project, and she proposed that Alpha Foundation be selected.

107. When Counsel for the Applicant questioned her about whether she had discussed with the Applicant a significant increase in the initial budget, V01 testified that she did not complete the document alone. She guessed that the issue could have been raised or that the Applicant was copied on the emails at that time. When asked whether the Applicant was only copied when she sent this document to the Chair of PRC, V01 stated that she could not recall the Applicant raising any issues in a separate email correspondence, and the Applicant did come through in the Committee meeting.

108. In this connection, Mr. G's statement noted that he had been involved in discussions with the Applicant, V01, Mr. T, and other relevant persons regarding the proposed digital architecture before and after the meeting of 14 August 2020. His view of the proposal was that it was extremely ambitious, and there would have been a need to create vast amounts of software, many of which were already available from existing resources. He further explained that it all did not seem to make sense until later, when he saw the amount of money being asked for to create this, which, from his memory, was around USD 10 million, and he had reservations about whether this was an appropriate use of funds.

109. When Counsel for the Applicant asked why V01 didn't discuss the creation of the Alpha Foundation with the Applicant before her first mentioning it in the email dated 30 July 2020, since she knew that the Alpha Foundation was established on 9 June 2020, V01 testified that she could not recall the exact reason and that it was impossible to talk to the Applicant at that stage because he started to send emails trying to accuse her of misconduct.

110. Section 23 of the Standards of Conduct for the International Civil Service sets forth conflicts of interest in para. 23 as follows:

> Conflicts of interest may occur when an international civil servant's personal interests interfere with the performance of his/her official duties or call into question the qualities of integrity, independence and impartiality required the status of an international civil servant. *Conflicts of interest include circumstances in which international civil servants, directly or indirectly, may benefit improperly, or allow a third party to benefit improperly, from their association with their organization.* Conflicts of interest can arise from an international civil servant's personal or familial dealings with third parties, individuals, beneficiaries, or other institutions. *If a conflict of interest or possible conflict of interest does arise, the conflict shall be disclosed, addressed and resolved in the best interest of the organization.* Questions entailing a conflict of interest can be very sensitive and need to be treated with care. (emphasis added)

111. The evidence on record reflects that, at the very least, partially with the assistance of V01, the PRC in which Mr. T was an active member identified him or

the Alpha Foundation as the person or the Foundation who might have put in control of the USD13 million budget.

112. The Tribunal is persuaded by the Applicant's arguments that V01 was aware of a possible conflict of interest when Mr. T founded the Alpha Foundation, rendering the Committee non-independent, and she chose not to report it to the Applicant. V01's explanation under oath does not convince the Tribunal as to why she avoided reporting it to the Applicant, as they were still frequently exchanging emails by then. In any event, confusing her professional obligations with her emotions is not a legitimate excuse for not reporting a potential conflict of interest.

Assessment of the credibility and reliability of V01

113. The Tribunal's task here is not to determine whether V01's involvement in the LearnIn project could amount to misconduct because that is the task of the Administration following a proper disciplinary process. Rather, the task before the Tribunal is to determine whether the undisputed disagreements, the aforementioned WhatsApp messages, and the possible conflict of interest are sufficient to demonstrate a potential ulterior motive and bias against the Applicant.

114. In this respect, the Tribunal finds that the established disagreements alone may have led V01 to have an improper motive for filing the complaint against the Applicant.

115. The record shows that V01 never mentioned the Applicant's alleged misconduct throughout the disagreements with him during 2020, not even when a neutral third party was intervening. She also did not file the complaint against the Applicant to OIAI until the Applicant threatened to report her for possible misconduct.

116. More recently, at the hearing, when Counsel for the Applicant asked V01 why she reported the Applicant's misconduct only in December 2020, over a year after Incident 1, V01 testified that she knew those incidents were inappropriate but took some time to fully understand herself, what had happened, and what harassment and sexual harassment are.

117. The Tribunal is not persuaded by V01's explanations. By examining the timeline of events with respect to the disagreements with the Applicant, the date of the alleged incidents, the close relationship the Applicant and V01 shared during the time said incidents happened, the Applicant's accusations against V01, and the potential conflict of interest, V01's account seems illogical and inconsistent, which calls into question the reliability of her complaint.

118. While the Tribunal agrees with the Respondent that it is unlikely that V01 fabricated all the reported incidents and/or manipulated the testimony of the witnesses, it cannot disregard the inconsistencies in her testimony and behaviour during the timeline of events. Considering the totality of the documentary evidence and the testimonies heard at the hearing, coupled with the breakdown of the professional relationship between the Applicant and V01, and the flawed investigation that did not adequately establish V01's credibility given the foregoing issues, it is reasonable for the Tribunal to consider the Applicant's version of events that Incident 1 and Incident 2 might have been exaggerated to fit into a narrative of harassment and sexual harassment.

Legal framework on harassment and sexual harassment

119. Section 1.1 of CF/EXD/2012-007 (Prohibition of discrimination, harassment, sexual harassment and abuse of authority), UNICEF Executive Directive, which was applicable until 8 March 2020, provides that:

> (b) Harassment is any improper and unwelcome conduct that has or might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to abuse, demean, intimidate, belittle, humiliate or embarrass another person or which create an intimidating, hostile or offensive work environment. It includes harassment based on any grounds, such as race, religion, color, creed, ethnic origin, physical attributes, gender or sexual orientation. Harassment normally involves a series of incidents.
>
> (c) Sexual harassment is any unwelcome sexual advance, request for sexual favor, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile,

> or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either victims or offenders.

120. UNICEF Policy on the Prohibition of Discrimination, Harassment, Sexual Harassment and Abuse of Authority (Policy/DHR/2020/002), applicable from 9 March 2020 to date, provides that "sexual harassment" constitutes any unwelcome and improper conduct of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment.

121. In *Appellant* 2022-UNAT-1210, para. 35, the Appeals Tribunal clarified the threshold of evidence needed to establish a finding of sexual harassment:

> Hence, before concluding that there has been sexual harassment, there has to be sufficient, credible and reliable evidence proving a high probability that the perpetrator: i) made a sexual advance; ii) made a request for a sexual favour; iii) engaged in conduct or behaviour of a sexual nature; or iv) made a gesture of a sexual nature. In addition, the advance, request, conduct or gesture must be shown to have been unwelcome; might reasonably have been perceived to cause offence or humiliation to another; or have caused a hostile work environment.

122. UNAT has also emphasized that a finding of sexual harassment is a serious matter, as noted in *Appellant* 2022-UNAT-1187, para. 50, and in *Appellant* 2022-UNAT-1210, para. 37 that:

> Such a finding will have grave implications for the staff member's reputation, standing and future employment prospects. For that reason, the UNDT may only reach a finding of sexual misconduct on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that the elements of sexual exploitation and abuse have been established in accordance with the standard of clear and convincing evidence. In other words, the sexual misconduct must be shown by the evidence to have been highly probable.

123. In determining whether clear and convincing evidence has been established in harassment or sexual harassment case, UNAT ruled that the UNDT must consider

and weigh not only the evidence put forward by witnesses produced for the Secretary-General, but also any countervailing evidence adduced for the staff member, and any relevant and probative documentary evidence which may either corroborate or cast doubt on the recollections of witnesses. Such an analysis has to be applied by the UNDT not only to each individual piece of disputed evidence, but it must then be applied likewise to the totality of the evidence in support of the allegation of misconduct. The Judge can only then answer the fundamental question: "Is there clear and convincing evidence to enable the Tribunal to conclude that the allegation(s) of misconduct have been established?" (*Khatib* 2021-UNAT-1153, para. 23; *Neguisse* 2020-UNAT-1033, paras. 46-47).

Incident 1

124. In the present case, the relevant facts of the 11 September 2019 incident are established and require an assessment of whether they could legally amount to harassment.

125. The reason why the Applicant entered V01's hotel room unannounced is not under dispute. The Applicant claims that he had dinner plans with V01 and, when he went to call her because they were late, he saw the hotel door was open. V01 does not dispute that. What is disputed between the Applicant and V01 is what happened after he entered the hotel room. She claims that he scared her by going over to her bed, touching her and calling her while she slept. The Applicant alleges that he never touched her, nor stood over her. He claims that he called her because he noticed she was sleeping under the covers and acknowledges that she got scared when woken up. He thought the incident was amusing and immediately told their colleague about it.

126. The two witnesses that testified at the hearing confirmed that the Applicant joked about scaring V01 when he entered her hotel room to call her for their dinner plans. Ms. K further testified that she found the situation strange but that V01 did not really react when the Applicant was telling the story. The Tribunal is of the view that if the Applicant had intended to harass V01, he would have avoided to publicly joke about it. However, as intention is not a necessary requirement for a finding of harassment, as per the foregoing legal provisions, the Tribunal will examine

whether the Applicant's conduct was improper and unwelcome and whether it could reasonably be perceived to cause offense or humiliation.

127. In this regard, the Tribunal agrees that the Applicant exercised poor judgment in entering V01's hotel room unannounced. Irrespective of the reason, he was V01's supervisor on an official mission and his action cannot be taken lightly. However, the Tribunal cannot reasonably interpret said action as a form of harassment causing offence or humiliation to V01. That is because the nature of the Applicant's close friendship with V01 and the context prior and immediately after Incident 1 does not denote to an issue. Instead, the evidence shows that V01 not only continued to act on a friendly manner with the Applicant, but sought out this friendship and trusted the Applicant enough to confide in him personal things.

128. The Administration considered the positive relationship between the Applicant and V01 only "on the surface" rather than genuinely looking into the context when it assessed the totality of evidence, which, in the Tribunal's view, wrongfully made the assessment that Incident 1 met the applicable standard of proof.

129. The Tribunal recalls that "harassment may take the form of words, gestures or actions which tend to abuse, demean, intimidate, belittle, humiliate or embarrass another person or which create an intimidating, hostile or offensive work environment".

130. Indeed, while a supervisor entering a supervisee's hotel room unannounced and mistakenly scaring said supervisee could be seen as improper conduct that could reasonably be perceived to cause offence or humiliation, the Tribunal is of the view that, in this case, the context of the relationship between the two, as set out in this judgment, subdues such an inference.

131. The Appeals Tribunal held that the standard of clear and convincing evidence is a finding of higher probability. There must be very solid support for the finding; significantly more evidence supports the finding and there is limited information suggesting the contrary (*Appellant* 2022-UNAT-1187, para. 64).

132. Consequently, the Tribunal finds that the evidence on record does not support the charges of harassment made against the Applicant with respect to Incident 1.

Incident 2

133. Similarly, the relevant facts pertaining to the alleged unsolicited neck massage of March 2020 are established and require an assessment of whether they legally amount to sexual harassment.

134. The Respondent argues that the Applicant's conduct is already established as "unprofessional", and that the threshold to establish sexual harassment is met when considering that the Applicant "imposed a prolonged physical touch on his supervisee", which V01 testified as unwelcome, uncomfortable and unsolicited. The Respondent further argues that is "unacceptable for a supervisor to give an unsolicited massage to a supervisee".

135. The Applicant submits that Ms. B, who was in the office during the alleged neck massage witnessed the conversation about body posture and back pain. She witnessed the Applicant giving V01 the alleged massage for approximately 30 seconds, expressed no reaction to it, and did not notice any signs of resistance or rejection from V01. The testimony of Ms. B contradicts that of V01, who said that she and the Applicant were alone in the office when the alleged neck massage happened and that she immediately retracted from it.

136. The Applicant further submits that the fact that Ms. B described the interaction as neither unusual nor typical and her "neutral" reaction demonstrates that she did not witness an act of a sexual nature.

137. The Tribunal considers that the testimony of Ms. B does not support a finding that the "neck massage" was unsolicited, unwelcomed, and of a sexual nature. Likewise, the inconsistent account from V01 does not raise the established facts to the applicable standard, especially given the evidence on record about the unusual close relationship between the Applicant and V01 and V01's motivation for the complaint being questioned. From the context described by the impartial witness, it is not possible to establish any sexual connotation related to this incident.

138. In response to the Respondent's argument that Incident 2 would amount to harassment if the Tribunal considers it is not of a sexual nature, it is also not possible to establish any conduct meant to intimidate or embarrass V01, nor one that created an intimidating or hostile work environment. The Applicant and V01 exchanged confided messages shortly after the incident showing their good relationship and a positive work environment.

139. On the remand, UNAT held that "[b]y its nature, harassment or sexual misconduct usually occurs between two individuals and often in the absence of any third-party witness able to corroborate the events" (*Soobrayan* 2024-UNAT-1469/Corr.1, para. 85).

140. It is conceivable that giving a massage to a colleague openly could not be automatically or reasonably perceived to cause offense or humiliation. Indeed, it is highly unlikely that the Applicant would sexually harass V01 while another female colleague was seeing it from the opposite desk just two meters away.

141. Therefore, the Tribunal finds that the established facts surrounding Incident 2 do not legally amount to sexual harassment or harassment.

142. As it follows, the disciplinary sanction is unlawful and shall be rescinded.

Whether the Applicant is entitled to any remedies

143. The sanction imposed on the Applicant was separation from service with compensation in lieu of notice, and without termination indemnity.

144. Since the Tribunal finds that the facts that Incident 1 and Incident 2 do not legally amount to harassment and/or sexual harassment within the meaning of CF/EXD/2012-007, and considers the disciplinary sanction unlawful, the sanction imposed is rescinded.

145. The Tribunal would normally order the Applicant's reinstatement, with the benefits and entitlements at the level he had before being separated from service. However, the Applicant would have reached the maximum age of retirement of 65 at the time his fixed-term appointment was due to expire on 31 October 2022.

146. As the Applicant has exceeded the mandatory age of retirement, in the view of the Tribunal, to order reinstatement would be a moot remedy. Therefore, the Respondent must pay compensation *in lieu* instead.

Compensation *in lieu*

147. Considering the unlawful disciplinary sanction that has negatively impacted the Applicant's career and adversely affected his reputation, the Tribunal believes that the Applicant is entitled to the maximum amount of compensation *in lieu*.

148. From the time of his separation on 15 November 2021 to the expiration date of his fixed-term appointment on 31 October 2022, the Applicant could have only worked with the Organization for another 11.5 months.

149. Therefore, compensation *in lieu* is set at 11.5 months of net-base salary, which is the maximum of what the Applicant would have ever received from the Organization had he not been separated.

150. In line with the above, the Applicant's name shall also be deleted from the United Nations wide screening database on sexual misconduct.

Moral damages

151. The Applicant requests USD10,000 as moral damages for violation of his due process rights, presumption of innocence and the effect the sanction had on his health.

152. Pursuant to art. 10.5(b) of the Tribunal's Statute, compensation for harm needs to be supported by evidence.

153. Furthermore, it is well-settled that a mere procedural breach is not ground for compensation for harm, and a staff member's testimony alone is not sufficient to present evidence supporting harm under art. 10.5(b) of the Tribunal's Statute (*Kallon* 2017-UNAT-742, para. 60). Thus, "the testimony of an applicant needs corroboration of independent evidence to support the contention that harm has occurred" (*Langue* 2018-UNAT-858, para. 17). There must be evidence to support

the existence of harm, an illegality, and a nexus between the two (*Kebede* 2018-UNAT-874, para. 20).

154. Accordingly, "the claimant bears the burden of establishing the negative consequences resulting from the illegality, namely that there is a "cause-effect" nexus between the illegality of the contested administrative decision and the harm itself" (*Kilauri* 2022-UNAT-1304, para. 38).

155. In the instant case, the Applicant did not provide any evidence of harm directly linked to the contested decision apart from his own testimony. Therefore, he is not entitled to moral damages.

Conclusion

156. In view of the foregoing, the Tribunal DECIDES:

a. The disciplinary sanction is rescinded;

b. The Applicant shall be paid a sum equivalent to 11.5 months of net-base salary at the same grade and level he held at the time of his separation;

c. The aforementioned sums shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable;

d. The Applicant's name shall be deleted from the UN wide database on sexual misconduct; and

e. All other claims are rejected.

(*Signed*)
Judge Sun Xiangzhuang
Dated this 12th day of December 2025

Entered in the Register on this 12th day of December 2025
(*Signed*)
Liliana López Bello, Registrar, Geneva