UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2021/029
Judgment No.: UNDT/2021/164
Date: 29 December 2021
Original: English

**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

**Counsel for Applicant:**
Robeiro de Jesus Franco Lopez

**Counsel for Respondent:**
Miryoung An, AAS/ALD/OHR, UN Secretariat
Romy Batrouni, AAS/ALD/OHR, UN Secretariat

## Introduction

1. By application filed with the Tribunal's Nairobi Registry and registered under Case No. UNDT/NBI/2020/007, the Applicant contests the disciplinary measures:

a. Separating him from service with compensation in lieu of notice and without termination indemnity; and

b. Imposing on him a fine equivalent to one month of net base salary.

## Facts

2. The Applicant began his service with the United Nations in November 2014, as a United Nations Police ("UNPOL") Officer at the United Nations Integrated Peacebuilding Office in Guinea-Bissau ("UNIOGBIS"). In September 2016, he started working as a Security Officer (FS-4 level) at UNIOGBIS, a position he held until the expiration of his appointment on 30 October 2019.

3. On 4 January 2019, the Investigations Division, Office of Internal Oversight Services ("OIOS"), received from the Conduct and Discipline Service ("CDS"), Department of Management, Strategy, Policy and Compliance ("DMSPC"), a report of possible serious misconduct by the Applicant at UNIOGBIS, based on a complaint made against him in connection with allegations of sexual exploitation and abuse.

4. On 24 January 2019, OIOS interviewed the Applicant. The interview was recorded; the Applicant was provided with a copy of the audio-recording and given two weeks to present any additional information that he deemed appropriate and/or a written statement in relation to the matter under investigation. He did so on three occasions, namely, on 24 and 25 January 2019, and on 25 February 2019.

5. On 30 April 2019, OIOS issued its investigation report finding that the Applicant:

a. Engaged in a consensual sexual relationship with the complainant, which was also transactional as well as forced at times, and that the Applicant also engaged in transactional sex with other, unidentified, girls, particularly on the night of 29 and 30 December 2018;

b. Physically assaulted the complainant on the above-mentioned night and treated her with contempt by putting her personal belongings outside of his house;

c. Interfered with the investigation by negotiating with the complainant either directly or through third parties; and

d. Breached the Standard Operating Procedures ("SOPs") regarding measures on the Operation of UNIOGBIS vehicles by providing his driver's licence to a former colleague and transporting the complainant in a United Nations vehicle.

6. The OIOS investigation report concluded that the "established facts constitute[d] reasonable grounds … that the Applicant failed to observe the standards expected of United Nations personnel".

7. On 16 May 2019, OIOS provided the Assistant Secretary-General ("ASG"), Office of Human Resources ("OHR"), DMSPC, with an addendum to its investigation report prompted by the Applicant's allegations against the Chief, Special Unit Investigation ("SIU"), UNIOGBIS, and a Local Security Associate, UNIOGBIS.

8. By memorandum dated 18 June 2019, the Officer-in-Charge, OHR, DMSPC, issued formal allegations of misconduct against the Applicant who was requested to submit "any written statement or explanations" in response to the allegations of misconduct.

9. On 26 July 2019, the Applicant submitted his comments to the above-mentioned allegations.

10. Upon review of the Applicant's comments, additional information was sought and received from OIOS, which the Appeals and Accountability Section ("AAS") shared with the Applicant by email of 25 September 2019. Consequently, AAS invited the Applicant to submit comments, if any, on the additional information.

11. By memorandum dated 23 September 2019, the Chief Human Resources Officer, UNIOGBIS, informed the Applicant that his temporary appointment would not be extended beyond its expiration date of 31 October 2019. The memorandum listed administrative formalities for the Applicant's check-out procedure and referred to the fact that temporary appointments "[do] not carry any expectancy, legal or otherwise, of renewal".

12. On 8 October 2019, the Applicant provided additional comments in response to the above-referred request from AAS.

13. By letter dated 23 October 2019, the ASG, OHR, DMSPC, informed the Applicant of the imposition of the disciplinary measures set out in para. 1 above.

**Procedural history**

14. On 20 January 2020, the Applicant filed the application referred to in para. 1 above.

15. On 20 February 2020, the Respondent filed his reply.

16. On 11 November 2020, the then presiding Judge held a Case Management Discussion ("CMD") with the parties during which, on the one hand, she requested them to submit a "joint bundle of documents" and, on the other hand, the parties stated that they did not intend to call any witnesses or to request a hearing on the merits. The parties filed a joint bundle of documents on 30 November 2020.

17. On 19 May 2021, the application was transferred to the Tribunal's Geneva Registry, registered under Case No. UNDT/GVA/2021/029, and assigned to the undersigned Judge.

18. On 29 July 2021, the Applicant filed a motion seeking to introduce additional evidence. Five documents constituting the additional evidence in question were annexed to the motion.

19. On 2 August 2021, the Respondent opposed the admission into evidence of the above-mentioned material questioning their relevance and arguing that the documents were neither authenticated nor officially translated.

20. By Order No. 140 (GVA/2021) of 8 September 2021, the Tribunal *inter alia*:

a. Informed the parties of its preliminary view to decide the case based on the papers on file, without holding an oral hearing;

b. Requested the Respondent to clarify seven issues that the Tribunal outlined in the above-mentioned Order;

c. Instructed the parties that the Applicant would be given the opportunity to comment on the Respondent's forthcoming clarifications; and

d. Decided to defer to its judgment a ruling on the admissibility and relevance of the Applicant's 29 July 2021 filing.

21. On 21 September 2021, the Respondent filed the requested clarifications. The Applicant submitted his comments on 26 September 2021.

**Parties' submissions**

22. The Applicant's principal contentions are:

a. The alleged misconduct, as denounced by the complainant, never occurred and the alleged facts were not proven to the required "standard of clear and convincing evidence";

b. Presumption of innocence was not observed during the investigative and disciplinary procedure;

c. The investigators have used illegally obtained evidence, namely, an audio-recording taken without the consent of the Applicant and in breach of his privacy rights;

d. Witness testimonies suggested by the Applicant were not accepted by the investigators; and

e. The sanction imposed on the Applicant breached the principles of consistency and proportionality and there was no consideration of any mitigating factors.

23. The Respondent's principal contentions are:

a. The Application is not receivable in connection with the challenge of the decision not to renew the Applicant's temporary appointment that expired on 30 October 2021;

b. There is clear and convincing evidence that the Applicant's actions constituted sexual exploitation of the complainant and of other unidentified women at his duty station;

c. The complainant's testimony was detailed and consistent throughout the investigation process and was corroborated by other evidence on file;

d. The audio-recording of the 2 January 2019 conversation between the Applicant and the complainant is authenticated by her testimony and is *prima facie* admissible since the Applicant admitted having had said conversation;

e. The audio-recording in question is relevant, probative of facts and serves the interests of justice;

f. On the contrary, the evidence on which the Applicant relies is not credible; and

g. All relevant circumstances were considered in determining the disciplinary sanction and the Applicant's procedural rights were respected.

**Consideration**

24. Before entering into the merits of the application, the Tribunal must rule on a number or preliminary matters related to confidentiality, receivability of the application and admissibility and relevance of evidence.

*Confidentiality*

25. The Applicant requested the Tribunal not to mention his identity in any public document related to this case. The Respondent objected to this request arguing that the Appeals Tribunal has ruled that "[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, indeed, accountability" and, also, that the Applicant provided no greater need than any other litigant for confidentiality.

26. Public interest, transparency, scrutiny and accountability are not impaired by the removal of the Applicant's name from the public domain.

27. On the contrary, the Applicant's family and his own reputation may be severely affected by a public exposure of his personal details.

28. In view of the foregoing and taking into consideration the sensitive nature of the facts, which involve alleged "sexual exploitation of a vulnerable person", the Tribunal grants the Applicant's request for anonymity.

*Receivability*

29. In his reply, the Respondent challenges the receivability of the application in connection with the non-renewal of the Applicant's temporary appointment communicated to him on 23 September 2019. The Tribunal notes that the Respondent, however, did not further develop this argument or its underlying rationale.

30. It is well-settled case law that it is incumbent on the Tribunal to properly interpret the Application as well as its legal and factual arguments. In the case at hand, the Tribunal is seized of an application where the Applicant contests the two sanctions imposed on him, which culminated in his separation from the Organization on 30 October 2019.

31. However, the Applicant is also arguing that the decision to separate him was taken before the conclusion of the disciplinary process and that, therefore, was illegal.

32. The Tribunal is of the view that the 23 September 2019 decision not to renew the Applicant's temporary appointment, which is not grounded on disciplinary considerations, is an autonomous administrative decision that he could have contested before the Tribunal if he had requested management evaluation.

33. A management evaluation request has been consistently considered as a "condition sine qua non" for judicial review and, in the case at hand, the Applicant has not provided any evidence of having complied with this mandatory requirement.

34. Consequently, the decision not to renew the Applicant's fixed-term appointment, communicated to him on 23 September 2019, is irreceivable "ratione materiae".

*Admissibility and relevance of evidence*

35. The Tribunal notes that the parties have challenged the admissibility of some evidence: the Respondent in connection with material in the joint bundle of documents and the Applicant's 29 July 2021 motion, and the Applicant with respect to the audio-recording of his 2 January 2019 conversation with the complainant.

36. At the outset, the Tribunal finds it pertinent to recall, first, that a difference needs to be established between admissibility and relevance of evidence and, second, that it "has broad discretion to determine the admissibility of evidence and the weight to accord [to it]" (see *Kambar* 2021-UNAT-1082, para. 43, *Verma* 2018-UNAT-829, para. 29 and *Lemonnier* 2017-UNAT-762, para. 37).

Joint bundle of documents

37. The joint bundle of documents filed by the parties includes three sets of documents from the Applicant, namely, three "psychology reports" (in Portuguese and Spanish), that the Respondent objects to their being admitted into evidence.

38. The Respondent questions the authenticity and reliability of one of the documents and submits that the other two do not explain what medical issues they attest to. The Respondent also suggests that it is not clear if psychologists are "medical professionals who [can] independently and competently assess the mental and physical well-being of the Applicant", in view that, unlike psychiatrists, they "are not medically trained and thus not treated as medical doctors".

39. The Tribunal finds that the documents at stake are not inadmissible *per se* as there is no evidence that they were illegally obtained or that they were forged. Moreover, article 18 of the Tribunal's Rules of Procedures allows the judge to accept different means of evidence, as it is the case here.

40. The above notwithstanding, the Tribunal is of the view that the probative value of the documents in question is dubious as it is not clear what the link is between the health issues described therein and the sanctions imposed on the Applicant.

The Applicant's 29 July 2021 motion for additional evidence

41. The evidence that the Applicant seeks to introduce through his 29 July 2021 motion consists of documents (written in Portuguese or Spanish) from or exchanged with national authorities in Guinea-Bissau and Colombia in connection with the closure of criminal proceedings against him, initiated following grievances by the complainant, because the latter did not come forward to testify.

42. The Respondent also objected to the admission of these documents into evidence arguing, first, that they are irrelevant and not probative of the issues before the Tribunal and, second, that they are neither authenticated nor officially translated.

43. For the reasons set out below, the Tribunal finds that the documents in question are admissible and should be part of the case file, and that, however, they are not determinant for a fair disposal of this case.

44. The documents at stake are official documents from a national jurisdiction and there is no evidence that they were illegally obtained. These documents are admitted as evidence as they relate directly to the subject matter of this case, i.e., the complainant's grievance against the Applicant leading to the opening of an investigation and of the subsequent disciplinary procedure against him.

45. The fact that they are written in Spanish or Portuguese is irrelevant to a determination of their admissibility. First, the Tribunal underlines that Spanish is one of the official languages of the Organization and, therefore, a translation can be internally arranged if needed. Second, in relation to the evidence in Portuguese (mother tongue of the undersigned Judge), if the Tribunal finds it determinant for the merits of the case, it could order its translation so that it can be made available to the parties.

46. The United Nations, as an international organization, enjoys legal personality and jurisdictional immunity from national authorities of Member States. This clearly results from art. 105 of the Charter of United Nations as well as the Convention on the Privileges and Immunities of the United Nations.

47. Jurisdictional immunity is a multidimensional concept intended to preserve the autonomy and the well-functioning of the Organization vis-à-vis Member States, and to ensure that the Organization operates and undertakes its functions in the exercise of its mandate without political interference.

48. One of the specific dimensions of this autonomy relates to the Organization's workforce, whose rights, duties and obligations are specifically contemplated in an internal framework and fall under the exclusive jurisdiction of the internal justice system.

49. As a consequence of the autonomy of the Organization, its staff members are subject to a specific set of norms that are totally independent from national jurisdictions.

50. The UN disciplinary framework and the rules applicable to misconduct and disciplinary proceedings constitute an autonomous body of law, of a hybrid nature (composed of administrative and labour law principles) whose main purpose is to ensure abidance by the core values and principles that guide the UN's work and its operational needs.

51. Consequently, UN rules on misconduct constitute a particular set of norms of an administrative nature and are totally independent from national rules applicable in the field of criminal law.

52. To enact these norms constitutes a prerogative of the Organization (acting in its capacity as an employer) as they are only applicable to its staff members. Therefore, if a staff member's specific behaviour falls under the provisions of these norms, the Organization is entitled to open an investigation and pursue a disciplinary procedure against said staff member.

53. A certain type of conduct may be qualified as "misconduct" under the internal legal framework despite it not being considered a crime under national law (the contrary situation is not common as, generally, the UN qualifies as misconduct criminal offences committed under national law).

54. In the case at hand, the fact that national jurisdictions did not pursue a case against the Applicant has no impact on the disciplinary procedure instituted against him under the Organization's internal law, as his behaviour can still be considered misconduct under the applicable internal legal framework.

55. This means that the outcome of the internal disciplinary procedure does not depend on the outcome of national criminal procedures nor is it impacted by the closure of such criminal procedures.

56. The above is supported by sec. 2.1.(g) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), which specifically provides *inter alia* that "[i]nvestigations are administrative in nature", and by the internal jurisprudence. For instance, in *Abu Ghali* 2013-UNAT-366 (para. 43), the Appeals Tribunal held that:

> Misconduct based on underlying criminal acts does not depend upon the staff member being convicted of a crime in a national court. As the former United Nations Administrative Tribunal concluded, "different onuses and burdens of proof would arise in the … domestic criminal proceedings than would arise under an investigation for misconduct under the [Agency's] appropriate Regulations and Rules" (footnote omitted).

Audio-recording of the 2 January 2019 conversation

57. The Applicant requested the exclusion from the case file of an audio-recording of a conversation he had with the complainant on 2 January 2019, objecting to its use because he did not consent to the recording of the conversation. This, in his view, leads to conclude that evidence was illegally obtained and should be disregarded by the Tribunal under the doctrine of the "fruit of the poisonous tree."

58. The Respondent argues that such evidence should not be excluded from the case file as it is essential to demonstrate the veracity of the allegations against the Applicant.

59. The Tribunal notes that there is no internal provision precluding the recording of a conversation or requiring that the parties to it be aware/made aware that it is being recorded. There are, however, some precedents about the Tribunal's consideration of audio-recordings in its case law.

60. For instance, in Judgment *Applicant* UNDT-2020-014, the first instance Judge admitted into evidence the audio-recording of discussions on grounds of relevancy and probative value to the case, and referred to a decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East Tribunal (Judgment No. UNRWA/DT/2013/035) finding that:

> There is no universally accepted practice or legal principle against the admissibility of secret recordings of discussions so long as the information sought to be admitted is relevant and probative of the issues to be determined. Furthermore, the evidence must be necessary for a fair and just disposal of the proceedings.

61. In *Chikara* (Order No. 172 (NBI/2016)), the Dispute Tribunal listed the following principles when considering the admissibility of audio-recordings as evidence:

a. Whether the evidence contained in the recording and its transcript is prima facie admissible?

b. Whether the evidence contained in the recording and its transcript is relevant and probative of one or more of the issues in the case?

c. Whether there is any specific prohibition in the United Nations legal framework against recording conversations without the consent of one or more of the parties to that conversation?

d. Whether the recording was an unreasonable intrusion into the privacy of the participants to the conversation?

e. If the evidence was wrongfully obtained, is it in the interests of justice to exclude it?

62. More recently, in *Asghar* 2020-UNAT-982, the Appeals Tribunal dealt with a similar situation, i.e., the recording of a conversation without the consent of one of the parties to it, and stated the following:

> 43. There is no difficulty in principle regarding the admissibility of the recorded conversation on the basis of the manner in which it was procured, even though it perhaps involved an element of entrapment. Where evidence has been obtained in an improper or unfair manner it may still be admitted if its admission is in the interests of the proper administration of justice. It is only evidence gravely prejudicial, the admissibility of which is unconvincing, or whose probative value in relation to the principal issue is inconsequential, that should be excluded on the grounds of fairness.

> Hence, the problem in this case is not the secret recording of the conversation; it is rather the weight to be given to it.
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> …
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> 45. Hearsay evidence, before a tribunal such as the UNDT which is an inquisitorial body, can and should be admissible in the interests of justice. The UNDT, before admitting such evidence, however, should have regard to: i) the making or absence of any objection to the evidence by any one of the parties; ii) the nature of the evidence; iii) the purpose for which the evidence is tendered; iv) the probative value of the evidence; v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; vi) any prejudice to a party which the admission of the evidence may entail; and vii) any other relevant factor.
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> …
>
> 47. A document purporting to be a transcript of a telephone conversation, without evidence identifying who recorded the conversation or transcribed it, and without any elucidation of the reason why the evidence was not given by the person upon whose credibility the probative value of such evidence depends, is not alone sufficiently cogent to constitute clear and convincing evidence of fraud.

63. The above and art. 18 of the Tribunal's Rules of Procedure, vest on the Tribunal a margin of appreciation to admit or exclude evidence.

64. The Tribunal recognizes that, as collected, the audio-recording breached a privacy right, namely, the right to keep private interactions outside the scrutiny of third parties. Nevertheless, the Tribunal finds that the audio-recording is also a necessary piece of evidence (even though not determinant) as it demonstrates the veracity of the allegations made against the Applicant, namely the fact that, indeed, the Applicant was intimately involved with the complainant.

65. When balancing in the case at hand the Applicant's right to privacy against the Organization's right to secure its operational needs and its policy commitment to the protection of vulnerable persons, the Tribunal finds that the latter clearly prevails over the former.

66. As a consequence, the breach of a privacy right is justified by the prevailing interest of the Organization to investigate and ultimately to sanction staff members who breach its internal rules.

67. In this regard, the Tribunal also underlines that legal principles applicable in the context of a criminal procedure cannot be directly and automatically transposed into administrative disciplinary procedures. As liberty is not at stake in the latter proceedings, procedural guarantees do not have to meet the highest threshold.

68. The Tribunal also recalls that the UN (similarly to other international organizations) does not have any law-enforcement powers and, as such, the means available to it to investigate and pursue misconduct are of a limited nature.

69. Upon review of the recording, the Tribunal finds that the evidence it contains and its transcript are *prima facie* admissible as there is no indication that they are not authentic or have been tampered with.

70. The Tribunal finds that the recording is relevant and probative of the issues in this case. It confirms the Applicant's behaviour with the complainant and his efforts to persuade her to drop the charges she made against him.

71. The available evidence also demonstrates that the transcript was made by the OIOS investigators and that the Applicant was given the opportunity to listen to the full and complete recording of the conversation and to read the Summary of the audio-recording. Also, during the Applicant's interview of 24 January 2019, the OIOS investigators played several sequences of the audio-recording to him and sought his comments. Moreover, the full audio-recording was provided to the Applicant as part of the supporting documentation for the allegations of misconduct in the memorandum dated 18 June 2019.

72. As to the Applicant's objection to this piece of evidence under the doctrine of the "fruit of the poisonous tree", the Tribunal recalls the precedent in *Massah* UNDT/2011/218, where the presiding judge clearly explained that

> in the common law system, which is governed by exclusionary evidentiary rules, illegally or improperly obtained evidence is not inadmissible *ab initio*. The admissibility or otherwise depends on the discretion of the judge who should weigh in the balance the fairness of the proceedings and the need to admit relevant evidence.

73. In view of the above, the Tribunal finds that it is in the interest of justice to find the audio-recording not only admissible but also relevant for the proper adjudication of the case.

*Merits of the case*

The scope of judicial review in disciplinary cases

74. The current case refers to a disciplinary sanction of separation from service with compensation in lieu of notice and without termination indemnity and to the imposition of a fine equivalent to one month of net base salary.

75. The Applicant contests these two decisions and requests his reinstatement (in accordance with his grade and step), payment of all the entitlements due for the period in which he was placed on Administrative Leave Without Pay ("ALWOP") and compensation for all the stress and anxiety suffered, which he estimates at the equivalent of five years of net-base salary.

76. The Appeals Tribunal has held that judicial review is focused on how the decision-maker reached the impugned decision, and not on the merits of the decision (see *Sanwidi* 2010-UNAT-084 and *Santos* 2014-UNAT-415).

77. The Appeals Tribunal has also determined the role of this Tribunal when reviewing disciplinary matters (see *Mahdi* 2010-UNAT-018 and *Haniya* 2010-UNAT-024).

78. Bearing in mind the above-mentioned case law and the standard of judicial review in disciplinary cases, the issues to be examined in the case at hand are:

a. Whether the facts on which the disciplinary measure was based have been established according to the applicable standard;

b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules;

c. Whether the disciplinary measure applied is proportionate to the offence, and

d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

Have the facts on which the disciplinary measure was based been established?

79. According to the jurisprudence of the Appeals Tribunal, when the disciplinary sanction results in separation from service, the alleged misconduct must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable (see *Molari* 2011-UNAT-164).

80. As mentioned above, it is the role of the first instance Judge to critically assess the evidence, to review how it was collected and under which circumstances and to determine whether it rationally supports the allegations made against an Applicant.

81. As noted above, the UN disciplinary proceedings are of an administrative nature and the Organization has limited means to investigate because it does not have law-enforcement powers and bases its investigations on cooperation from staff members and other entities.

82. As a consequence, the main legal principles that are applicable in a criminal law setting cannot be "automatically" transposed to the internal legal framework.

83. This explains why, as confirmed by the Appeals Tribunal, the standard of proof applicable to misconduct in disciplinary proceedings resulting in termination of employment is not "beyond reasonable doubt", as well as the lower protective status of defence rights in comparison to national jurisdictions in criminal law proceedings.

84. After a thorough analysis of the case file and the available evidence, the Tribunal finds that there is clear and convincing evidence establishing the facts on which the disciplinary measure was based.

85. The Investigation Report contains an exhaustive description of the events that led to the disciplinary proceeding against the Applicant. It is well supported by documents, interview transcripts held with several witnesses, photos and phone messages demonstrating an intimate relationship between the Applicant and the complainant.

86. The Applicant argues that the facts were not established by clear and convincing evidence asserting that the complainant's testimony is neither detailed nor remained consistent throughout the investigation. He denies having had an intimate relationship with the complainant with whom he assures to only have had a labour relationship and argues that the testimony of one of the witnesses (Mr. S) lacks credibility as he was "instrumentalized by [the complainant]".

87. The Applicant also adds that the investigators were biased against him as they did not consider the relevant testimonies of the witnesses that he suggested, and that his procedural rights, mainly the presumption of innocence, were not respected as the investigators accepted evidence illegally obtained to support the case against him.

88. In disciplinary cases and when dismissal is at stake, it is for the Organization, on the one hand, to collect clear and convincing evidence of the facts that it believes to constitute misconduct. On the other hand, it is incumbent on the implicated staff member to adduce evidence rebutting the facts held against him or her.

89. The Investigation Report contains the transcripts of the interviews held with the complainant as well as her statement before the Judiciary Police of Guinea-Bissau. In both records, the complainant's accounts of events coincide.

90. Furthermore, the audio-recording of the conversation between the Applicant and the complainant indicates, first, that they had an intimate relationship of a sexual nature, that the Applicant was extremely concerned with the fact that the complaint made against him could cost him his job and that it could also affect other people's employment. Second, it also shows that the Applicant was offering money to the complainant in exchange of her withdrawing the charges against him.

91. Added to the above, the record also has the interview that OIOS investigators conducted with the complainant's mother. Despite the fact that she was not present when the events of 28 December 2018 took place, her testimony confirms the complainant's account of events and renders the complainant's version more credible. In fact, this witness confirmed that the Applicant met the complainant's family, asked for their permission to take her to Bissau and offered the family a solar panel. It also demonstrates that the Applicant "has helped the [complainant's] family a lot".

92. Finally, the complainant's mother testified to be aware that her daughter and the Applicant were both living together as "man and woman" which means, logically, that they entertained an intimate relationship of a sexual nature, and that, lately, her daughter was calling her often to complain about the way the Applicant was mistreating her and that she knew that he had put all her daughters' belongings outside his house.

93. The above is also consistent with the pictures taken by the judiciary police in Bissau, which went to the Applicant's home and took shots of the complainant's belongings. The record on file also contains a set of telephone messages and pictures showing the complainant and the Applicant together on many occasions.

94. The nature and content of their exchanges by SMS or WhatsApp, for instance, clearly shows that both the Applicant and the complainant had an intimate relationship that went far beyond a professional link.

95. Consequently, the Tribunal finds the Applicant's version of the events not to be credible.

96. In fact, if, indeed, there was a purely professional issue, why was the Applicant insistently requesting the complainant to drop the charges against him, offering her money to do so and even involving members of the Catholic Church in Guinea-Bissau, who were acquainted with both parties, to persuade her to withdraw the complaint?

97. The Tribunal also notes that despite all the pressure she endured, even from several individuals who were close to the Applicant, the complainant has consistently kept her narrative and refused to accept money to "close the case".

98. Another relevant piece of evidence that the Tribunal has carefully taken note of was the narrative of Mr. S., who runs a shop in front of the Applicant's house, because it also corroborates other evidence on file.

99. Despite refusing to formally testify, this witness accepted to talk to the investigators about what happened in the evening of 28 December 2018. He described exactly the same situation as the one the complainant depicted, i.e., that during the night of 28 December 2018, three girls were screaming and laughing outside the Applicant's house and that the complainant, who was also there, protested.

100. According to Mr. S, when the complainant protested, the Applicant insulted her and threw her and her personal belongings outside of his house.

101. Contrary to the Applicant's assertion, there is no evidence that the complainant influenced Mr. S in any way, nor that he had any previous knowledge of the content of the complainant's statements before the investigators.

102. Also, the testimony of Ms. M.C. is relevant as it confirms the complainant's account of the events before the OIOS investigators. This witness described how she met the complainant, she mentioned that the complainant was very disturbed the evening of the events and alluded to a conflict with her boss who had "thrown

her out of his house". Consequently, Ms. M. C. confirmed having allowed the complainant to sleep at her place.

103. The Tribunal finds that the witnesses indicated by the Applicant were not reliable. In fact, they all knew the Applicant either as friends (Mr. C, Mr. K.T. and Mr. V.) or as his employees (this is the case for instance of both security guards at the Applicant's home). They provided an incomplete narrative and it appears that they omitted details that could have also involved them in the events. In this connection, it is pertinent to recall that the complainant alleged that all three witnesses were usually involved in transactional sex with local women.

104. In relation to the second charge held against the Applicant (i.e., that he transported the complainant in a UN vehicle several times and provided his driver's license to a former colleague thus allowing him the use of an official vehicle), the Tribunal has relied on the documentary evidence presented by OIOS, the authenticity of which was not challenged by the Applicant, namely, the log reports of the vehicle in question and OIOS email exchanges with the respective Transport section.

*Whether the established facts legally amount to misconduct under the Staff Regulations and Rules*

105. The Tribunal has now to assess whether the facts attributed to the Applicant constitute misconduct.

106. As explained above, there is clear and convincing evidence that the nature of the Applicant's relationship with the complainant went beyond being a professional one as the Applicant kept an intimate relationship, of a sexual nature, with the complainant, a local woman from a poverty-stricken family who relied on her income as a housemaid to pay her studies in Bissau.

107. According to the applicable internal legal framework, the Applicant's established actions constituted sexual exploitation of the complainant and of other Guinea-Bissau females.

108. It is irrelevant for the purpose of applying the internal framework on sexual exploitation whether those intimate relations were consensual or not. In fact, the underlying rationale of the UN policy is to prevent its staff members and officials to make use of their professional status to engage in this sort of exchanges with the local populations the UN assists.

109. As a consequence, it is clear that the Applicant's actions were in violation of staff regulations 1.2(a), 1.2(b), 1.2(f), and 1.2(q), and staff rules 1.2(c) and 1.2(e), as well as sec. 3.1 and 3.2(a) of ST/SGB/2003/13 (Special measures or protection from sexual exploitation and sexual abuse). The Applicant's actions were also in violation of the Standard Operating Procedures governing the use of official vehicles.

110. Moreover, the Applicant's behaviour demonstrates a lack of "moral judgement" and a disrespectful attitude towards the complainant, which is incompatible with the standard of conduct expected from UN staff members.

Was the disciplinary measure applied proportionate to the offence?

111. It is well-established jurisprudence that the Secretary-General has wide discretion in applying sanctions for misconduct and that at all relevant times he must adhere to the principle of proportionality (*Applicant* 2013- UNAT- 280). Once misconduct has been established, the level of sanction can only be reviewed in cases of obvious absurdity or flagrant arbitrariness (*Aqel* 2010-UNAT-040).

112. In *Rajan* 2017-UNAT-781, the Appeals Tribunal held that the most important factors to be taken into account when 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 the employer's consistency in the application of sanctions.

113. While assessing the proportionality of the sanction imposed on the Applicant, the Tribunal recalls that he was not dismissed. In fact, his contract was not renewed beyond its expiration date of 30 December 2019 due to the gravity of the charges held against him.

114. Indeed, in the Tribunal's view, the seriousness of the Applicant's behaviour, his interferences with the on-going investigation and his lack of judgement, render the sanction proportional to the gravity of the offence.

115. Therefore, the Tribunal finds that there was no abuse of administrative discretion in the determination of the disciplinary measure for the case at hand.

Were the Applicant's due process rights respected during the investigation and the disciplinary process?

116. According to the Appeals Tribunal's jurisprudence, due process entitlements only come into play in their entirety once a disciplinary proceeding is initiated *(Akello* 2013-UNAT-336), whereas at the preliminary investigation stage only limited due process rights apply (*Powell* 2013-UNAT-295).

117. The Tribunal recalls that an investigator has a certain margin of discretion, based on a critical assessment of the evidence produced, to decide what is relevant or not for the purpose of the investigation (*Pappachan* UNDT-2019-118).

118. The Tribunal has carefully scrutinised the investigation report as well as the evidence collected by the OIOS investigators and is satisfied that they comply with the requirements of the internal legal framework.

119. The Applicant failed to demonstrate his allegations of bias or wrongdoing and, consequently, his arguments in this respect also fail.

*Remedies*

120. The Applicant requested to be reinstated in the same functions, at the same step and grade he was before his separation from service, and to be paid all the benefits and entitlements he lost when he was placed in ALWOP. Further, he claimed compensation equivalent to 5 years of net base salary for all the stress, harm and anxiety he has endured.

121. Pursuant to art. 10 of its Statue, the Tribunal can only grant remedies to applicants who have demonstrated the unlawfulness of the administrative decision(s) they were contesting. This is not so in the case at hand.

122. Having found that the disciplinary measures imposed on the Applicant were lawful, there are no grounds for entertaining the remedies requested. As such, the medical evidence filed by the Applicant in support of those remedies is irrelevant.

**Conclusion**

123. In view of the foregoing, the Tribunal DECIDES to confirm the disciplinary sanctions imposed on the Applicant and to reject the application in its entirety.

(*Signed*)
Judge Teresa Bravo
Dated this 29th day of December 2021

Entered in the Register on this 29th day of December 2021
(*Signed*)
René M. Vargas M., Registrar, Geneva