



Before: Judge Eleanor Donaldson-Honeywell

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Matthias Schuster, UNICEF

Alister Cumming, UNICEF

Introduction

1. The Applicant's career with the United Nations Children's Fund ("UNICEF"), spanned his adult life, from 1984 to 2018. In 2018, he served on a permanent appointment as a Senior Adviser, which was a supernumerary post, following his removal from a country office he had been appointed to as Head of Office.

2. On 28 December 2018, the Respondent informed the Applicant that he was dismissed with immediate effect, for abuse of authority, harassment, and sexual harassment. The Applicant, by the instant application, challenges the summary dismissal decision. He seeks rescission of the decision, reinstatement and compensation.

3. For the reasons further explained in this Judgment, the Application is successful in part.

Procedural history

4. On 20 February 2019, the Applicant filed an application before the United Nations Dispute Tribunal to challenge the Respondent's decision to dismiss him.

5. The Respondent filed his Reply on 25 March 2019. The Respondent argues that there is clear and convincing evidence of the Applicant's misconduct and that the sanction imposed on him was proportionate.

6. On 4 February 2021, the Tribunal issued Order No. 25 (GVA/2021) setting this matter down for a case management discussion ("CMD").

7. The CMD took place, as scheduled, on 17 February 2021 with Counsel for both parties present. The Applicant was not present at the discussion.

8. Following the CMD, on 18 February 2021, the Tribunal issued Order No. 54 (GVA/2021) in which it recorded the salient aspects of the discussion, the issues to be adjudicated and the orders that ensued.

9. While the parties took the view that this matter can be decided on the basis of their written submissions and the documentary evidence that had been filed, the Tribunal's position was that an oral hearing in which the Applicant testifies would be necessary if the parties are not able to resolve this dispute informally. The Tribunal left it up to the Respondent to decide who, if anyone, he would like to call.

10. On 10 March 2021, the parties filed separate submissions with motions for further submissions and partial postponement of the oral hearing respectively.

11. On 12 March 2021, the Tribunal issued Order No 69 (GVA/2021) with directions to the parties.

Facts and Parties' submissions

12. From 1984 to 1990, the Applicant worked in his home country on a UNICEF assisted Water and Environmental Sanitation project ("WASH"). Thereafter, he joined UNICEF as a staff member in 1990. Following assignments at progressing levels of seniority in many countries, he was appointed as the Head of the Papua New Guinea ("PNG") Country Office in May 2016.

13. This assignment was the Applicant's first as Head of Office. This assignment is acknowledged as having been a challenging duty station, with a difficult programme and office environment.

14. The Applicant's challenges with handling the situation were addressed early on, in supportive correspondence by his first line supervisor, namely the Regional Director, Regional Office of East Asia and Pacific ("EAPRO"). Staff members' complaints about the Applicant being unpredictable and not consulting with them properly were discussed.

15. There were also several missions by the Regional Office to the Country Office in 2016 to deal with the challenges. The appointment of a Deputy Representative in May 2017 to assist with the management of the Country Office, which position had been difficult to fill, was one of the measures taken to alleviate the difficulties faced by the Applicant.

16. Despite the difficulties associated with the Country Office, the Applicant was appraised on 3 May 2017 as a person who relates easily with colleagues and partners, and a strong network and partnership builder; it was also recorded that he “communicates well” but could do with improving on his “active listening skills.”¹ The Regional Director’s final comments are noteworthy for the context provided:

2016 has been a year of enormous transformation for [the Applicant]. He is very eager to become a respected leader. The context in which programs are delivered is very challenging in PNG including because of the violence against women and children and the lack of connectivity and means to reach deprived rural populations. The Office had too many vacancies and maybe not all staff have the right profile to achieve the expected results. [The Applicant] had to work very long hours often having to deal with meeting high expectations. He is likely to grow into his new role. I hope to see in 2017 more active participation in RMTs. I would like to thank [the Applicant] for organising an impressive mission for the DED, Management, Fatoumata, and myself in December 2016. The mission gave a lot of insights of the conditions under which the UNICEF programs are delivered.

17. On 3 September 2017, the Deputy Representative complained of harassment and abuse of authority by the Applicant to the Regional Director. She also had concerns about the Applicant’s leadership of the Office.

18. The Regional Director forwarded the allegations to the Deputy Executive Director (“DED”), Management and the Director, Division of Human Resources (“DHR”).

19. On 6 September 2017, the Director, DHR, forwarded the Deputy Representative’s complaint to the Office of Internal Audit and Investigations (“OIAI”), together with seventeen other grievances by PNG Country Office staff members, obtained from a confidential PNG Country Office suggestion box.

¹ Annex A/28 to the Applicant’s motion filed on 15 March 2021.

20. On 19 September 2017, the Regional Director decided, as a managerial measure, to remove the Applicant from the Country Office. The Applicant took leave but wrote to the Regional Director questioning the basis of the decision to remove him from the Country Office. He pointed out what he saw as performance issues with the Deputy Representative. He further indicated that from the outset of the Deputy Representative's appointment, he tried to work to address her shortcomings whilst she sought to undermine his role as Head of Office.

21. On 28 September 2017, a staff member who was not assigned to PNG ("C1") contacted the Principal Adviser, UNICEF, to report that the Applicant had engaged in inappropriate conduct of a sexual nature with her. The conduct she referred to was said to have taken place in 2013, when they worked at a different duty station.

22. The Applicant was later placed in a supernumerary post in New York on 26 December 2017. On 24 February 2018, he was placed on administrative leave with full pay ("ALWFP"), upon notification that OIAI was undertaking an investigation. The investigation commenced with remote interviews.

23. From 16 April to 4 May 2018, OIAI conducted an on-site investigation at the Country Office; and obtained witness statements from approximately forty current and former staff members, the vast majority of whom worked in the Country Office. There were a few witnesses, including C1, who came forward as having worked with the Applicant in Sudan and Afghanistan.

24. During the investigation, further allegations of sexual harassment arose and these were also investigated. On 26 April 2018, OIAI provided the Applicant with a list of certain allegations made against him. He submitted a response, which included the names of approximately 18 witnesses, including "X1", who could speak favourably about the Applicant.

25. On 5 September 2018, OIAI provided the Applicant with a copy of its draft investigation report for his comments. This report included summaries of the testimony given by witnesses including some of those suggested by the Applicant, such as X1.

26. The Applicant submitted his comments on 24 September 2018. On 8 October 2018, the final copy of the report, including the Applicant's comments, was sent to the Director, DHR. The Investigation Report identified facts relevant to areas of alleged misconduct under four headings, namely:

- a. Harassment;
- b. Irregular recruitment of two local consultants;
- c. Sexual Harassment, and
- d. Abuse of authority.

27. On 25 October 2018, the Director, DHR, issued a charge letter. The allegations listed included the same subject headings as the Investigation Report, except that the irregular recruitment and abolition of post allegations were listed as sub-headings under abuse of authority.

28. The Applicant was charged with abuse of authority encompassing harassment, sexual harassment and failing to ensure a harmonious work environment contrary to staff regulations 1.2(a), (b), (f), (g) and (m), staff rules 1.2(f), (k), (q), and 10.1(a), constituting misconduct under CF/EXD/2012-005, secs. 1.4(a) and (m), breach of the staff selection principles under CF/EXD/2016-007, sec. 1.1, breach of the policy of discrimination, harassment, sexual harassment and abuse of authority under CF/EXD/2012-007, secs. 1.1(b), (c) and (d), secs. 2.1, 2.2, 2.3 and 4.1 and breach of the Standards of Conduct for the International Civil Service under paras. 12, 16, 17, 21, 22 and 24.

29. On 12 November 2018, the Applicant submitted his reply to the charge letter. He also, around that time, prepared negative references in relation to one of the Country Office staff members who testified in the investigation, namely X1.

30. On 28 December 2018, the DED, Management, wrote to the Applicant. This correspondence is the decision impugned in these proceedings. The DED found that the Applicant had committed misconduct, in that he had:

- a. Sexually harassed C3, a National Health Officer at the NO-A level in the Country Office;
- b. Harassed and sexually harassed C1 then a Programme Officer at the Sudan Country Office;
- c. Made comments at a meeting which were tantamount to inviting staff members to engage in sexual exploitation and abuse;
- d. Harassed C2, formerly a Communications Specialist;
- e. Created a hostile work environment in the Country Office he headed;
- f. Gave gifts to a member of the PNG government; and
- g. Threatened and/or belittled the Deputy Representative.

31. The DED's letter expressly took account of the fact that the Applicant had been assigned to a difficult duty station and of his prior long, unblemished service to the Organization. While these were mitigating factors, the extensive nature of the misconduct findings was an aggravating factor. Another aggravating factor was that whilst on leave, pending conclusion of the investigation, the Applicant had issued negative references against one of the witnesses. This was seen as retaliatory.

32. The DED, Management, therefore decided to impose the sanction of dismissal from service. The Applicant was dismissed and separated from service on the same day.

Consideration

33. The function of the Tribunal in this matter is that of judicial review.

34. The Appeals Tribunal has consistently held that 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”.²

35. In reviewing the Secretary-General’s exercise of discretion, the Tribunal is to follow the well-established standard of review as provided in *Sanwidi* 2010-UNAT-084 at para. 40:

[W]hen judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But 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. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

36. Among the circumstances to consider when assessing the Respondent’s exercise of discretion, the Appeals Tribunal’s guidance is as follows:

[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.³

37. The United Nations Appeals Tribunal explained in *Mbaigolmem* 2018UNAT-819 that in a disciplinary case what is required is consideration of whether the facts on which the sanction is based have been established, whether the

² 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.

³ *Sanwidi* 2010-UNAT-084, at para 38.

established facts qualify as misconduct and whether the sanction is proportionate to the offence. A *de novo* hearing into the findings on misconduct is not always necessary. It depends on the available evidence and the circumstances of the case.

38. “[W]hen 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.”⁴

39. In *Negussie*, the Appeals Tribunal expounded on what it means by “clear and convincing evidence” thus:

Clear and convincing evidence of misconduct, including as here, serious misconduct, imports two high evidential standards. The first (“clear”) is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard (“convincing”) 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. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.⁵

40. Given the facts of this case, the Tribunal finds it useful to recall the Appeals Tribunal’s guidance on the examination of evidence of sexual misconduct.

41. The Dispute Tribunal held in *Hallal* UNDT/2011/046, para. 55 (affirmed by the Appeals Tribunal in *Hallal* 2012-UNAT-207) that

[I]n 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.

⁴ See, for instance, *Turkey*, para. 32.

⁵ See *Negussie* 2020-UNAT-1033, para. 45.

42. 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”.

43. 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.”⁶

44. The issues for adjudication in this matter were set out by the Tribunal during the CMD with the parties and recorded in Order No. 54 (GVA/2021) as follows:

- a. Was there clear and convincing evidence of the charges that were preferred against the Applicant?;
- b. Did those allegations properly amount to serious misconduct?;
- c. Did the Respondent adhere to the relevant procedural strictures in the disciplinary process?;
- d. Was it proper for the Respondent to not interview some of the witnesses put forward by the Applicant?;
- e. Was the sanction meted out proportionate?; and
- f. Were mitigating and aggravating circumstances properly considered?

45. In addition to the foregoing, the parties on both sides sought permission to submit on the need for anonymity of their respective clients. Counsel for the Respondent objected to anonymity for the Applicant. The issue of anonymity is therefore addressed at the end of this Judgment. The other issues will now be addressed in turn.

⁶ *Hallal* 2012-UNAT-2007, para. 30.

Was there clear and convincing evidence of the charges that were preferred against the Applicant?

46. The facts identified in the Investigation Report, which led to the allegations in the charge letter, following which findings were made in the decision letter, will be considered in turn.

Allegations of Harassment

47. The Applicant is alleged to have harassed staff during staff meetings by consistently and regularly shouting at them, and not giving them an opportunity to be heard when trying to provide him with explanations and advice. The most pointed example relates to treatment of the Deputy Representative. The Applicant's treatment of her triggered managerial measures against him, and the wide-ranging investigation into his conduct that led to the ultimate sanction being meted out against him.

48. The Applicant returned from leave on 18 July 2017. The Country Office Emergency Preparedness training exercise supported by the Regional Office was in progress. The Applicant arrived late and found the Deputy Representative going through the planned earthquake simulation exercise. Later, when she suggested that he read the simulation emails received from the Regional Director, the Applicant intimidatingly stared at her and told her "do not tell me what to do."

49. The Deputy Representative's evidence is that she spoke with the Applicant the day before the exercise and told him that he had to be at the office for 9 am. It is unclear whether the discussion was in person, by telephone or other remote means. While the Applicant acknowledges having called and spoken to the Deputy Representative, he disputes having been told when he needed to be at the Office.⁷

50. There is a subjective element to the Deputy Representative's account of the intimidating stare. It is a matter of perception. As to the words used, which are denied by the Applicant, even if they were said, must be viewed in context. Here again, the intent is subject to interpretation.

⁷ Interview Transcript line 1502 at Annex 4 to the Respondent's Reply.

51. Disagreement on work performance and other work-related issues is by definition not to be treated as harassment.⁸ The words attributed to the Applicant must be examined within context. It may have been a situation where the Applicant felt that his deputy was over-stepping her role, by instructing him on what should be done. Acting on that feeling perhaps signifies poor leadership and management skills on the part of the Applicant, as a good manager would encourage staff members' input so that the Organization's objectives are achieved. However, the remark he made is not clearly misconduct in and of itself.

52. The manner and tone of the remark made to the Deputy Representative is more probative. In that regard, the investigation includes a statement from the Regional Emergency Advisor, who led a team from EAPRO, that came to the Country Office to guide the earthquake readiness simulation.

53. She corroborated the Deputy Representative's testimony that the Applicant arrived late for the simulation. The Deputy Representative therefore took charge at first. Then the Applicant came in. After briefly allowing her to continue, he gestured to silence her, and took lead of the process.

54. At a point later in the exercise, the Regional Emergency Advisor heard when the Applicant responded to the Deputy Representative in "an abrupt manner" that caused her to be intimidated, telling her not to tell him what to do. Further, she said that before then the Applicant had made the Deputy Representative feel belittled in front of the gathered staff members, by saying that she had not informed him about the simulation exercise.

55. Both the Deputy Representative and the Regional Emergency Advisor spoke about discussing certain management issues with the Applicant, such as whether a staff member accused of domestic violence should not be selected for a training opportunity. They complained that after they voiced their concerns, the Applicant publicly stated that they had agreed with him on the matter. This made them feel uncomfortable and belittled, as they had in fact not agreed with the Applicant.

⁸ Section 1.2 of CF/EXD/2012-007.

56. The Respondent further relies on the investigation interviews with many staff members, to support the contention that the Applicant's actions went beyond bad management practice. The Tribunal finds that almost all the accounts lack sufficient probative value when looked at in isolation. Rather than making concrete allegations, each account describes the Applicant's appearance, voice and personality subjectively.

57. He is described as being "incredibly narcissistic"⁹, "a very big and strong personality"¹⁰, "a big man with a loud voice and, which he often used, intimidated local staff"¹¹, he had a huge voice that was naturally high¹², he would "look at people in an aggressive way", he would express what he wanted and bang on the table for emphasis¹³, he was "stopping to speak to certain staff members without a clear reason why, shouting at them in the office or in the hallways or during meetings, calling chiefs of programme sections jokers, clowns and idiots, banging the table during meetings"¹⁴, he used language staff members' found offensive like "shoot from the hip" while "gesturing his hand and forming a 90 degree angle in the elbow"¹⁵, he spoke with a PNG local staff member about needing "to prove to the white people that we could also do it ... that black people can be able to work, that they are not stupid."¹⁶

58. The Applicant was also said to have been "enthusiastic in what he did", but to have had a management style that was erratic, misogynistic, homophobic and prone to gossip behind people's backs.¹⁷ One staff member, while corroborating that the Applicant has a "bombastic personality and a booming voice", conceded that she was not scared of him as she attributed his behaviour to his personality.¹⁸

⁹ Para 31 of the Investigation Report.

¹⁰ Para 23 of Investigation Report.

¹¹ Para 18 of Investigation Report.

¹² Investigation Report Para 27.

¹³ Para 29 of Investigative Report.

¹⁴ Para 19 of Investigation Report.

¹⁵ Para 25 of investigation Report.

¹⁶ Para 26 of Investigation Report.

¹⁷ Para 31 of the Investigative Report.

¹⁸ Para 34 of the Investigation Report.

59. The above-mentioned comments, in and of themselves, are too subjective to stand as evidence of harassment. Some are also hearsay. However, these descriptions of the staff members' perceptions of the Applicant are probative to the extent that they corroborate each other and lend credibility to some other stronger evidence.

60. The strongest evidence of the allegations of harassing and shouting at staff members is in an incident witnessed by staff members and admitted to by the Applicant. It was an incident when he shouted at his driver and belittled him for sending an email to other staff members. It is described as follows in the investigation report

[A Senior] Driver, who was [the Applicant's] driver, said [he] shouted at him sometimes and he recalled one incident when he had assisted another driver because he had helped with a run that the office need, when upon his return from the chore, he said [the Applicant] summoned him to his office and in the presence of Ms. Kirori, he had shouted at him telling him he "was not a junior driver anymore" and that he had to be in the office waiting for [the Applicant] so that he could drive him around when he needed or that he would be demoted. Mr. Ipaguto explained that [the Applicant] did not understand his culture and that for someone of his (Ipaguto) age, he should not be shouted at. C3, Health Officer, said that she had seen [the Applicant] shout at Mr. Ipaguto for an email that Mr. Ipaguto had send out to staff on changes of drivers' weekend duties, for which she said [the Applicant] kept telling him that "he had no right on telling people what to do, that he was just a driver". C3 said she felt sorry for Mr. Ipaguto because [the Applicant] was disrespecting him.

61. The Applicant is also said to have created a work environment of intimidation, rife with gossip. The specific items of alleged gossip by the Applicant are denied, including calling a former UNICEF consultant "gay" and another former UNICEF consultant "fat"; calling C2, former Communication Specialist, a "witch" and telling her that "you are black, you are African, you are not French"; calling section chiefs "jokers, clowns or idiots." Although all these alleged gossip comments are based on hearsay, and denied by the Applicant, the fact that these things were being said amongst staff illustrates the unhealthy work environment of intimidation and gossip he is said to have created.

62. Another aspect of the hostile work environment complained of, was that the Applicant stopped talking with persons under his supervision. Three staff members corroborated that, for several months, the Applicant did not speak with his Communications Specialist. They felt it was because she had made unfavourable reports about him.

63. The Applicant confirms that he and the Communications Specialist were not on speaking terms. The Tribunal finds the evidence as to whether it was on his or her initiative is inconsistent and lacks credibility. During the investigation, the Applicant admitted that he stopped talking to this staff member after she inappropriately engaged in a public tirade against him, following a performance evaluation discussion between them. Under cross-examination at the Tribunal's hearing, he said that it was the staff member who started avoiding him, when the issue of the abolition of the post she encumbered arose. In any event, as the Head of Office, allowing the situation of not speaking with this staff member to persist for several weeks added to a hostile work environment.

64. There is a subjective element to some of the allegations against the Applicant. However, the totality of the evidence presented by the Deputy Representative and the Regional Emergency Advisor on how they were treated and the shouting at the driver, paints a clear and convincing basis for a finding of harassment. It is highly improbable that staff members, in the numbers interviewed, would overwhelmingly speak in these negative terms, unless there was truth to the allegations.

65. The Applicant was the Head of Office. It is clear that he did not enjoy the support of a large number of his staff, certainly those interviewed. There is, as a result, no evidence to corroborate his denial of the finding that he harassed staff and created a work environment of intimidation and discomfort.

66. The Applicant by his own admission has confirmed one of the allegations that illustrates his propensity to shout at and belittle staff. Further, during his own interview, the Applicant gave the names of persons who may have spoken in more positive terms about him. Not all of them were interviewed but among those who were, X1, Head of Child Protection, gave an account that supported the allegations

that he had created a hostile work environment by shouting at staff members and calling people “jokers”.

67. The Applicant’s submission that the numerous accounts given against him by staff members were indicative of mobbing or cultural and racial influences is not borne out by the evidence.¹⁹ About 40 persons were interviewed during the investigation, and not all these persons could be considered disgruntled subordinates, intent on mobbing the Applicant. The Applicant’s contemporaries and those at a senior level such as the Regional Emergency Advisor were also interviewed.

68. The Applicant testified that the cultural differences that were of more concern in the duty station were tribal rivalries amongst the local staff. The Tribunal therefore accepts that race and culture were not one of the Respondent’s lines of inquiry.

69. The Tribunal does however also note that the nature of the complaints of harassment in this case overlap as managerial/leadership performance issues. In other words, did the Applicant have the necessary experience in, and training for, this role; did he have the skills to lead an office as challenging as this one? This overlap was a relevant factor to be considered.

70. The Applicant was placed in a situation where, in his first appointment in that capacity, after decades of prior unblemished service, he became Head of Office at a Country Office with major challenges. He had to operate in a leadership role as an agent of change to turn around an already dysfunctional office.

71. The Applicant’s role as a change agent in very difficult circumstances, required a transformational leadership approach in order to communicate the changed vision in a meaningful way and also to behave in a manner consistent with the vision.²⁰ This was necessary to motivate staff members to achieve the

¹⁹ Para 23 on page 6 of the Application.

²⁰ McShane and Von Glinow, *Organizational Behaviour*, 4th Edition at page 499.

Applicant's objectives in transforming the Organization and to minimise resistance to change.

72. The Applicant's approach failed; his style of communication was unduly coercive with the use of shouting. On all accounts, there was minimal listening to the views of others and there was belittling of their contributions. The Applicant's approach created a hostile work environment in which change resistance escalated from aggression, blaming and gossip²¹ to the point of a unified desire to have him removed.

73. Unfortunately, the Applicant's efforts, which seem genuinely to have been intended to achieve positive change, were neither appropriate nor effective in winning over staff buy-in. This may have been a basis for concern as to his managerial abilities, hence his initial removal from the Country Office and placement in a supernumerary role at Headquarters.

74. The investigation that followed revealed deeper concerns as to the Applicant's difficulties with this challenging assignment. His mishandling of the change process, and the frustrations involved, clearly manifested in a behaviour pattern that was intimidating to staff. This included shouting, desk pounding, jovial but inappropriate name calling and "gaslighting."²² Some staff members, who initially supported him, turned against him as did others such as C1, from prior shared duty assignments, who became aware of his difficulties.

75. In all the circumstances, there was sufficient evidence in the investigation report, based on which the Respondent could conclude that the Applicant harassed staff members and created a hostile work environment.

²¹ Brewster, Carey, Grober, Holland and Wörnich, *Contemporary Issues in Human Resource Management*, 3rd Edition at page 264-265.

²² A form of psychological abuse where a person makes someone question their thoughts, perception of reality and the events around them or their memories.

Allegations of Irregular Recruitment of Two Local Consultants

76. At the hearing, the Tribunal sought clarification on the inclusion of this area of fact finding in the Investigation Report. It concerns managerial functions and bears no relevance to investigations into misconduct. The Respondent's witness gave valuable assistance to the Tribunal, in confirming that the focus of the investigation was limited to fact- identification regarding allegations of misconduct. However, allegations that were more performance related in terms of the Applicant's role as a manager, were included in the reports made by staff members against him.

77. These allegations of irregular recruitment need not have been included as part of the fact identification part of the investigation report. Allegations based on this aspect of the investigation report were also included as allegations in the charge letter issued to the Applicant. As such, they would have been considered by the Respondent in coming to the conclusions referred to in the summary dismissal letter. Accordingly, it is necessary for the Tribunal to determine whether this subject matter ought to have been expressly omitted as a relevant factor in deciding on the Applicant's summary dismissal.

78. The hiring of two consultants, head-hunted by the Applicant, caused some tensions amongst staff members. It was felt that the appointees were not well qualified, and that they were unfairly paid more than others because they were hired as Consultants instead of staff members.

79. It is clear, however, from the testimony of the Applicant and the relevant Human Resource Officers, that he was not involved in the actual hiring process. The process was carried out in a proper and transparent manner by the Human Resource professionals.

80. Accordingly, there is no clear and convincing evidence against the Applicant that this recruitment was an act of misconduct on his part. It was a managerial process in which he was not integrally involved. As such, there was no basis for the inclusion of irregular recruitment in the charges against him, which in turn formed part of the basis for summarily dismissing him.

Allegations of Sexual Harassment

81. The allegations of sexual harassment against the Applicant appear, from the record, to have arisen as an afterthought during investigations into the toxic work environment brought on by his shouting and belittling of staff members. The only outlier to this circumstance is the complaint made by C1.

82. Even though she was stationed at a different Country Office where she worked with the Applicant several years before, her complaint was the first allegation of a sexual nature to be made. It came on 28 September 2017, within three weeks of the complaints made by the Deputy Representative, which led to the Applicant's removal from the Country Office.

83. C1 was not interviewed until 6 March 2018, and her complaint did not form part of the 26 April 2018 letter to the Applicant. That letter invited him, for the first time, to respond to specific allegations that had given rise to the investigation and to provide the names of his witnesses. By then another staff member, PH, who was not assigned to the Country Office, had also approached the investigators with a statement in support of C1's report.²³ That report was also omitted from the initial correspondence inviting the Applicant's response.

84. In the Applicant's first interview in June 2018, no issue concerning C1 was raised by the investigators. It was only later, on 30 July 2018, that an additional interview with the Applicant was convened to address C1's allegations.

85. Having examined the evidence concerning allegations as to sexual harassment affecting C1 and two other staff members, the Tribunal's finding is that no clear and convincing case had been made out. The allegations concerning each of the three staff members will now be examined, to explain this finding.

²³ Annex 1 to the Reply - Investigation Report – Para 57 -He contacted OIAI on 15 March 2018 because he heard, through Ms. SA, that there was an investigation underway concerning the Applicant.

C1

86. The account given by C1 commences with a statement that undermines its value in lending any credibility to other sexual harassment allegations against the Applicant. She says, “*What happened I would not define it as sexual harassment but more abuse of power and it made me feel very uncomfortable*”.

87. Under cross-examination by counsel for the Applicant, the Respondent’s witness conceded that C1 was a friend of the Deputy Representative. There is documented evidence of emails between the Applicant and C1, from which it can be gleaned that she was well acquainted with the Deputy Representative. The Tribunal finds it curious that C1 thought to report her experience in Sudan five years prior, within weeks of the Deputy Representative lodging her complaint of harassment and abuse of authority. But beyond the coincidence of the timing of these complaints, the Tribunal finds it disturbing that an allegation as serious as this did not form part of the allegations put to the Applicant for his initial response.

88. C1 had an internship assignment, in August 2013, to learn more about UNICEF in the field. That was when, at age 25, she met the Applicant. The assignment involved sharing duty locations with the Applicant for three weeks, firstly in El Fasher and then in Nyala.

89. She claims she and the Applicant stayed in the same guest house in Nyala. The Applicant denies it. The paperwork regarding the residence of the two is inconclusive as to whether they stayed in the same physical building. The Applicant’s case is that there was more than one guest house building at the location. He stayed separately in one across the road.

90. C1 makes clear that the Applicant did not touch or make physical contact with her. She says what made her uncomfortable was that he insisted that she have dinners with him at the guesthouse. During dinner, and in telephone calls, he questioned her about her relationships with boyfriends. He also promised her jobs if he could get somewhere with her. She said she tried to remain friendly with him because she was looking to work with UNICEF on a regular contract.

91. The Applicant, in his testimony, said that due to a prior sex scandal that impacted on the Sudan duty stations, he took extra care to ensure there was separate accommodation for male and female staff members. He did not stay in the same guesthouse building as C1. He named other staff members who would have been present at that time, but they were not interviewed by the investigators. Further he denies dining with C1, calling her at night, or ever having alcohol during his time there.

92. In El Fasher, C1 says the Applicant stayed at a separate guest house but that he would often drive her to the shops and cook food for her at his place and drive her back home at night. The Applicant denies this and points out that his driver drove him during his time there.

93. He named his driver as a witness, who could corroborate that he would not have driven by himself with a female staff member. That driver was not interviewed by the investigators. Accordingly, the Applicant was granted permission to file the driver's witness statement to be considered by the Tribunal in the instant proceedings.²⁴

94. The driver's witness statement provides credible evidence, including cultural and security context, to corroborate the Applicant's testimony. It also provides the driver's corroboration that he never drove with the Applicant and C1 in the vehicle. Furthermore, he indicates that had that happened there would be documented clearance slips as to persons leaving from the Organization's compounds at night. The fact that no documentary evidence was produced sheds further doubt on the account given by C1.

95. C1 said that in another incident, in September 2013, the Applicant gave her a brown bracelet with a golden buckle²⁵ as a birthday present and insisted that she wear it. The Applicant admitted under cross-examination before the Tribunal, that he gave her this gift at a time when he had not known her long. He was informed by a fellow staff member, on the way back to the duty station from a business trip,

²⁴ Statement of Mr. Aalaeldin Adam Farah at Annex A/26 to the Applicant's submission filed on 10 March 2021.

²⁵ Note for the Record on page 215 of annex R6 to the Respondent's Reply.

that C1's birthday was being celebrated at the office. He quickly bought an inexpensive token on the airplane and presented it to her and made a brief birthday speech at the office.

96. There was a separate allegation by another former co-worker of the Applicant from his time in Sudan, PH. He gave hearsay testimony that C1 had been asked by the Applicant to test a bunker while in her pyjamas, and that he made inappropriate comments.

97. The Applicant left for a new assignment in Afghanistan in December 2013.

98. The credibility of the account given by C1, as to her discomfort with the Applicant, was thrown into question, when in his interview he disclosed that she kept in touch with him after he left Sudan. Her communications were in relation to job seeking, private matters, to congratulate him on his appointment to head the PNG Office and to let him know of her acquaintance with the Deputy Representative who she commended to the Applicant upon hearing of her appointment as his Deputy.

99. The investigators questioned her about these communications and there was no denial. The documents provided by the Applicant in this regard included emails by C1 reminiscing about good times shared in Sudan and expressing interest in working with him again. The tone of the correspondence was cordial.

100. The Applicant gave evidence that the Deputy Representative had informed him early on during her tenure that they had a mutual acquaintance, C1. There is merit to the suggestion made in the case for the Applicant that C1 appears to have been encouraged to supply a statement which could be used to bolster a case accusing him of sexual harassment and abuse of authority.

101. Overall, the Tribunal finds that the Respondent has failed to prove that there is clear and convincing evidence of sexual harassment of C1 by the Applicant. More specifically, the timing of her complaint and her narration of the facts of her allegations are inconsistent and lack credibility. Additionally, the element of the

Applicant's actions being of a sexual nature or unwelcome have not been proven. On the contrary, C1 pursued a continuing friendship with the Applicant.

C2

102. The Investigation Report included the identification of alleged facts concerning a sexual harassment allegation by C2. However, the incident she reported during her interview, was not included in the Respondent's decision letter as giving rise to any findings. There was good reason for omitting such a finding as the action reported by C2 was ambiguous as to whether it was true and if so whether it was sexually related.

103. On C2's own account, she was volunteering to assist the Applicant with his personal affairs, including purchasing household goods for him on one of her trips abroad. This was in the context of a cordial relationship between them, that started when she decided to help him settle in when he arrived in PNG to take up duties. The Applicant says he in turn appreciated the assistance at first and referred to her as his "African sister." Later on, C2 cited this label as evidence of harassment because she was French and not African.

104. C2 claims to have visited his home to deliver the household items. She believes the outfit he had on, when he greeted her at the door, was pyjamas. She entered his home and sat down at the table to talk. When she was ready to leave to run errands, she got up and he grabbed her shoulder. This disturbed her and she went home.

105. There is also no corroboration that the incident took place at the Applicant's home. He denies it and, in his interview, presented a timeline with alibi evidence that has not been refuted.

106. The report was also discredited by the fact that there were performance matters and allegations of C2's own harassment of other staff members being addressed by the Applicant. Under cross-examination, he said that at first when he received such reports against her, he dismissed them as a "witch-hunt." This was interpreted as calling C2 a witch and included in the allegations of harassment.

107. Eventually, the Applicant had to address the complaints made against C2 and the issue of the abolition of the post she encumbered also arose. There were confrontations between them, and their previously cordial relationship ended in a manner which gave her reason to retaliate against him.

108. The Tribunal does not find C2's allegations to be credible. On the contrary, the Applicant's theory of her motive for retaliation provides a more plausible explanation.

109. Be that as it may, the Tribunal must note that this does not detract from its previous finding that the Applicant's conduct in respect of C2 contributed to the hostile work environment, which there is clear and convincing evidence that he created.

C3

110. The account of the Applicant's actions given by C3 is comparatively straight forward. There is no indication of bad faith on her part. She genuinely expressed concern about her experience of discomfort in interacting with the Applicant. However, the extent to which this was based on sexual harassment has not been proven in any clear or convincing manner.

111. On the evidence presented in her interview transcript, C3's concern was in relation to constant text message invitations from the Applicant and that he was "looking at her" in a way a man looks at a woman. She said that she did not encourage him, so "the situation ended up dying up."

112. She perceived that the Applicant, who had head-hunted for her recruitment by the Organization, had not been attracted to her based on her professional merit. She believed, based on his actions, that it was based on a sexual attraction. There is an extent to which this belief can only be subjective, as it had to do with her view of the way the Applicant looked at her.

113. C3's testimony was that her colleague, HM, was always called into the office with her by the Applicant and that colleague once commented that the Applicant seemed to like C3. However, HM, in her own interview, did not admit to having made that comment.

114. The perception of C3, that there was a sexual attraction towards her by the Applicant, is also based on her allegation that he sent her many text messages inviting her to have coffee, to go for drives and on one occasion to visit a resort area outside Port Moresby. She told the investigators that she did not keep these messages on her phone.

115. The Applicant on the other hand, while admitting he sent messages, was also able to present printed copies of some of them to the investigators. He denied that there were several messages and put the Respondent to strict proof by phone records that there were numerous calls and texts. No such evidence was produced by the Respondent.

116. The Applicant had not deleted the messages exchanged with C3 from his phone. He further disclosed that some message streams and emails were initiated by her. This included messaging where she suggested that they drive alone together to a certain destination. This lends credibility to the Applicant's case that the messages inviting the Applicant to meet were not for purposes of seeking sexual favours. Instead he claims that *"so called insistent phone calls and text messages to PT were all related to the peer support group ... that he had set up for his late PA Nyoka Kirori who died of cervical cancer. [C3], being a national of PNG, female with a medical officer and who lost her sister to the same cervical cancer, she became my first choice that I relied on to provide me the much needed support at that difficult time for Nyoka."*²⁶

117. Even though it has not been proven that the text message invitations were sexually related, the Tribunal views it as inappropriate for the Applicant to expect C3 to participate in activities unrelated to her professional appointment and to make contact with her for that reason. This clearly diminished her confidence in deserving

²⁶ The Investigative Report, Annex 1 to Respondent's Reply, paragraph 53.

her professional appointment to the Organization based on merit. However, there is no truth to that concern. She was appointed by the formal, transparent Human Resource Department processes for an advertised vacancy. The Applicant was convincing in his testimony at the Tribunal's hearing, that his attraction to her in inviting her to apply was based on her intelligence and vast knowledge in her field as a health professional.

118. In the circumstances addressed above, there was no clear or convincing basis, in the initial interview given by C3, for a finding of sexual harassment. However, it is in relation to an incident that she did not mention in her interview that the Respondent largely bases the allegation of sexual harassment concerning her.

119. Another staff member and fellow PNG national, Mr. W., spoke in his interview about C3 having expressed concerns when the Applicant returned from an official event and gave her a garland of flowers. There is documentary proof of this concern as she also emailed another colleague about it.

120. The Applicant's explanation of the event is consistent from his first interview with the investigators, to the written accounts in his Application and under cross-examination at the hearing. His evidence is that the practice of giving garlands to guests at official events is customary in PNG. There are many pictures on social media depicting him receiving such garlands. He provided some to the investigators.

121. That such a practice exists is corroborated by Mr. W. However, he says the appropriateness of the gesture depends on the occasion and the reaction of the recipient.

122. The only first-hand evidence before the Tribunal as to the nature of the occasion when the garland was given is that of the Applicant because C3 did not mention it in her statement. The Applicant's account, as summarized from his written and oral testimony, is that C3 had helped him with a speech for an event during the Immunization Week celebrations around 27 April 2017, but she could not attend the event.

123. He attended the event with two other staff members, including a person to “mobilize the media”. That person had a camera. The event went very well. He was given a garland.

124. On the way back to the office, they discussed what to do with the garland, including whether it should be thrown away as he had done several times before. On other occasions, garlands received were given to the staff association to distribute to staff. Only one garland was received at this event. The idea of giving it to a staff member came up.

125. When they arrived at the office the only person present, of the eight or so who usually sit together, was C3. The Applicant gave her the garland. Under cross-examination, he says he did not place it on her neck. His testimony is that this was done in the presence of the female staff member with the camera and another woman, his personal assistant. He told C3 words to the effect that as the only person present, she should accept the garland as representative of the section. He asked that a picture be taken.

126. The Applicant admits that on the same evening after this incident, another staff member came to him and expressed a concern that giving the flowers in this way may be perceived as “you want something” from C3. His response, on the concern being expressed was that he was merely making attempts to draw out C3 who was very quiet, and to thank her for the speech she had written and which was well received. He did not see it as a problem.

127. There is some ambiguity as to the extent to which C3 saw the incident as a problem because she did not highlight it in her interview. The questions posed to the Applicant by Counsel for the Respondent during the hearing, further highlight the ambiguity of the gesture. The Applicant was asked whether because of C3’s youth and appearance, giving her the garland had to be looked at differently from the instances when the Applicant himself received garlands. By raising this, Counsel begged the question as to whether it would be considered more appropriate if the recipient of the garland had been an older woman.

128. It is the Tribunal's finding that the ambiguities concerning the gesture remain unresolved. There is no clear and convincing evidence that the gesture amounted to sexual harassment.

129. All in all, it is credible that C3 was made to feel uncomfortable in her professional capacity by the Applicant. However, there was no clear and convincing basis for the Respondent's finding that he sexually harassed her.

General considerations on Sexual Harassment

130. At the hearing, the Respondent's witness was asked by Counsel for the Applicant whether any of the three persons mentioned above, or any other staff member, had made formal complaints of sexual harassment against him. She confirmed that no staff member had formally complained.

131. As to the interview accounts cited by the Respondent as proof of sexual harassment by the Applicant, there is no merit to the accounts given by C1 and C2. C3's account is more credible, but not of sexual harassment.

132. The Respondent seeks to bolster the sexual harassment case against the Applicant by relying on comments made about the Applicant by another staff member, C4. She worked for a few weeks with the Applicant in PNG. Although she did not complain of sexual harassment, her testimony was as follows:

[O]n a couple of occasions, he had asked her for a drink which she politely brushed off. She said that he came across as someone who wanted to be like "a buddy" and "flirty". C4 mentioned to OIAI an incident that took place in May 2016, though she could not recall the exact date, involving [the Applicant] and her at the Waterfront Supermarket Mall, PNG, where [the Applicant], who had just arrived in PNG, had stuck his leg out, stretching it to prevent her from passing him, to draw her attention, and an incident she described as bizarre and an allegation [the Applicant] denied.

133. This account by C4 tends to support the finding, that the Applicant often acted in a way that embarrassed staff members. There is nothing of a sexual nature about the absurd action of putting out a leg, to encourage a colleague to stop and talk in a supermarket, if that was in fact done, which he denies. It is an attention-grabbing gesture, which could have been used in a non-sexual way with any person, whether

male or female. Accordingly, C4's account adds no probative value to the Respondent's allegations of sexual harassment.

134. The documented evidence of emails and text messages whereby C3, C1 and C4 initiated and maintained very cordial communications with the Applicant, sheds further doubt as to whether they considered him to be a sexual harasser.

135. The only other allegation against the Applicant that his acts of harassment extended to include actions of an offensive sex related nature in PNG, came from the Deputy Representative. She said that at a meeting to discuss suggestion box complaints, he made a comment about it being "nobody's business" if he wanted to have a prostitute at his home.

136. One other staff member supported her as having heard the statement. The meeting notetaker, who was a Human Resources Officer, informed the investigators that she did not hear it. The Applicant admits that the topic of prostitutes may have arisen, in a work-related context, at meetings, but he does not admit to using the specific words in question at that time.

137. It is possible that the words heard by two persons in a meeting where many others were present may have been misconstrued by those two persons. The accounts by the Deputy Representative and the one other witness do not sufficiently explain the context in which the words were used, so as to rule out that it was a work-related discussion e.g. about the risks to society from prostitution.

138. In *Bagot 2017-UNAT-718*,²⁷ the Appeals Tribunal required that the Applicant needed to have "constructive knowledge of the unwelcome nature of his actions." The Appeals Tribunal noted that

²⁷ Cited by the Applicant in closing submissions at paragraph 30.

[F]or a behaviour of a staff member to be punishable as constituting the disciplinary offence of sexual harassment or harassment pursuant to Paragraph 6(c) and Paragraph 6(b) of GSC No. 06/2010, it is not enough to be found "inappropriate". No conduct automatically rises to the level of sexual harassment merely on the basis of its sexual overtones and lack of "appropriateness" or to the level of harassment on foot of its "inappropriate" character. This is true no matter how reprehensible one finds that conduct to be, unless it involves the elements articulated in the relevant rules and jurisprudence.

139. The Tribunal's determination is that in all the circumstances, there was no clear and convincing basis for the Respondent's finding that the Applicant engaged in sexual harassment.

Allegations of Abuse of Authority

140. Like the accounts of irregular recruitment of two local Consultants, the facts identified in the Investigation Report as to abuse of authority were not relevant to the allegations of misconduct against the Applicant. They had more to do with managerial considerations as to how well the Applicant performed in his role as Head of Office.

141. These matters were misplaced in the Investigation Report as they could not support findings of misconduct. More importantly, they served as a sort of surrogate appraisal when the Applicant had been engaged in the Organization's normal appraisal process which did not yield the same adverse findings against him.²⁸

142. Accordingly, the matters raised as abuse of authority do not provide any clear and convincing basis for the charges issued, nor for the findings of misconduct made by the Respondent.

Allegation of providing gifts to a member of the PNG government

143. The investigation report includes allegations made by staff members that the Applicant engaged in the practice of giving gifts such as alcohol and perfume to PNG Government Officials. The Applicant admits that he gave one gift to the PNG

²⁸ Annex A/28 to Applicant's Motion filed on 15 March 2021.

Secretary for Social Welfare. It was a scarf which he purchased when she asked him to bring a souvenir from one of his trips.

144. At the hearing before the Tribunal, he explained that she was willing to pay for the scarf; it cost around \$20. However, he gave it to her as a token of appreciation for going out of her way to assist with the Organization's objectives. During his investigation interview, it was put to him that gift giving to government officials could adversely affect the image of the Organization. He conceded that he made a mistake.

145. In the decision letter, there was no specific rule cited in relation to which this allegation was considered to be misconduct. However, in the charge letter the offence of breach of the Standards of Conduct for the International Civil Service under para 12 was included. It provides that "[i]nternational civil servants who are responsible for projects in particular countries or regions may be called upon to exercise special care in maintaining their independence."

146. There was sufficient in the staff members' interviews on record for the Respondent to have found that the Applicant engaged in giving gifts to third parties within the PNG government. The seriousness of the gift giving remains unclear; while alcohol and perfume were mentioned, no specific gift giving occasions were identified. The Applicant's admission provides evidence about one gift of a scarf.

Did the allegations properly amount to serious misconduct?

147. As to the allegations of harassment, the Respondent has successfully proven that there was clear and convincing evidence based on which a finding of misconduct was justified. This is clear on a reading of the definition of harassment in UNICEF's CF/EXD/2012-007 which provides:

1.1(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.” (emphasis added)

148. An examination of the evidence on this allegation bears out that there was clear and convincing basis for finding that the Applicant, by a series of incidents and his general approach to managing the Country Office, was abrasive and created an intimidating work environment. This unfortunate development appears to have been an aberration for the Applicant, brought on perhaps by the challenges he faced for the first time as Head of Office in a challenging assignment.

149. As aforementioned, the allegations of sexual harassment have not been supported by clear and convincing evidence. This type of misconduct is defined as follows in UNICEF’s CF/EXD/2012-007:

1.1(c) [...] 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. (emphasis added)

150. The Tribunal has extensively deliberated on the allegations of sexual harassment which formed the basis of the Respondent’s impugned decision and found that the evidence cited by the Respondent is neither clear nor convincing. C3’s testimony served to bolster the strong case of harassment against the Applicant but *did not* prove sexual harassment.

151. The testimony of the other staff member, C1, was not credible as it was raised by herself and a male co-worker who sought to corroborate it, as an afterthought several years after the alleged sexual advances.

152. In order to have sound basis for the finding of abuse of authority the Respondent needed clear and convincing evidence that the Applicant's conduct fell within the definition of 1.1(d) of UNICEF's CF/EXD/2012-007 as follows:

Abuse of authority is the improper use of a position of influence, power, or authority against another person. This is particularly serious when a person uses, or threatens to use, his/her influence, power, or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. **Abuse of authority may also include conduct that creates a hostile or offensive work environment**, and such conduct can include (but is not limited to) the use of intimidation, threats, blackmail or coercion. (emphasis added).

153. There is some overlap in this definition with the definition of harassment. Abuse of authority can also include conduct that creates a hostile work environment. The matters separately listed under this heading in the investigation report did not provide any other basis for a finding of misconduct against the Applicant.

Did the Respondent adhere to the relevant procedural strictures in the disciplinary process and in particular, was it proper for the Respondent to not interview some of the witnesses put forward by the Applicant?

154. The investigators and the decision-maker have largely complied with the procedural requirements of due process. 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."²⁹

155. The one shortcoming is in the failure to interview some witnesses identified by the Applicant. The witnesses, and in particular AAF, may have further clarified that the case of sexual harassment was not clear and convincing enough for a finding of misconduct to be made justifying summary dismissal.

²⁹ *Applicant v Secretary General* UNDT/2021/007 at para 24.

Was the sanction proportionate taking into account the seriousness of the misconduct as well as mitigating and aggravating Factors?

156. Staff rule 10.3(b) states that “any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”.

157. In *Rajan* 2017-UNAT-781, the Appeals Tribunal held that

The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.

158. In circumstances where there was clear and convincing evidence for findings of harassment but not of the far more serious misconduct of sexual harassment, the Tribunal finds that the Respondent has not established that the most severe possible sanction of summary dismissal was justified. Additionally, the misconduct of harassment that was established involved an overlapping of personality flaws with performance failings of the Applicant as a first time Head of Office. This ought to have been considered as a mitigating factor.

159. The Tribunal notes that proper use of the Organization’s performance appraisal system may have served to highlight the Applicant’s shortcomings and performance failings, with a view to having these addressed and corrected.

160. The Respondent’s view that the Applicant’s lack of remorse was an aggravating factor is not reasonable. The Applicant is clearly able to concede to a mistake when one is pointed out, as evidenced by his admission that he made a mistake with his gift giving to a PNG government official.

161. The Respondent did take note of the challenging environment in PNG, the Applicant’s long tenure with UNICEF and his clean record, as mitigating circumstances. The seriousness and wide-ranging impact of the misconduct he was found to have engaged in as the Head of Office and UNICEF Representative in PNG, as well as his refusal to accept responsibility and blaming of others were considered aggravating factors.

162. However, the proven misconduct was not as wide ranging as indicated by the Respondent. Sexual harassment, which formed a large plank of the impugned decision, has not been made out to the required standard. Many aspects of the abuse of authority allegations that the Applicant was charged with were more managerial than disciplinary in nature.

163. It was appropriate for the Respondent to have considered the prior, long and unblemished record of the Applicant. The pressure caused by a very difficult first assignment as Head of Office, in a dysfunctional work environment was duly considered. Some leeway had to be given as the Applicant navigated very choppy waters.

164. However, although not all the wide-ranging findings of misconduct can be upheld as having been proven by clear and convincing evidence, there was sufficient finding of misconduct as it relates to harassment, to justify imposition of a severe sanction. This is so particularly when the aggravating factors are taken into account.

165. It was reasonable for the Respondent, in deciding on a sanction, to take into account that the Applicant as a manager in a senior leadership role, had “a responsibility to ensure a harmonious environment based on mutual respect and to serve as a role model and uphold the highest standards of competence, integrity, and conduct.”³⁰ As such it was within the reasonable remit of the Respondent to hold the view that due to the pervasive nature of the hostile work environment created by the Applicant he was, as stated in the decision letter, “not suitable to remain in UNICEF.”

166. Termination of his employment was therefore a reasonable option to be considered. However, the summary nature of the termination was disproportionate. The sanction of summary dismissal is the most severe available to the Respondent.

³⁰ The Decision letter at Annex 2 to the Application.

167. In cases of harassment that are not of a sexual nature, the sanctions usually imposed range from censure to “separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations.”³¹

168. Even in many cases of sexual harassment involving actions such as unwelcomed kisses, groping³² and lurid text messages³³ the more severe sanction of summary dismissal was not imposed. Those accused were terminated but with compensation *in lieu* of notice and with indemnity. On the other hand, where an Applicant made admissions in a case where persons who had formally complained of being touched on the breast and inner thigh, summary dismissal was upheld as proportionate.³⁴ The allegations in the instant case pale by comparison.

169. Given the Respondent’s favourable appraisal of the Applicant’s work between May 2016 and May 2017, the Tribunal can only assume that the work environment became “hostile” and toxic after that. The Applicant was removed from PNG in September 2017, and there is little indication of how he fared in the months he served at UNICEF Headquarters in New York before he was placed on ALWFP. The chain of events begs the question whether the Respondent would have acted similarly but for the allegations of sexual harassment? In other words, would the Respondent have dismissed a staff member who served the Organization flawlessly between 1984-May 2017 on grounds of harassment and abuse of authority over a four-month period?

170. The Tribunal finds that summary dismissal was disproportionate under the circumstances. The relief of reinstatement sought by the Applicant is, however, without merit. Although sexual harassment and some aspects of abuse of authority were not proven, there was clear and convincing evidence that he was integral to

³¹ Staff Rule 10/2(viii).

³² *Applicant* UNDT/2021/007.

³³ *Applicant* UNDT/2020/111.

³⁴ *Applicant* 2012-UNAT-209.

the creation of a hostile work environment. Separation from service with notice and termination indemnity would have been a proportionate sanction.

Anonymization

171. There must be a balance between transparency in the internal justice system and protection of witnesses. The Appeals Tribunal has held that, as a matter of general principle

[T]he names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality.

172. To depart from this principle, exceptional circumstances are required.³⁵

173. There are instances when anonymizing the name of the Applicant may be necessary to minimize identifiability of the complainants. The Tribunal, in the recent Judgment in *Applicant UNDT/2021/007*, observed 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.*” For that reason, the names of not only the witnesses, who had complained of sexual harassment, but also the Applicant were anonymized in that case.

174. For similar reasons, orders on anonymity and *in camera* hearing were issued at the outset of the proceedings in the instant case, to protect the alleged victims of sexual harassment.

175. However, the Respondent’s submission that anonymizing the names of the witnesses will be sufficient to protect them in the instant case is accepted. The Tribunal’s decision is that anonymization will be limited to the names of those who complained of sexual harassment.

³⁵ *Buff*, 2016-UNAT-639, paras. 21 and 23.

Observations

176. It would be remiss of the Tribunal to not observe that the Respondent in this case failed to duly act in the interests of the Papua New Guinea Country Office as a whole, and the Applicant in particular.

177. The jurisprudence of the Tribunals underscores that the “[o]rganization has an obligation to act fairly and in good faith with its staff and a duty of care concerning its employees.”³⁶

178. All parties acknowledge that the Applicant was deployed—in his first assignment as Head of Office—to a most difficult duty station. He had brief conversations with the outgoing Representative and Deputy Representative, but those briefings were inadequate. The Applicant had previously served in hardship duty stations such as Iraq and Afghanistan, but told the Tribunal that the security briefing he received on arrival in PNG made it seem that he landed himself in a duty station that was “10 times worse than Afghanistan.”

179. The success of the programs being run by the UNICEF Country Office in Papua New Guinea depended on the system and structure of the Organization working cohesively and collaboratively.

180. It is clear to the Tribunal that the Applicant did not receive the support or the assistance that was necessary to fix the issues facing the Country Office. The record before the Tribunal does not adequately address what steps UNICEF took to address the interpersonal difficulties impairing the fulfilment of its objectives at the Country Office. Was mediation attempted? Was management training contemplated for the Applicant and his Deputy, considering this was the Applicant’s first appointment at the helm of an office?

³⁶ *Kusuma* UNDT/2014/143; *Pirnea* 2013-UNAT-311; *Allen* UNDT/2010/009; *McKay* UNDT/2012/018, confirmed in *McKay* 2013-UNAT-287; *Hamayel* 2014-UNAT-459.

181. The Applicant in this case went from having an unblemished history and a solid track record to a shattered career within a matter of months, with nary an ounce of support, or inquiry into suitable/possible support, from those charged with managing his performance. The Applicant and the Country Office deserved better. The Respondent fell short of expectations in this regard.

Conclusion

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

- a. The application is granted in part;
- b. The Respondent's decision as to findings of misconduct against the Applicant is partially upheld. The finding of sexual harassment committed by the Applicant is rescinded;
- c. The Respondent's decision as to the sanction imposed is partially rescinded. The Applicant's summary dismissal is to be replaced with the sanction of separation from service with notice and termination indemnity;
- d. *In lieu* of rescission the Respondent may elect to compensate the Applicant in the amount of six months net-base salary. The said compensation shall bear interest at the United States of America 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 of America prime rate 60 days from the date this Judgment becomes executable; and

e. All other grounds of appeal are rejected.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 28th day of April 2021

Entered in the Register on this 28th day of April 2021

(Signed)

René M. Vargas M., Registrar, Geneva