UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2019/047
Judgment No.:	UNDT/2021/007
Date:	3 February 2021
Original:	English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Omar Yousef Shehabi, OSLA

Counsel for Respondent:
Lucienne Pierre, ALD/OHR, UN Secretariat
Isavella Maria Vasilogeorgi, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former staff member with the United Nations Secretariat, filed the application in which he contests "the decision to impose the disciplinary measure of separation from service with compensation in lieu of notice, and with termination indemnity in accordance with Staff Rule 10.2(a)(viii)".

2. In response, the Respondent contends that application is without merit.

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

Facts

4. The contested decision, taken by the Under-Secretary-General for Management Strategy, Policy and Compliance ("the USG"), was conveyed to the Applicant by an inter-office memorandum dated 21 March 2019 from the Assistant Secretary-General for Human Resources ("the ASG"). In this memorandum, it was stated that "[b]ased on a review of the entirety of the record, including your comments, [the USG] … concluded that … the allegations against [the Applicant] are established by clear and convincing evidence".

5. Regarding the factual background for the contested decision, the ASG indicated that "[i]n the allegations of misconduct memorandum, it was alleged that, on 8 November 2017, during a farewell party", the Applicant had "sexually harassed" AA, BB and CC (names redacted). It was found that the Applicant "in particular, on one or more occasion" had:

> a. "grabbed [AA's] face, held her closely, leaned forward and attempted to kiss her";
>
> b. "when [AA] resisted [the Applicant] kissing her, [he] forced [AA's] head down and kissed her on the forehead";

c. "grabbed [BB's] face, held her closely, leaned forward and attempted to kiss her";

d. "tried to move physically close to [AA] and [BB] while dancing, despite their attempts to keep [him] at a distance";

e. "attempted to grab [CC's] face; when she blocked her face with her hands, [the Applicant] grabbed her hands and tried to pull them apart; when she resisted, [he] fell on her forcefully"; and

f. "took and pulled [CC's] hands to try to get her to dance, despite her resistance".

Consideration

Standard of review in disciplinary cases

6. The Appeals Tribunal has consistently held the "[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration". In this context, [the Dispute Tribunal] is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". See, for instance, para. 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT-1024.

7. The Appeals Tribunal has, 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" (see *Sanwidi* 2010-UNAT-084, para. 40). In this regard, "the Dispute Tribunal is not conducting a

"merit-based review, but a judicial review", explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

8. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal has stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

9. Specifically regarding disciplinary matters, the Appeals Tribunal has held that the Administration enjoys a "broad discretion … with which [the Appeals Tribunal will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi*, at para. 40, "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

Whether the facts on which the sanction was based have been established?

Basic jurisprudence on the evidentiary burden and how to assess evidence in sexual misconduct cases

10. In disciplinary cases "when termination is a possible outcome", the Appeals Tribunal has held that the evidentiary standard is that the Administration must establish the alleged misconduct by "clear and convincing evidence", which "means that the truth of the facts asserted is highly probable" (see, for instance, *Turkey*, para. 32).

11. Regarding the meaning of clear and convincing evidence, the Appeals Tribunal has ruled that this "imports two high evidential standards", which are: (a) "clear", which means that "the evidence of misconduct must be unequivocal and manifest"; and (b) "convincing", which requires that "this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance". The Appeals Tribunal further clarified that clear and convincing evidence can either be "direct evidence of events", or may "be of evidential inferences that can be properly drawn from other direct evidence". See *Negussie* 2020-UNAT-1033, para. 45.

12. Specifically regarding the examination of evidence of sexual misconduct, the Dispute Tribunal held in *Hallal* UNDT/2011/046, para. 55 (affirmed by the Appeals Tribunal in *Hallal* 2012-UNAT-207) that "in sexual harassment cases, credible oral victim testimony alone may be fully sufficient to support a finding of serious misconduct, without further corroboration being required", because "[i]t is not always the situation in sexual harassment cases that corroboration exists in the form of notebook entries, email communications, or other similar documentary evidence, and the absence of such documents should not automatically render a complaining victim's version as being weak or meaningless". The Dispute Tribunal also held that "[a]s is always the case, any witness testimony should be evaluated to determine whether it is believable and should be credited as establishing the true facts in a case".

13. When affirming the Dispute Tribunal's finding in *Hallal*, the Appeals Tribunal held that the applicant "failed to present any evidence that contradicted the [complainant]'s evidence or that showed that it was unreasonable to accept her evidence in light of other evidence" (*Hallal* 2012-UNAT-2007, para. 30).

The facts regarding incidents involving AA

14. The Applicant submits that it is undisputed that AA "considered [that his] conduct towards her did not warrant a formal complaint, that it was appropriately resolved informally, and that it was informally resolved to her satisfaction, and she attested in her letter of support for the Applicant".

15. The Respondent, in essence, submits that the facts stated in the disciplinary decision have been "clearly established".

16. The Tribunal notes that the Applicant does not contest the facts set out in the contested disciplinary decision regarding AA, which are therefore settled. Similarly, the Respondent does not deny the Applicant's submissions regarding AA subsequently reconciling with the Applicant. All these facts are therefore appropriately established and do not require any further review.

The facts regarding the incidents involving BB and the significance of her not appearing as a witness before the Tribunal

17. The Applicant submits that the Tribunal had directed BB to testify at the hearing and that the Respondent "was to lead the hearing" of her "in direct evidence, in recognition of the Administration's burden to prove its case by clear and convincing evidence". As the Respondent's witness, he "was responsible for ensuring her participation", but she did not appear before the Tribunal, and the Applicant was therefore "denied the opportunity to 'challenge the veracity' and reliability of [BB]" with regard to her interview with the Office of Internal Oversight Services ("OIOS").

18. The Applicant contends that "[h]ad [BB] participated in the hearing, the Respondent could have adopted her OIOS interview as her direct testimony, which the Applicant could challenge—and the Tribunal could assess—on cross examination". Since BB did not participate, it follows that "her OIOS interview cannot be credited as her direct testimony", and "under established jurisprudence, it should be ascribed no evidentiary value whatsoever". While the Tribunal has "discretion not to hear witnesses interviewed during the investigation proceedings, if it decides to hear such a witness, like [BB], that hearing takes the form of … a 'fresh' or '*de novo*' examination … whereby the Tribunal will 'examine and assess whether the [applicable] standard of proof has been met', referring to *Nadasan* 2019-UNAT-918 (para. 40), as well as *Mbaigolmem* 2018-UNAT-819. Without testimony of AA, the "*de novo* examination must be resolved in favour of the Applicant, who steadfastly denies the allegations involving her". The "determination that the Applicant 'attempted to kiss' [BB] is

manifestly unfounded", and "[n]o one—not even [BB] herself—alleges that the Applicant kissed her, or even tried to kiss her".

19. The Respondent, in essence, contends that "no adverse inference should be drawn from the Respondent's inability to produce [BB] for the hearing", who "never replied to Respondent's invitations to testify before the Tribunal" and is not a United Nations staff member.

20. The Tribunal notes that in *Mbaigolmem* (para. 29), the Appeals Tribunal held that the Dispute Tribunal should "*ordinarily* hear the evidence of … material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and convincing evidence has been discharged on the evidence adduced (emphasis added).

21. BB not appearing before the Tribunal was, however, not an ordinary situation. Despite the Tribunal's explicit instructions in Order No. 153 (NY/2020) dated 8 October 2020 for the Respondent to lead BB as a witness in direct evidence, she did not reply to the Respondent's messages. BB, however, is not a United Nations staff member (this fact is not contested by the Applicant) and has no obligation to participate in the hearing, and neither the Tribunal nor the Respondent have any means to compel her to do so.

22. In *Mbaigolmem* (para. 29), the Appeals Tribunal further held that while it will "often … be safer" for the Dispute Tribunal "to determine the facts fully itself", occasions may occur "where a review of an internal investigation may suffice". In line herewith, in *Sall* 2018-UNAT-889 (para. 39), the Appeals Tribunal held that "[t]he requirement of a *de novo* review of the facts does not mean that [the Dispute Tribunal] will have to re-hear all the witnesses of the investigation … [i]f there is sufficient and substantial evidence in the written record, [the Dispute Tribunal] may also base its findings on this record". In *Nadasan*, the Appeals Tribunal also stated that the Dispute Tribunal "is not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the Secretary-General",

and instead "[i]t will only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based".

23. The Tribunal also notes that cross-examination is not an absolute right without which a witness' statement to an investigatory entity becomes invalid (see also the Appeals Tribunal in *Mohammed Yousef abd el-Qader Abu Osba* 2020-UNAT-1061, para. 69). If the person is not available to appear before the Dispute Tribunal, her/his reason must instead be assessed (the person could even be deceased) after which the evidentiary weight of the previous statement given during the investigation must be determined.

24. A similar approach was taken by the Appeals Tribunal in *Applicant* 2013-UNAT-302 (full bench). In this case, similar to the present case, the alleged perpetrator was dismissed (although even summarily) on sexual misconduct charges, and the complainants, who had testified to an investigatory body, did not reappear to testify before the Dispute Tribunal because they could no longer be located for which reason they were therefore not cross-examined. Their initial testimony was, however, still accepted by the Appeals Tribunal (see, paras. 33, 34, 36, 38, 39 and 40):

> ... As a general principle, the importance of confrontation, and cross-examination, of witnesses is well-established. That said, "[d]isciplinary cases are not criminal. Liberty is not at stake" [reference to footnote omitted]. Thus, due process does not always require that a staff member defending a disciplinary action for summary dismissal has the rights to confront and cross-examine his accusers.
>
> ... The former Administrative Tribunal "consistently maintained the right of Applicants to see all evidence against them and their right to cross-examine witnesses" [reference to footnote omitted]. Under certain circumstances, however, denial of this right does not necessarily fatally flaw the entire process.
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> …
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> ... There are … cases in which it is impossible, or inadvisable, for such confrontation to occur. […]
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> …
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> … In the instant case, it proved impossible for the Administration to produce the Complainants to testify, and be cross-examined, before

> the Dispute Tribunal. This situation, while certainly regrettable, was not of the making of the Organization and should not be held against it. The United Nations operates globally and in situations which can prove highly transient or volatile. The Appeals Tribunal accepts that the Organization was unable to produce witnesses in the South Sudan almost five years after the complained-of incidents.
>
> ... The Tribunal is satisfied that the key elements of the Applicant's rights of due process were met: he was fully informed of the charges against him, the identity of his accusers and their testimony; as such, he was able to mount a defense and to call into question the veracity of their statements. This Tribunal is, therefore, satisfied that the interests of justice were served in this case, despite his inability to confront the persons who had given evidence against him during the initial investigation.[reference to footnote omitted]
>
> ... This decision is not inconsistent with *Liyanarachchige* [2010-UNAT-087], in which this Tribunal concluded that "a disciplinary measure may not be founded solely on anonymous statements".

25. In the present case, regarding BB's absence, the Tribunal notes that according to the Respondent, she never responded to his request to appear as a witness before the Tribunal. In this regard, the Tribunal takes also note that BB was to provide testimony as an alleged victim in a sexual harassment case and that the case has generated a story on a private blog on which names of witnesses have been stated in the context of the present case.

26. Rather than hearing BB as a witness, the Tribunal will, in the lack of other options, therefore instead ascertain whether the content of the various OIOS testimonies concerning the incidents between the Applicant and BB were appropriately reflected in the contested disciplinary decision, and if BB's testimony is corroborated by the other evidence. In assessing the evidentiary weight to be given to BB's testimony to OIOS, the Tribunal will give due deference to the fact that the Applicant was not provided with the possibility of cross-examining her, while it is also noted that the Applicant has, at least, been able to comment on her OIOS statement in his submissions before the Tribunal. In this regard, it is also noted that BB's testimony was given under oath and in application of all other OIOS procedural safeguards.

The parties' submissions regarding the incidents involving BB

27. The Applicant submits that "[e]ven if [BB's] witness statement could be credited as testimony, her account defies credulity and is belied by the testimony of other witnesses". BB told "investigators that the Applicant grabbed her face so abruptly and so publicly (but without attempting to kiss her) that she likened it to an out-of-body experience". A short time later, she claims, "she accepted a dance with the Applicant as a way of 'defusing' the situation; and that the Applicant insisted upon dancing in uncomfortably close proximity, which she again defused with humour". No one "testified to seeing anything unusual about their dance" or "witnessed the events as described" by BB. If BB was "traumatised by these experiences, however, she presumably would have avoided the Applicant thereafter", but according to another person, BB "thereafter was engaged in conversation with the Applicant" and was "having good fun" and "getting a good kick out of the whole thing". That conversation "would be far beyond what any reasonable person would consider necessary to defuse a tense situation", and BB also "acknowledged having increased work-related interaction with the Applicant after the party, entirely without incident". Since BB's "allegations cannot be credited, neither can they serve as evidence a 'pattern of behaviour' by the Applicant towards female colleagues".

28. The Respondent, in essence, submits that the factual findings involving BB are "clearly established" by the transcript of the OIOS interviews.

29. The Tribunal notes that in BB's testimony to OIOS, she explained that she was at the farewell party on 8 November 2017 because she worked on a UN project as a consultant from a private sector firm. BB presented her account of the relevant events to the OIOS investigators as follows (all tracked changes stipulated in the original interview transcripts have been accepted in following quotations):

> … I was with two of our [company name redacted] colleagues [one of them was EE, name redacted], I was just having a conversation with them off to the side, it was a very jovial and festive environment ...
> …

> … […] I was standing there catching up with them, just chatting about day to day work stuff and what not, when [the Applicant] came and grabbed my face in front of everyone and he basically put his two hands right on my cheeks and he was holding me as if he was going to kiss me in front of everyone and my instinct at that moment was to freeze, I don't know it was just… It almost, well, could have been like a bit of an out of body experience when you are standing there and looking down and you're seeing that this person is just grabbing your face ready to kiss you in public, I wasn't the only one who had this reaction, my two colleagues also stood there in shock because it just like came out the field, he was not even in my periphery at that moment, I was having this off-sided conversation, I think the shock registered on my face, just I think... I don't know, I think he noticed just how shocked I was and how uncomfortable and how I froze… well, he let go and walked away and then I just kind of tried to play it off, it's different when you are on the consultant side and not the [United Nations] because at the end of the day these are my clients and while we do have to abide by UN protocols, so I also have to abide by corporate policies as well so… and we always kind of talk to finesse or defuse a situation, so I just kind of pushed it to a side, we were in the middle of this very big get together and I just didn't want to call any of attention to myself or cause any type of reputable damage to the firm, so I just kind of brushed it off and he was just very pressy the rest of the evening and it wasn't just with me, there were other colleagues, both UN and non-UN staff members whom he was just beyond the pillar of what is acceptable behavior, yeah, so...

30. When BB was then asked, "So when [the Applicant] grabbed you he was grabbing you on the face?", she stated:

> … He hold [*sic*] my face with his two hands open, I know that this is audio recording but he had his two hands around my cheeks and he was just holding my face and extremely close … and I know that sometimes there is cultural differences of what's appropriate space, but it was obscenely close and I just thought he was going to kiss me in public.

31. EE, who according to BB was one of the two colleagues that had witnessed the incident, was also interviewed by OIOS under oath. The Tribunal notes that the Applicant did not request him to appear before the Tribunal for direct examination or cross-examination or has otherwise tried to challenge EE's credibility as a witness. The Tribunal further observes that at the time of the incident and interview, he was employed by the same private sector firm as EE and that he also worked on an

assignment with the United Nations. He had no other association with BB than the work relationship and was only in the United States for a three-month work assignment with the United Nations as he otherwise was based in another country.

32. EE stated to the OIOS investigators that at the farewell party, the Applicant "was drunk … he was not in his conscious like he drunk [*sic*] a lot". Regarding the incident with BB, EE essentially confirmed her account and stated, *inter alia*, that when he and another person were chatting with BB, the Applicant "came by and he tried... he hold [BB's] mouth and made a gesture of like kissing her", holding her "[o]n the neck by both the hands". EE further described this as the Applicant "was just holding [BB's] neck like pressing her ... like trying to choke her". Regarding BB's subsequent reaction, EE described this as "[a]gain first the reaction was she was shocked and after that she was saying 'You didn't help me'".

33. In other OIOS testimonies, three witnesses separately described the Applicant's appearance at the farewell party as, respectively: "drunk … definitely intoxicated … maybe you could … classify him as probably out of control"; "intoxicated … [the Applicant] is normally a quiet person, he gets on with his work and he was much more vibrant on that night … there are levels of inebriation, intoxication and he was clearly happy, but I wouldn't say he was out of control or that he did not know his actions at that point"; and "tipsy". DD, who described the Applicant as a "good friend", said that the Applicant as an "outgoing" and "fun loving" person, and stated that "I wouldn't say he was loaded like that and I was with him all way till the end of the evening".

34. One witness testified that during the farewell party, BB had approached him to express that she was "really disappointed with the conversation" she had had with the Applicant, for which reason the witness got "a bit worried" and "paid a little more attention to [the Applicant's] behavior". The witness further stated that BB "wanted to be kind of surrounded and so we stayed a bit long ... I stayed a bit longer and we kind of accepted the fact that she was with us to make sure that she was basically kind of comfortable basically because she was a bit disappointed again as I said earlier".

35. The day after the farewell party, BB and CC reported the Applicant's conduct at the party to two different United Nations staff members, who gave the following accounts of these reports:

a. One witness described their report as follows, "'Hey, we [BB and CC] were at the party last night. [The Applicant] became very aggressive either on the dance floor with either grabbing or touching and I believe they both had indicated that he had come and to try to kiss them but they had pushed him away and that ... it was a repeated action, it was ... it seemed to me like ... it wasn't like okay, my bad, it was more of he kept on trying and trying and then I think either ... I'm not even sure if anyone intervened, I believe [name redacted] had told me that she had talked to [name redacted] about 'Hey, this guy is getting a little bit out of line'".

b. The other staff member explained that when BB and CC reported the alleged incidents to her, BB "was visibly shaken, visibly and they told me that there had been some harassment, I can't remember the actual words they used but certainly they felt that they had been assaulted in some way". The witness further stated that "[o]ne of them [BB or CC] described [the Applicant] trying to kiss them, I think perhaps both of them said that".

36. The Applicant did not himself wish to testify before the Tribunal. In his OIOS interview, he stated that he had "two-three beers", "some shot of whisky", and had felt "overexcited" at the farewell party as it was a special occasion. The Applicant, however, denied that he had touched or attempted to kiss BB. The Applicant, however, admitted that he had kissed AA and another woman and described that it was not unusual for him to do so when he was dancing.

37. Based on the above, the Tribunal concludes that the Respondent has substantiated with clear and convincing evidence that the factual finding of the contested decision that the Applicant had "grabbed [BB's] face, held her closely, leaned forward and attempted to kiss her" was appropriate. In reaching this conclusion, the Tribunal has, in particular, taken into consideration:

a. BB's testimony to OIOS, also noting that as a non-United Nations consultant, she had no other interest in the matter than justice;

b. The OIOS testimony of EE, who directly witnessed the incident within close range and, in essence, confirmed BB's testimony;

c. The various testimonies of AA, BB and CC regarding the Applicant's behavior at the farewell party towards them, which all set out a similar pattern of conduct;

d. The consistent witness accounts by which the Applicant was described as being in a highly animated state of mind at the party and, at least to certain degree, also influenced by alcohol;

e. The similar descriptions by two different senior United Nations staff members of the reports that BB and CC made to them on the day after the party.

38. The Tribunal also considered the Applicant's accounts of events, but found them unconvincing due to the contradicting other evidence. Similarly, it is found that DD's testimony did not in any possible manner disprove or even reduce the credibility of the factual finding of the contested decision regarding the Applicant attempting to kiss BB. In light of the above, the Tribunal finds that the substantial amount of corroborating evidence supports BB's OIOS testimony even in the absence of her testimony. For this reason, the Tribunal will give no importance to the circumstance that Applicant did not have the opportunity to cross-examining her.

39. Specifically regarding the other factual finding that the Applicant "tried to move physically close to … and [BB] while dancing, despite [her] attempts to keep [him] at a distance", BB explained to OIOS that later at the farewell party, the Applicant asked her to dance by "pull[ing] [her] in front of a bunch of other colleagues", and to "defuse" the situation, she asked him "something like 'Are you going to behave yourself?'" twice. When asked the second time, the Applicant said, "Yes". As for the subsequent events, BB explained that:

> … There was a whole cluster of people, so I was just trying to keep my distance but keep it very light and he just wouldn't ... he kept trying to get closer and I was like no, no like leave space and he didn't … and then he basically got into a tantrum of I am the man, I lead at which point I reciprocated by being like I am the woman, I am lead … just to kind of lightening up because there was a whole group of people until someone … I guess a colleague of his or my what not called in and just kind of pulled him …

40. The Applicant admitted that he had danced with BB in a style of "Latino Americano, this kind of Caribbean dancing" and that BB "may have" pushed him away. The Applicant further described the situation as follows:

> … [W]e were on the dancing floor, okay, there are a lot of couples dancing. I [*sic*] was one of these couples, I was dancing Latino Americano, like that's kind of... what you had to do. The man has to lead, right? This is how you dance. The man has to grab their hands like that, the woman is here and then the woman has to follow what the man does. That's the basic of the dance, that's how it work as, it's not like I was kind of imposing myself, my figure or abusing her was ... that's how it works.

41. In light of the above, the Tribunal finds that the Respondent has proved with clear and convincing evidence the second factual finding regarding BB. It is evident that even though BB explicitly resisted the Applicant's "Latino Americano" dancing style, he ignored her opposition and insisted on continuing the dance in his manner. In this regard, the Tribunal takes judicial note that in many Latin American inspired dances, the dancing partners will typically dance physically very close to each other, which was also what the Applicant attempted to do with BB, but which she did not want.

The parties' submissions regarding the incidents involving CC

42. The Applicant submits he "acknowledges that he touched [CC's] hand while she was still working to encourage her to join the party, and again once she had joined the party, as a way of inviting her into an 'Italian Train' (i.e. Conga line) communal dance", but denies "the more grave allegation that he forcibly pressed his body against hers, such that he fell on top of her". CC confirmed that the first incident involving her

occurred "as she stood just in front of the desk of [another person], which was the centre of the party and bordered the dance floor", and she described the Applicant's "advances forcing her to bend back over [the other person's] workspace and to use all her strength to parry the Applicant to the side". Yet the investigation "did not resolve, nor could it be explained even after the hearing, why none of the witness OIOS interviewed saw this physical, almost violent, encounter (which, had it occurred as [CC] described, should have caused both [her] and the Applicant to fall to the floor)". CC, moreover, "did not notify anyone of this incident, which seems incongruent with her testimony that she feared for her safety afterwards".

43. The Applicant contends that the Respondent had found that "the Applicant's alleged misconduct at the crowded party could be established, by clear and convincing evidence, even in the absence of witnesses". The Administration reasoned that "for the witnesses' lack of knowledge of the conduct to be determinative, the witnesses would have had to have a much keener interest in, and more continuous view of the relevant parties", which did not "survive the hearing testimony". It is "incontrovertible, given the layout of the party as confirmed at the hearing, that virtually anyone on the dance floor, and anyone mingling in the cubicles area, would have a 'continuous view' of [the other person's] desk". If the Applicant's "gratuitous physical contact" with CC and her resistance thereto occurred as CC described it in her testimony, it "defies belief that none of the dozens of persons with a continuous view" of the incident would "have a sufficiently 'keen interest' to do or say something about it". Any such witnesses who were United Nations staff members "would have been obligated to report potential misconduct; none did so with respect to any of Applicant's alleged acts of misconduct".

44. The Applicant submits that CC identified "a single witness to her allegations against the Applicant: [FF (name redacted)], whom she claims saw her escape with a panic on her face and commented to her that she looked panicked' after alleged incident". FF told investigators that "he did not encounter, let alone speak to" CC that night. No one else, "at any stage in this process—not even the other alleged victims—has ever corroborated [CC's] account. The "only reasonable explanation for the lack of witnesses" to the incident is that "it simply did not happen". Regarding the incident,

CC posited in her hearing testimony and OIOS interview that "all of the Applicant's interactions with her were motivated by sexual desire, such that the act of grabbing her hand and pulling her into a Conga line took on a sexual nature, and thus was sexual harassment". However, "unrebutted witness testimony established that the Applicant danced individual and communal dances and interacting colourfully with other colleagues, male and female, without distinction". The Administration has therefore failed to prove, by clear and convincing evidence, "a key element of sexual harassment under ST/SGB/2018/5 section 1.3: that the physical conduct, gesture, or other behaviour was 'of a sexual nature'", referring to *Nadasan* 2019-UNAT-918, *Bagot* 2017-UNAT-718 and *Applicant* 2013-UNAT-280.

45. The Applicant acknowledged that "as the Conga line passed by [CC] on several occasions, he might well have encouraged her to join the line two or three times, as was the practice of all participants in the dance, and did so by touching her hand", but that was "the extent of their physical contact". By CC's own account, "when she asked the Applicant to stop asking her to join in, i.e. when the Applicant was put on notice of the unwelcome nature of his actions, he promptly stopped", comparing to *Bagot*.

46. The Applicant contends that the Respondent argues that "the Tribunal must credit CC's testimony over than of other witnesses, including [FF]; and over common sense, which dictates that someone would have seen an intensely physical encounter that allegedly occurred in the most crowded area of a crowded party". CC "testified that while the dance floor area was crowded when the Applicant alleged forced herself on her (and she parried him off her), she could not recall who was present, nor did she did not tell anyone at the party about the incident afterwards". The relevance is "not whether CC was 'thinking to note who was around who could serve as a witness later in an investigation', as Respondent submits, but rather whether this event could colourably have happened as [CC] describes it".

47. The Applicant submits that "the remaining rehashed allegations relating to [CC] do not amount to sexual harassment". The Applicant "acknowledged touching [CC's] hand, potentially on multiple occasions, to invite her into a communal dance, as the

other participants in the dance were doing", and the Respondent "does not contest that the Applicant made no further efforts of this sort once [CC] made clear that they made her feel uncomfortable".

48. The Respondent contends, in essence, that the findings involving CC in the contested decision are proved by clear and convincing evidence and that the testimony provided to the Tribunal is consistent with the one she gave to OIOS.

49. The Tribunal notes that the situation regarding the Applicant allegedly attempting to kiss CC was indeed not witnessed by any other person. CC's account of events is, however, appropriately reflected in the transcript from her OIOS testimony, and at the hearing before the Tribunal, where she credibly explained the situation both in direct evidence and cross-examination. In addition, the Tribunal notes that CC would have no reason to try to implicate the Applicant; on the contrary, this would only appear to complicate her work situation as she was hired by the United Nations as a private consultant in a more precarious position than a United Nations staff member because she had no standing to challenge any employment-related decision(s) through the internal justice system. Also, CC's testimonies describe a behavioral pattern of the Applicant at the farewell party that is in line with what AA and BB had experienced and which has been corroborated by other witnesses.

50. The Tribunal notes that the actual incident was not a prolonged interaction between the Applicant and CC, but simply occurred in the blink of a moment. Also, it follows from all the witness testimonies and the pictures from the farewell party that the atmosphere was indeed very festive with animated people dancing to loud music in a very crowded area. This incident could therefore easily have escaped everyone else's attention. Therefore, the Applicant's contention that the incident did not take place because no-one else saw it is not credible.

51. Consequently, the Tribunal finds that the Respondent has demonstrated with clear and convincing evidence that the Applicant "attempted to grab [CC's] face; when she blocked her face with her hands, [the Applicant] grabbed her hands and tried to pull them apart; when she resisted, [he] fell on her forcefully".

52. Regarding the other incident involving CC, the Tribunal notes that the Applicant only denies having tried to pull CC into the communal dance against her will. Considering the other evidence on the case record, including the Applicant's own testimony to OIOS during which he stated that CC "was not happy with me inviting her to the dancing floor", the Tribunal finds that the Respondent has clearly and convincingly showed that the Applicant "took and pulled [CC's] hands to try to get her to dance, despite her resistance".

Whether the established facts amount misconduct and whether the disciplinary measure applied was proportionate to the offence

The parties' submissions

53. The Applicant submits that since the only incidents, which he "acknowledges" are those two involving AA, the sanction of termination was "grossly disproportionate". In this regard, AA "was clear in her OIOS interview that she did not consider the Applicant's conduct, when taken in its evident context of a party atmosphere, to have sexual motivations, nor did it cause her offence or humiliation; she thought it could be appropriate addressed between them, and it was". CC's "subjective experience was different" and pulling her into a communal dance against her will "objectively does not constitute sexual harassment". The Respondent does not dispute that AA "considered the Applicant's conduct towards her did not warrant a formal complaint, that it was appropriately resolved informally, and that it was informally resolved to her satisfaction, and she attested in her letter of support for the Applicant".

54. The Respondent, in essence, contends that the established facts amount to misconduct and that the sanction of termination with compensation in lieu of notice and termination indemnity was proportionate.

Did the Applicant's behavior amount to misconduct?

55. The Tribunal notes that the applicable Secretary-General's bulletin at the time of the farewell party is ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) in which "sexual harassment" is defined as follows (see sec. 1.3):

> … Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

56. The Tribunal finds that as a point of departure, kissing or attempting to kiss someone in the workplace of the United Nations would typically constitute sexual harassment. The key subjective element is whether the potential victim consented to the kiss, and if s/he did not explicitly do so, if the alleged perpetrator had reasonable grounds to believe that the kiss would be welcomed by the words and gestures of the victim. Also, the context is important, including the occasion and cultural environment—in principle, no one should expect to be kissed in the workplace, and if it occurs, the power dynamics between the alleged perpetrator and the victim must also be taken into consideration.

57. The Tribunal finds that the Respondent has clearly and convincingly established that the Applicant kissed or attempted to kiss AA, BB and CC at the farewell party and that none of them had consented thereto or given any indications that such a gesture would be acceptable. Also, while not during working hours, the context was still the workplace of the United Nations as it was the farewell party for a staff member held in the office environment. No one should be expected to anticipate an attempt to be kissed in these circumstances.

58. Regarding AA's case, it does not matter whether it was normal for the Applicant to kiss his dancing partner after a dance—what is important is how AA perceived the kiss and she clearly did not welcome it. Concerning BB and CC, it took them entirely by surprise that the Applicant tried to force a kiss with them and none of them had given any gesture whatsoever that a kiss from the Applicant would be welcomed. Also, both were private consultants hired by United Nations and therefore in a delicate position vis-à-vis a United Nations manager at the P-5 level such as the Applicant.

59. Concerning the Applicant's dancing with AA and BB and his attempts to pull CC into a communal dance, while these incidents are less intrusive than the kiss and/or attempted kisses, they only add to the overall gravity of Applicant's offenses in the circumstances.

60. Accordingly, the Tribunal finds that it appropriately fell within the USG's discretion to decide that the established facts amounted to misconduct.

Was the sanction proportionate?

61. 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".

62. Regarding the Administration's discretion in sanctioning misconduct, the Appeals Tribunal has held that "the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case and to the actions and behaviour 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" (*Portillo Moya* 2015-UNAT-523, paras. 19-21; see also *Sall* 2018-UNAT-889*, Nyawa* 2020-UNAT-1024).

63. The Appeals Tribunal has further stated, "But 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". The Appeals Tribunal has further explained that this means that the Dispute Tribunal should "objectively assess the basis, purpose and effects of any relevant administrative decision" (*Samandarov* 2018-UNAT-859, para. 24).

64. In light of these established facts and the finding of misconduct, the six incidents outlined in the contested disciplinary decision essentially can be summarized as the Applicant committed sexual harassment when as a P-5 level manager, he either kissed or intended to kiss three women, of which, at least, two were in a subservient work-related power position, and otherwise acted inappropriately towards all of them at a workplace party.

65. The past practice of the Organization in cases involving sexual harassment shows that disciplinary measures have been imposed at the strictest end of the spectrum, namely, separation from service or dismissal in accordance with staff rule 10.2(a), which has been affirmed by the Appeals Tribunal in various judgments, such as, for instance, *Applicant* 2013-UNAT-280, *Applicant* 2013-UNAT-302, *Khan* 2014-UNAT-486 and *Nadasan* 2019-UNAT-918. The Appeals Tribunal stated in *Mbaigolmem* 2018-UNAT-819 (see para. 33) 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.

66. Accordingly, the Tribunal finds that the sanction of termination with compensation in lieu of notice with termination indemnity fell within the scope of discretion of the USG.

Anonymity

67. By Order No. 178 (NY/2020) dated 9 November 2020, the Tribunal ordered that the names of the Applicant and all other individuals mentioned in the present Judgment be anonymized. The background was that various confidential documents and, by implication, also the names of some witnesses and the firm at which BB and CC worked had been revealed on a private blog unaffiliated with the United Nations. To protect the privacy of these witnesses, the Tribunal therefore ordered all its previous Orders to be removed from the Dispute Tribunal's website and all names to be kept anonymous.

68. In the Respondent's closing statement, he argues that this anonymity be lifted as for "the purpose of transparency and accountability" the Applicant's name should be stated on the present Judgment in accordance with routine practice of the Dispute Tribunal and that the "unauthorized and independent actions of the non-party whom this Tribunal has held in contempt should not change this routine practice". The Respondent further submits that that Appeals Tribunal held that the purpose of confidentiality is to protect victims of misconduct, that "the Applicant is not a victim of misconduct; quite the contrary", and that "[p]ersonal embarrassment and discomfort are not sufficient grounds to grant confidentiality, and the Applicant should not be treated any differently than any other individual identified in published decisions of this Tribunal which become part of the public purview".

69. The Tribunal notes that the very objective of anonymizing all names in the present case is exactly to protect victims of misconduct, as well as the identity of witnesses and the confidentiality of the disciplinary records of the Administration. The order on anonymity of Order No. 178 (NY/2020) is therefore maintained.

Conclusion

70. The application is rejected.

(Signed)
Judge Joelle Adda
Dated this 3rd day of February 2021

Entered in the Register on this 3rd day of February 2021

(Signed)
Nerea Suero Fontecha, Registrar, New York