



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/033

Judgment No.: UNDT/2024/007

Date: 26 February 2024

Original: English

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**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Isaac Endeley

AGUILAR VALLE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON LIABILITY**

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**Counsel for Applicant:**

George G. Irving

**Counsel for Respondent:**

Isavella Maria Vasilogeorgi, DAS/ALD/OHR, UN Secretariat

Marcos Zunino, DAS/ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant, a former staff member of the United Nations Department of Safety and Security (“UNDSS”), filed an application requesting the Tribunal to rescind the decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity. The Applicant was found, as a supervisor, to have sexually harassed a female colleague, created a hostile working environment, and abused his authority.

2. The Respondent contends that the application is without merit.

3. From 6 to 10 November 2023, the Tribunal conducted a hearing at which 13 witnesses gave testimony. This included the Applicant but not the alleged victim of sexual harassment, who declined an invitation from the Respondent to testify as a witness before the Tribunal.

4. For the reasons set out below, the application is granted on its merits, leaving the issue of remedies and costs to a subsequent judgment.

## **Facts**

5. In the parties’ jointly-signed statement of 11 August 2023, which was filed in response to Order No. 056 (NY/2023) dated 31 July 2023, they provided a chronology of agreed facts.

6. As the Appeals Tribunal stated in *Ogorodnikov* 2015-UNAT-549, when “the parties have agreed to and identified the facts ... it is not open to [the Dispute Tribunal] to conduct its own evaluation and then to substitute its view for that of the parties”. The Tribunal may therefore not examine facts already agreed by the parties, which are the following:

... Following a distinguished career in the Colombian navy, the Applicant entered [United Nations] service with the ... Department of

Security and safety (UNDSS), Peru in 2009. In September 2014, he undertook duties as Field Security Specialist in Bolivia where he remained until September 2017 when he was transferred to UNDSS South Sudan and in June 2021 reassigned to UNDSS Panama as Regional Security Adviser.

... During his 13 years of service, he has consistently been rated as exceeding performance expectations.

... Since 2014 due to the proximity of the offices, the Applicant and [AM, the alleged victim of sexual harassment name (redacted for privacy reasons)] were known to each other but had little personal contact.

... On 18 August 2016, [AM] telephoned the Applicant. At that time, she was serving with [the United Nations Industrial Development Organization] in Bolivia, and her extant contract was due to expire. At a time subsequent to her recruitment by UNDSS, [AM's] former post in [the United Nations Industrial Development Organization] was abolished.

... On 19 August 2016, [AM] attended a birthday celebration held at the UNDSS office premises.

... On 12 September 2016, [AM] took up her new duties.

... From 2 to 17 October 2016, the Applicant was absent from La Paz on a field trip.

... On 24 October 2016, [AM] submitted her letter of resignation effective 31 October 2016, citing a desire for career development.

... On 24 February 2017, [AM] submitted a formal complaint of sexual harassment to [the United Nations Development Programme's Office of Audit and Investigations, "UNDP/OAI"] against the Applicant.

... On 28 March 2017, the Applicant submitted a response to the complaint.

... On 21 April 2017, the Applicant filed a formal complaint to [UNDP/OAI] against [RV (name redacted for privacy reasons)], then UNDP Resident Coordinator and Designated Official for Security.

... On 14 December 2017, the Applicant was interviewed by OAI/UNDP as a subject.

... On 23 April 2018, OAI shared a draft investigation report with the Applicant relating to [AM's] complaint against him.

... On 10 May 2018, the Applicant submitted extensive comments with 15 attachments.

... On 25 May 2018, two weeks later, the Applicant was advised that OAI had submitted its report to the [United Nations Development Programme “(UNDP)”] Legal Office.

... On 27 May 2020, the case was transferred to the UN Secretariat owing to the Applicant's UN contract of employment.

... On 12 January 2021, the Applicant was advised by OAI that the matter of his complaint against [RV] had been closed.

## **Consideration**

### *The limited judicial review in disciplinary cases*

7. Under the recently adopted art. 9.4 of the Dispute Tribunal’s Statute and the settled jurisprudence of the Appeals Tribunal, in conducting a judicial review of a disciplinary case, the Dispute Tribunal is required to examine (a) whether the facts on which the disciplinary measure is based have been established; (b) whether the established facts amount to misconduct; (c) whether the sanction is proportionate to the offence; and (d) whether the staff member’s due process rights were respected. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see para. 51 of *Karkara* 2021-UNAT-1172, and similarly in, for instance, *Modey-Ebi* 2021-UNAT-1177, para. 34, *Khamis* 2021-UNAT-1178, para. 80, *Wakid* 2022-UNAT-1194, para. 58, *Nsabimana* 2022-UNAT-1254, para. 62, and *Bamba* 2022-UNAT-1259, para. 37). The Appeals Tribunal has further explained that clear and convincing proof “requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable” (see para. 30 of *Molari* 2011-UNAT-164). In this regard, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred” (see para. 32 of *Turkey* 2019-UNAT-955).

8. The Tribunal is mindful of the General Assembly’s additional instruction in art. 9.4 of the Dispute Tribunal’s Statute concerning “the record assembled by the

Secretary-General and ... other evidence”, which only took effect subsequent to the holding of the hearing and the parties being ordered to file their closing statements. In any event, the provision would have made no decisive difference to the Tribunal’s management of the case or any of its substantive findings entailed in the present Judgment.

*Whether the facts on which the disciplinary measure is based have been established*

9. In the contested decision of 1 April 2022, the overall factual allegations accepted by the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) as established with clear and convincing evidence were the following:

- a. “Between August and October 2016, [the Applicant] created a hostile work environment for [AM], which resulted in her resignation from [UN]DSS Bolivia by commenting on her choice of underwear and physical appearance, suggesting that she close her eyes so that [he] could teach her how to properly kiss/greet, suggesting that [he] lift her from her waist to reach high shelves, commenting on the prospect of her undertaking training with [him] alone, and hinting at eating her leg for lunch; and/or”;
- b. “[The Applicant] created a hostile work environment for staff members during [his] tenure in Bolivia, including by making denigrating, humiliating and offensive remarks and comments with regards to [VM, name redacted for privacy reasons], [BP, name redacted for privacy reasons], and [AJ, name redacted for privacy reasons], showing favouritism to certain staff members [the USG/DMSPC, however, “dropped” the favoritism allegations concerning one particular staff member, namely VG, name redacted for privacy reasons] and by greeting female staff members with unwelcomed physical contact and salutations, such as “my love”, “my life”, “my princess”, etc.”

10. A full reading of the 1 April 2022 contested decision and its annexes reveals that in addition to creating a hostile work environment, the Administration also found that the Applicant had sexually harassed AM and abused his authority towards VM, BP, and AJ. For future reference, the Tribunal encourages the Administration to clearly state all grounds of misconduct in the same place.

11. At the hearing, the following witnesses provided testimony (all names redacted for privacy reasons): the Applicant, VM, PA, LC and AB (all in English via Microsoft Teams) and AJ, BP, VF, HA, RV, FD, MU and AR (all in Spanish with Spanish-English interpretation via Zoom). VM had initially been scheduled to give testimony in Spanish, but due to various technical problems, she agreed to do so in English with the consent of Counsel for both parties.

12. Regarding AM, the Respondent had requested her to provide testimony, but according to his 6 October 2023 submission, she informed him that she did “not wish to participate in the oral hearing”. As AM was no longer a United Nations staff member, the Respondent had “no means to compel her presence before the Tribunal”. Consequently, AM did not provide any testimony before the Tribunal.

#### The factual allegations concerning AM

13. The Applicant, in essence, submits that the Respondent has not lifted his burden of proof regarding the “underlying claim” that the Applicant allegedly sexually harassed AM. Rather, the “case against the Applicant was constructed out of a deliberate solicitation of complaints largely from disgruntled staff, initiated and encouraged by the UNDP Resident Coordinator”. He further contends that “no direct witnesses to the actions AM complained of and no contemporaneous evidence” exist. Instead, the “only support for these incidents comes from AM’s own words repeated to two friends”, hearsay, and gossip.

14. The Respondent’s contentions may be summarized as follows (references to footnotes omitted):

a. From the witness testimonies of AM, VM, FD and RV, it follows that AM had “disclosed” to them that “the Applicant had sexually harassed her”, confirming “the disclosures made to them by ... AM and/or her obvious change of behaviour, as described in the Allegations Memorandum and in the Sanction Letter”.

b. A “careful reading” of the “multiple different statements during the investigation, as well as by his Comments during the disciplinary process, and most recently with his various submissions to the Tribunal” shows “slight adjustments to the Applicant’s position, which seek to finetune his argument each time the Applicant is confronted with evidence which contradicts his account”.

c. As held by the Appeals Tribunal in *Paris* 2021-UNAT-1182, “this practice undermines the Applicant’s credibility”. For instance, the Applicant’s “theory” was that AM and VM could not have discussed “the real reason for ... AM’s intended resignation, i.e., the various instances of sexual harassment, at the ‘terrace’ of the building in which UNDSS/Bolivia was located, because there was no ‘terrace’ at that building”. The Tribunal, however, “heard precise testimony from ... VM, who explained that the discussion during which Ms. AM disclosed all incidents to Ms. VM took place at the building’s rooftop (“teraza”), which was accessible to staff members” and to which AJ also made reference.

d. None of the witnesses, who the Applicant heard on “AM’s character” were “present in the UNDSS/Bolivia office when any of the incidents of sexual harassment took place”. The Applicant has “failed to explain why the testimony of his witnesses should be preferred over that of UNDSS/Bolivia staff members, who were interacting with ... AM on a daily basis”. PA’s testimony before the Tribunal is “inconsistent with her own written statement which was solicited by the Applicant” concerning the question on her academic qualifications. PA’s “objection to ... AM’s character was that, allegedly, ...

AM had a ‘sugar daddy’ and that consequently, she could not have been sexually harassed by the Applicant”. This is “an unsubstantiated and irrelevant speculation as it blindly disregards that ... AM did not welcome the Applicant’s sexual advances and that ... AM’s prior intimate relationships, even if true, have no bearing on this matter”.

e. MU’s “testimony before the Tribunal and overall involvement in this case lacks credibility”. MU also “advanced the argument that ... AM was promiscuous and, therefore, could not be the victim of sexual harassment”. He “referred to having seen ... AM being intimate with an older gentleman, and then took objection with her supposed flirting with other men while she was in a relationship with said gentleman”. From that, MU “deduced that ... AM could not have been the victim of sexual harassment”. Besides being “uncorroborated by evidence”, his statement is “irrelevant for the matter at hand”. It does “not acknowledge that, irrespective of her current or past intimate relationships, ... AM did not welcome the Applicant’s sexual advances”. Simply put, “it is possible for a woman to welcome the advances of one man but refuse those of another”. Being “intimate with one man (or more) does not connote open doors for all, and certainly not for the Applicant”.

f. Despite AM’s “non-appearance before the Tribunal, there is sufficient, clear and convincing evidence to substantiate the facts underpinning the sexual harassment charge”. The testimonies of VM, FD, and RV were “truthful, cogent, and credible”. No “countervailing evidence was adduced to diminish their credibility or that of ... AM as a complainant”. AM herself “had nothing to gain from filing a false complaint against the Applicant—she had already quit her job with UNDSS/Bolivia, was not seeking reappointment, or any other benefit in exchange from UNDSS”. The Applicant has “failed to provide any credible explanation as to why ... AM would agree to become an instrument in ... RV’s alleged orchestrated attack against the Applicant”. In contrast, “as the record and the oral proceedings show ... AM only stood to lose, by being



subjected to the Applicant's and his witnesses' blatant victim-blaming and – shaming practices”.

15. The Tribunal notes that the Appeals Tribunal held in *Appellant* 2022-UNAT-1210, para. 37, that a “finding of sexual harassment against a staff member of the Organisation is a serious matter”, which “will have grave implications for the staff member's reputation, standing and future employment prospects”. For that reason, the Dispute Tribunal “may only reach a finding of sexual harassment on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that all the elements of sexual harassment have been established in accordance with the standard of clear and convincing evidence”.

16. With reference to art. 16.2 of the Dispute Tribunal's Rules of Procedure, in *Appellant*, para. 38, the Appeals Tribunal further held that to “ensure the satisfaction of the standard of proof in disciplinary cases, [the Dispute Tribunal] ordinarily will be obliged to convene an oral hearing at which the alleged wrongdoer will be afforded an opportunity to face and cross-examine those who accuse him or her of misconduct”. Articles 17 and 18 of the Rules of Procedure “therefore envisage the calling, examination and cross-examination of witnesses under oath before [the Dispute Tribunal] and the proper consideration and determination of the relevance and admissibility of any evidence led during an oral hearing”.

17. In the same vein, in *Applicant* 2022-UNAT-1187, para. 59, the Appeals Tribunal held that “the failure to call witnesses by the Secretary-General and the denial to the applicant of an opportunity to cross-examine his or her accusers, especially in serious cases, may very well result in a finding that the Secretary-General has failed to meet his burden of proof leading to a rescission of the contested decision”.

18. In the present case, the alleged victim of sexual harassment, namely AM, declined to give testimony before the Tribunal. Contrary to the jurisprudence of the Appeals Tribunal in *Appellant*, the Applicant therefore did not have the opportunity to face and cross-examine his accuser. The only evidence of AM in the case file is the

written summary of her statement to the disciplinary investigation conducted by OAI. The Applicant, however, was not allowed to be present at the OAI interview and therefore had no chance to challenge AM at the relevant time in order to test the reliability and veracity of her accusations. Further, as held by the Appeals Tribunal, an investigation, “given its peculiar methodology, is unlikely in most cases to prove the facts at the standard of clear and convincing evidence” (see AAC 2023-UNAT-1370, para. 48). Similarly, the Appeals Tribunal has criticized the first instance court’s reliance on the investigation report in a case where a witness did not appear to testify before it (see *Wakid* 2022-UNAT-1194, para. 59).

19. In addition, it is evident that only AM and the Applicant were present when the alleged events, on which the Administration based the contested decision, took place. These consisted of the Applicant allegedly (a) “commenting on [AM’s] choice of underwear and physical appearance”, (b) “suggesting that she close her eyes so that [he] could teach her how to properly kiss/greet”, (c) “suggesting that [he] lift her from her waist to reach high shelves”, (d) “commenting on the prospect of her undertaking training with [him] alone”, and (e) “hinting at eating her leg for lunch”.

20. At the hearing, the Applicant adamantly refuted all of these factual accusations, which he also, as relevant, contradicted in his interview statement of the investigation. As for the other witnesses, including VM, VF, HA, RV and FD, their knowledge of the various situations was entirely based on them testifying to what AM had told them about the different alleged incidents. In other words, the Respondent’s case before the Tribunal is solely based on hearsay evidence. In this regard, in AAO 2023-UNAT-1361, para. 60, the Appeals Tribunal held that as evidence, “hearsay is universally regarded to be of lesser weight”.

21. Considering the Appeals Tribunal’s unequivocal holdings in *Appellant*, *Applicant*, AAC, *Wakid* and AAO and the lack of any direct evidence before the Tribunal, it therefore finds that the Respondent has not managed to prove with clear and convincing evidence, or even with the preponderance of evidence, the factual allegations leading to the USG/DMSPC’s conclusion that the Applicant sexually

harassed AM. In the same vein, the Respondent has also failed to demonstrate that the Applicant created a hostile work environment for AM. Accordingly, the Respondent's claims thereon must therefore be rejected in their entirety.

The factual allegations concerning a hostile work environment of other staff members, including VM, BP and AJ

22. The Applicant basically contends that the Respondent has failed to prove that the Applicant also created a hostile work environment for other staff members than AM, including VM, BP, and AJ, and abused his authority.

23. The Respondent's contentions may be summarized as follows (references to footnotes omitted):

a. Different witnesses "testified that the Applicant had greeted them with inappropriate salutations". AR explained that "she felt uncomfortable when the Applicant referred to her as 'princessa' or 'querida' and had told the Applicant not to address her as 'mi amor'". HA stated that "she would remain seated, so as to avoid being hugged by the Applicant, while being greeted with inappropriate salutations". VM and AJ confirmed "having heard the Applicant greet women inappropriately".

b. In addition to VM, "multiple witnesses testified that the Applicant had made demeaning ageist remarks regarding [her] and that he had questioned her competence/suitability for a position within UNDSS, given her background in nursing". The Applicant "partially admitted to remarking on ... VM's background, asserting that she had misunderstood his comments". Other instances of the Applicant claiming a misunderstanding were that AM "had misinterpreted his intention when he offered to teach her how to react to certain situations", and FD, "at whom the Applicant had raised his voice in anger when he was dissatisfied about the processing of a home leave request". In all three instances, the Applicant "deflected the responsibility for his own conduct to the victims of his behaviour".

c. BP together with “multiple witnesses testified that the Applicant had habitually targeted [BP] with demeaning and offensive remarks”. This is corroborated by “documentary evidence on the record, namely the [GC, name redacted for privacy reasons] Report”, which was undertaken in response to BP’s complaint. (The Tribunal notes GC was sent to UNDSS in Bolivia in September 2015 by UNDSS New York and the Ombudsman for the United Nations Funds and Programmes to investigate and report on the workplace conflict between the Applicant and BP.) Neither “the Allegations Memorandum nor the Sanction Letter refer to the [GC] Report as such; rather, they refer to the undisputed fact that [GC] undertook a mission to UNDSS/Bolivia to address [BP’s] complaint against the Applicant”. Also, the “full case record” of the GC Report, which was “an internal document of the Organization which was not addressed to him and to which [the Applicant] had no independent right”, was shared by AB with him, as also admitted during the hearing. The “proper avenue for disclosure of the [GC] Report, had the Applicant deemed it necessary evidence, was to request the Tribunal to order its production into evidence”, but the Applicant “chose to circumvent this unequivocal procedural requirement and, with the admitted complicity of ... AB”.

d. AJ “described his personal experience of harassment by the Applicant” and “detailed the circumstances leading up to his resignation”. He also “described feeling humiliated by the contents of the ‘skewed, ill-intentioned’ note to file which the Applicant improperly placed in Mr. AJ’s status file, the day after ... AJ’s separation”. Other witnesses “also provided examples of harassment by the Applicant against ... AJ”. All “witness testimony is consistent with the record before the USG/DMSPC”. As to AJ’s reason for leaving his job, unlike the Applicant’s submissions, AJ stated to the Tribunal that “it made no sense for him to resign when he did, because just three weeks earlier, he had started a new contract with UNDSS/Bolivia, with a better salary—not a new job with a different employer; however, the Applicant’s harassment drove him to renounce the new contract”. AJ further specified that

“resigning left him and his family without a salary, a matter which he had discussed with his wife before tendering the letter”. AJ “expressly stated that when he presented his resignation letter, he did not have ‘a plan B’, but had to go home and figure out how to provide for his family”. AJ commenced employment at the United Nations Human Rights Office on 20 March 2017.

e. The Applicant has “failed to provide any legal basis for his decision to include an adverse note to ... AJ’s file, in response to a staff member’s resignation letter” and had no right to do so. Issues relating to AJ’s performance management “were already recorded in his performance evaluations”. An “adverse note, which retroactively records a negative performance assessment for ... AJ, issued outside the performance evaluation process, is not a lawful exercise of the Applicant’s managerial duties, but a clear case of abuse of authority with retaliatory undertones”. In and of itself, “it would warrant the Applicant’s separation from service”.

f. Both AJ and HA “testified about the Applicant treating ... AJ disrespectfully during the Secretary-General’s visit in Bolivia”. The fact that AJ received a letter of commendation at the end of the visit “does not disprove the Applicant’s conduct; a letter of commendation is reflective of the conduct of its recipient, not of the recipient’s harasser”. If anything, “in view of such commendation, the note that the Applicant placed on ... AJ’s file is even more unwarranted”.

g. None of the Applicant’s witnesses had “any relevant information to provide regarding the Applicant’s conduct regarding the specific issues for which he was sanctioned”. They “all came forward to help the Applicant advance his collusion theory”.

h. MU supported “the Applicant’s position that all witnesses who had provided statements against the Applicant during the investigation were rewarded by ... RV by obtaining better positions or increased job security”.

MU, however, had “no personal involvement or role in the corresponding selection exercises”, and “all career moves which were presented as reward for collusion were either the result of competitive selection exercises ... or the result of the 2017 transition of security personnel from UNDP-administered contracts to Secretariat-administered contracts”.

i. LC admitted that “being in New York, she did not have direct knowledge of incidents in the Bolivia office, unless the Applicant or other staff members informed her of the same”. She “admitted that she had not known that the Applicant had commented on ... AM’s underwear, had offended ... VM by negative ageist comments and had told Ms. VM ‘fuck you’, had raised his voice at ... FD, or had placed the adverse note on ... AJ’s official status file”. For his part, AB “confirmed that he ‘did not have a direct visibility [...] by not being present in the country’ and stated that he relied on ... LC to keep her ‘finger on the pulse’ of the UNDSS/Bolivia office and expressed his confidence both in ... LC’s abilities as well as to the fact that he was hearing about everything that was going on in the field within a matter of days”. Neither LC nor AB had “visited UNDSS/Bolivia at the material time; therefore, contrary to the Applicant’s assertions, they did not have ‘personal observations of the Bolivia Office’.” LC and AB “appeared to provide evidence of friction between the Applicant and ... RV regarding the latter’s expectations from the Applicant”, but the “relationship between the Applicant and ... RV was not the subject matter of the disciplinary process or of the present proceedings—the Applicant’s engagement in prohibited conduct was, for which neither Ms. LC nor Mr. AB had any information to offer”.

j. The “unwillingness of these witnesses to engage meaningfully with the true issue at hand was exemplified by ... AB’s statements regarding the date of his written statement”. The Respondent sought to “clarify the date of the statement and would have readily accepted the innocent explanation of a typo”, but AB was “adamant that his statement was provided on 31 March 2022, i.e.,

one year before the actual date and, in fact, prior even to the issuance of the Sanction Letter”. AB was “specifically asked as to how he could be referring to the Applicant’s separation, when no such decision had been communicated to the Applicant on 31 March 2022”, but instead of “realizing his mistake regarding the date ... AB proceeded to offer various implausible justifications”. AB’s “inability to concede his mistake, even on a comparatively minor issue, demonstrates that he appeared before the Tribunal with a predetermined story in mind, which he planned to deliver irrespective of what he was being asked”, and the Tribunal “should give no weight to ... AB’s testimony”.

24. The Tribunal observes that in the contested decision, four factual allegations can be identified regarding the Applicant creating an alleged hostile work environment and abusing his authority. Generally, the Applicant is accused of being responsible for the creation this “hostile work environment” for staff members in the UNDSS office in Bolivia. (Although the exact workplace is not specified in the relevant paragraph of the contested decision, as quoted above, this must be presumed from the context). More specifically, the Applicant is also accused of (a) “making denigrating, humiliating and offensive remarks and comments with regards to [VM, BP, and AJ], (b) “showing favouritism to certain staff members” [except for VG concerning whom the charge was dropped by the USG/DMSPC], and (c) “by greeting female staff members with unwelcomed physical contact and salutations”. Finally, the Applicant has made an objection against BP for allegedly having intimidated MU as a witness before the Tribunal. All these five issues are considered under separate headings in the following segment of the present judgment.

#### The Applicant creating a hostile work environment for staff members in the UNDSS in Bolivia

25. At the outset, the Tribunal notes that the review of the Respondent’s factual allegations against the Applicant is two-fold: (a) whether the work environment in the UNDSS office in Bolivia was, as a matter of fact, hostile during the Applicant’s tenure,

and (b) if so, whether the Applicant was solely responsible for this, or if others, partly or fully, also had a role therein.

26. At the hearing, the Applicant, the Security Advisor of the United Nations in Bolivia and the manager of the UNDSS office from 2014 to 2017, testified as follows of relevance to the present case:

a. The Applicant's role was to provide leadership, operational support and oversight of the security management for the entire United Nations system in Bolivia. The Applicant had two reporting lines: (a) the designated security official in Bolivia, who also acted as his first reporting officer and the Resident Coordinator RV (his testimony is summarized below), who took on this responsibility after the second semester of 2015, and (b) the UNDSS Headquarters in New York, where LC and AB (their testimonies are summarized below) were his liaisons and supervisors.

b. When the Applicant assumed his position in the UNDSS office in Bolivia, he found an already toxic environment. The then Resident Coordinator, CG (name redacted for privacy reasons), who held office until RV took over in 2015, was aware of the situation and not satisfied with the security services provided at the time. CG approved the Applicant's action plan, which involved daily operational meetings and weekly training sessions for the UNDSS office's team.

c. RV never advised the Applicant of any staff complaints during their bilateral bi-weekly meetings or when both attended the senior management team meetings. It was only during the performance evaluation conversation that RV advised the Applicant that he would give him a poor rating due to his perceived lacking managerial skills and the ongoing issues in the UNDSS office. The Applicant reported this to the UNDSS Headquarters in New York and also filed a rebuttal against the performance evaluation. The Applicant,



however, never got a response from the rebuttal panel, but after his tenure in Bolivia, he received a promotion when he received his next two assignments.

d. RV was not interested in the security policies and procedures of the Organization, but rather showed contempt against them. RV consistently rejected the Applicant's recommendations in public, in particular in front of the senior management team, and RV even created a WhatsApp group for security purposes. Some heads of agencies told the Applicant that RV felt threatened by him due to RV's lack of experience in security.

e. Eventually, RV went to New York to undertake the UNDSS training in security, but when he returned, the conflict between them escalated. RV's resentment of him was grounded in RV's disagreements with UNDSS Headquarters.

27. VM, the then administrative assistant of the Applicant in his UNDSS office, testified as follows of relevance:

a. In general, the Applicant created a very hostile work environment characterized by fear, distrust, stress and discomfort.

b. The Applicant harassed VM with the intended aim of making her resign in order to instead hire VG. The Applicant made comments such as (i) he could not believe that it was possible for him to have a 60-year old assistant, (ii) what is VM, a former nurse, doing in charge of administrative and financial affairs of the office? (iii) VM was losing her hair, and (iv) VM's opinions were those of a grandmother. On one occasion, the Applicant had even said, "fuck you", to her.

c. VM described the Applicant as a narcissist, manipulative, insecure human being who had to be put in his place. After VM had confronted the Applicant, he realized that she could be a danger for him. The Applicant then

completely changed his attitude towards her and became very friendly and supportive.

d. The Applicant abused his authority especially towards BP, whom he always insulted in front of everyone else, mistreated and discriminated against.

28. AJ, an operations assistant in the Applicant's UNDSS office at the relevant time, testified that the UNDSS team was in unrest under the Applicant's supervision. AJ explained that the Applicant harassed and mistreated him, talked to him in an aggressive voice, and hit the table when talking to him. Eventually, the Applicant managed to push AJ out of his UNDP job. AJ explained that at the time of his letter of resignation of 19 September 2016, he had received a new UNDP contract offer with a better salary and post. It therefore made no sense for AJ to resign as he had no other job, or a plan B at hand, but he nevertheless decided to do so.

29. As relevant, BP, a local security assistant in the Applicant's UNDSS office at the material time, testified as follows to the Tribunal:

a. Before the Applicant arrived, he had a normal work relationship with the security officials at the duty station. His relationship with the Applicant was, however, very difficult, hard, and even tortuous. The Applicant liked to maintain total power over his employees and used special techniques to ensure their subjection. He held daily 3-4 hours meetings, where everyone had to talk about their work. When staff were given the floor, if someone forgot a small detail, the Applicant would harass them. So everyone had to explain about everything, which created a sense of competition where people invented accomplishments to avoid being accused of not working. It was humiliating and scornful, leaving everyone in crisis.

b. The Applicant always seized the opportunity to harass and discredit others, and BP was his main victim. The Applicant was impossible to please. BP even suffered physical abuse when the Applicant made comments on his baldness. As BP could not take it anymore, he offered to resign.

c. The Chief of the Asia-Pacific Division of UNDSS at the New York Headquarters, GC, accused BP of instigating trouble, and colleagues in the UNDSS office in Bolivia were scared of him as everyone could overhear the various interviews when he conducted them.

d. The Applicant refused to withdraw some negative reports on BP's performance, because the Applicant believed that they showed BP's progress. The Applicant also told BP not to speak up at meetings.

e. BP heard the Applicant humiliating various female colleagues. Although he did not witness this himself, he had heard that the Applicant had said "fuck you" to VM on one occasion.

f. RV took initiative to improve the work environment in the UNDSS office. RV was the only one who took interest in the matter, and he was always available to all staff and listened to them. BP and his colleagues trusted RV, for which reason the Applicant forbade them to talk to him, and the Applicant even checked security cameras to ensure their compliance.

30. The Tribunal notes that GC's 2015 "Activity Report", which was the outcome document of his mission to Bolivia, was submitted as evidence by the Applicant. From this report, it follows that BP, a local staff member, was heading the UNDSS office from 2002 to 2008 until the responsibility was handed over to an international staff member. After BP experienced a traumatic personal loss, a "competency test" launched by "the National Stress Counsellor" revealed that he had a "[n]arcissist personality". Only in one out of nine questionnaires in the UNDSS office, namely that of BP, was it found that the Applicant had harassed and abused his authority against him. Whereas BP admitted to have made "mistakes" in his work, the Applicant explained that he tended to "be a perfectionist". Among GC's various recommendations, he proposed (a) the Applicant to be "moderate" when addressing BP and demonstrate "cultural sensitivities", (b) the Applicant and BP to improve their "inter-relationship" in their

daily communications, (c) BP to recognize “his mistakes” in his work, and (d) the Applicant to dedicate more time to coach BP.

31. VF, a security operations assistant working in the Applicant’s UNDSS office, testified that, in general, the work environment in the UNDSS office in Bolivia was tense, in particular because of the issues between the Applicant and BP. The team was divided, staff were afraid of speaking up, and some felt mistreated and afraid of reprisals.

32. HA, an operations analyst working in the Resident Coordinator’s office at the time, testified that even if she did not work directly for the Applicant, they often interacted professionally. The Applicant had a strong authoritarian and military attitude. BP and AJ were afraid of the Applicant. The Applicant treated BP disrespectfully. HA saw that one time when BP was traveling on a field mission, he was instructed to report to the Applicant every 15 minutes via telephone, which was very stressful for BP.

33. The main points of RV’s testimony to the Tribunal were the following:

a. RV began his term as Resident Coordinator and Designated Security Official in Bolivia at the end of October 2015 and was there until 2019. Whereas RV had not before held either of these functions, he had previously held other senior management posts and also had other security experiences and certified training. As the Designated Security Official, RV was the Applicant’s direct supervisor and first reporting officer. Upon RV’s arrival, RV’s predecessor, his deputy and GC informed him that the work environment in the UNDSS office was difficult due to the Applicant’s behavior.

b. After assuming office, RV received complaints from BP and AJ regarding discrimination, harassment, and other inappropriate actions. RV held many meetings with BP regarding his problems with the Applicant, who conversely had issues with BP’s performance and the Applicant used psychological tests to harass BP. When AJ resigned from the Organization, he

sent RV a detailed letter in which he stated that the Applicant had mistreated him and acted unprofessionally. In response, the Applicant left a note regarding AJ in the archives of UNDP, which AJ then requested to have removed.

c. AM told RV about her sexual harassment complaint against the Applicant, which RV believed was true. RV recommended a course of action for AM under the relevant legal framework, including on protection against retaliation. RV also provided guidance to AJ and BP concerning their legal rights.

d. RV never proposed any options for informal conflict resolution to address the Applicant's problems with VM, AJ and BP. Also, RV only recalled having discussed the issues with the Applicant when he left his post at which time RV expressed his strong disappointment with the Applicant, and RV did not discuss the issues with the Applicant at the time of the various complaints. RV, however, took note of the issues in the Applicant's performance reports for 2015-16 and 2016-17 and also reported them to his UNDSS supervisors in New York.

e. As part of RV's statement to the disciplinary investigation against the Applicant, RV had provided various names to the investigators, but he did not specifically decide on who to interview and did not instruct anyone on what to say. Also, RV did not reward any staff members, who complained against the Applicant, with promotions or other favors.

f. Regarding the Applicant's 2016-17 performance assessment, RV undertook this according to regular standards and practices, but the Applicant did not sign the report. RV did not receive any feedback from UNDSS Headquarters concerning the given ratings or on the Applicant's performance. At meetings at the New York Headquarters, RV reported that the Applicant had created a hostile and complex work environment in the UNDSS office in Bolivia.

34. FD, a human resources assistant in UNDP Bolivia but not working in the UNDSS office at the relevant time, explained that AM told her about her alleged problems with the Applicant. RV then called FD and asked her to share everything AM needed to file an official complaint. FD did so. FD also suggested that VM file an official complaint, but she did not help her to prepare it. Regarding BP and AJ, FD stated that BP had told her that the Applicant had mistreated him, but at the same time, FD also knew that BP had performance issues. On one occasion, the Applicant had been very angry with FD, but some days later, he reached out to her to tell her that she had misunderstood the situation.

35. MU, who at the time worked in the Applicant's UNDSS office as a physical security custodian, confirmed that BP and AJ had a difficult relationship with the Applicant. He explained that BP occasionally spoke badly about the Applicant, whereas AJ was averse to work and always fought and argued with everyone.

36. AR, a program analyst working at the time in the Resident Coordinator's office, testified that she had close and daily work-related interactions with the Applicant although she did not work in the UNDSS office. AR explained that BP had told her that the Applicant had changed his work functions, which resulted in some issues. Also, AR heard that the work environment in the UNDSS was not pleasant.

37. LC, a security coordination officer working at the time with UNDSS in New York as the Headquarters' desk officer for Bolivia, testified of relevance that:

a. Prior to the Applicant's arrival, the work on security in the UNDSS office in Bolivia had been substandard. Upon the Applicant's arrival, he introduced various measures to improve the situation, and LC generally commended the Applicant for his work in Bolivia as well as in other places.

b. GC's mission to Bolivia revealed that BP had performance issues and that the Applicant intended to teach him and the UNDSS team relevant policies and procedures. In LC's own experience, BP also came across as unwilling to learn and reacting negatively to feedback.

c. RV did not support GC's mission and referred to it as a joke. RV even proposed that the Applicant and GC had undue friendly relations, which upset GC very much. RV, at the relevant time, only had limited experience in security matters and therefore received training thereon. It was unprofessional of RV to (a) spread rumors and consult with subordinates on the Applicant, (b) receive GC negatively, and (c) state that he would not rest until the Applicant was out of his job. Rather, RV should have handled the situation one-on-one with the Applicant, who, on the other hand, maintained a professional attitude. LC even encouraged the Applicant to complain against RV.

d. When LC was on mission to Bolivia, the Applicant was only praised by colleagues working close with him. LC never heard that the Applicant acted inappropriately towards women, and as a woman, her own experience was that the Applicant's behavior was always proper. LC explained that she was never informed about or asked to provide input to the disciplinary investigation against the Applicant.

38. AB, the then Chief of the Europe and Americas desk working in UNDSS Headquarters in New York, who also served as supervisor for the Applicant and LC, testified that when RV assumed office in Bolivia, his knowledge in security matters was very limited and he had not taken the relevant UNDSS induction training. AB disagreed with RV's negative performance assessment of the Applicant and rather found his performance to be exemplary and in the top-tier of security advisors. BP was a difficult person who, after having previously been in charge of the UNDSS office, had lost his status when an international security advisor took over his responsibilities. AB was never contacted regarding the disciplinary investigation and was surprised to learn about the subsequent termination of the Applicant's appointment.

#### Denigrating, humiliating and offensive remarks

39. At the hearing, the Applicant testified that he had never made any disparaging comments against VM, including with regard to her age, and she never showed him as

much as a hint of dissatisfaction. Rather, the Applicant praised VM on many occasions. BP, on the other hand, had performance issues and received feedback for two years. Upon the Applicant's arrival, AJ was identified as a difficult person. AJ's style was aggressive and explosive, and he had many confrontations with colleagues. AJ came to the Applicant's office several times a day for informal coaching and threatened to resign many times.

40. VF testified that the Applicant was a constructive supervisor, but he witnessed an incident with BP where the Applicant referred to BP as baldheaded, which felt like harassment and bullying. The Applicant had also referred to VM as a grandmother, and AJ told VF that the Applicant had mistreated him. At the same time, AJ had problems with VG, which sometimes turned personal.

41. BP noted that the Applicant had referred to VM as an old person, and questioning her ability to work in administration, also called her a nurse. HA also said that the Applicant had referred to VM as an old person.

42. AR testified that she knew VM very well and that they were friends. VM told AR about her difficult relationship with the Applicant. This made VM feel bad and insecure and she even broke down crying at times. For instance, the Applicant would unflatteringly refer to VM's figure and the way she did her hair. Also, the Applicant would say VM was slow, and AR directly heard the Applicant referring to VM as an elderly person.

#### Favouritism

43. From the contested decision, it follows that circumstances regarding VG were excluded from the finding of favouritism against the Applicant. Logically, this would then mean that the finding was maintained towards everyone else. It is, however, not specified in the contested decision, or the parties' submissions, who the Applicant should then have unlawfully favored.



44. Accordingly, the Tribunal finds that the Respondent has not established the factual findings on favouritism with any evidentiary standard for disciplinary and/or administrative sanctions.

Greeting female staff members with unwelcomed physical contact and salutations

45. The Applicant testified at the hearing that whereas he did not address staff with greetings like “my love” or “princess”, he could not rule out that someone may have overheard him saying this among friends at a social event. He notes that he did not comment on women and had never received any such complaints. Occasionally, he would hug or kiss a woman, but this was normal in Bolivia and no one ever objected to it. FD, AR and PA, who are all from Bolivia, confirmed that, in Bolivia, greeting one another with hugs and/or kisses and being very affectionate by using a lot of flattering and/or adoring adjectives is common. FD further explained that in order to avoid such greetings and references, one might need to explicitly state this.

46. HA stated that it was generally known that the Applicant was very affectionate with women and, at times, too much so. HA would not get close to him to avoid him hugging her. The Applicant also referred to HA as “my princess” or my “love”, but she also never told him not to do so.

47. AJ testified that he had heard the Applicant addressing women with greetings such as “my love”, “my princess”, and “beautiful”. VM said the same, also noting that the Applicant always tried to be charming towards women.

48. AR testified that, on one occasion, she told the Applicant to stop addressing her as “my love”, as only her husband was to use such reference. HA independently confirmed AR’s statement. AR, however, further explained that it was not difficult for her to reject the Applicant like this as they had a cordial relationship and he received it well. The Applicant never addressed AR in such manner again and kept a bit more distance. AR testified that she was not aware of any other female colleagues objecting to the Applicant regarding his manner of addressing them.

### Possible witness intimidation

49. In a motion for “exclusion for evidence and referral for accountability” dated 26 October 2023, the Applicant raised the issue of BP, a witness called by the Respondent, possibly having “approached and threatened” MU, a witness called by the Applicant. In an annex appended to the motion, in a written statement of MU, he described that on 24 October 2023, at a United Nations Day celebration, BP had approached him and stated that he knew that MU was to give testimony in the present case and that MU was “going to defend a criminal, thief, and stalker who tried to rape [sic] and abused two colleagues”. MU further explained that BP had told him that “[y]ou have to know that there are going to be consequences when you defend a harassing rapist”. At the hearing, MU confirmed his statements, also noting that BP had a lot of influence and could harm people. MU clarified that he had the written statement translated into English from Spanish with the assistance of Google Translate software and a translator located in front of the American Embassy in Bolivia.

50. BP explained that he had met MU when he exited a United Nations Day event on 24 October 2023. They greeted each other as they had not seen each other for a long time. Whereas BP did not know that MU had been invited to provide testimony to the Tribunal, he told him that he had received an invitation to do so. BP did this because MU had asked him about the UNDSS office and his former colleagues. BP did not tell MU that he was defending a criminal but that justice needed to be done to any criminal. Also, BP did not refer to the Applicant as “a harassing rapist” but had said that truth and justice had to be defended. BP made no threats but told MU to testify as it was time for the truth to come out. BP had not told anyone but his security advisor about his providing a witness testimony to the Dispute Tribunal as BP needed to request leave from the security advisor to do so. No one overheard the conversation between BP and MU.

51. The Tribunal notes that from the contradictory testimonies of MU and BP, it is not possible to ascertain what actually transpired between the two persons on 24 October 2023. At the same time, the Tribunal notes that MU did not appear constrained

when providing his testimony, which, as follows from the present Judgment, does not have a significant impact on the adjudication of the present case.

52. The Tribunal, nevertheless, has a duty to ensure the safety and security of witnesses appearing before it. Rather than formally referring the issue to the Secretary-General for possible action to enforce accountability under art. 10.8 of the Statute of the Dispute Tribunal, by this Judgment, the Tribunal instead puts the Administration on notice of the issue. Under the given circumstances, the Tribunal finds that the Administration is better placed than itself to decide on any possible further action under the relevant legal framework.

The facts established after the judicial review

53. Based on the witness testimonies before the Tribunal and the written documentation on record, including the witness statements provided to the OAI investigation and the investigation report, the Tribunal finds that the only factual allegations, which the Respondent has established with the requisite evidentiary burden (clear and convincing for termination decisions and, otherwise, the preponderance of evidence) are:

- a. The UNDSS office environment was hostile during the Applicant's tenure. Based on the witness testimonies, this cannot, however, solely be attributed to the Applicant, but was also the result of a divided team where, notwithstanding the Applicant's behavior and actions, some individual team members had personal and/or professional conflicts and issues. Also, it follows that already when the Applicant assumed office in 2014, different problems existed in the UNDSS office, in particular with BP. In 2015, when RV took office as the Designated Security Official and the Applicant's supervisor in Bolivia, RV knew of the contentious situation but did not appreciate how the Applicant behaved. Despite meeting with the Applicant on a regular basis, RV did not address the problems with him or intended to resolve them amicably.

Instead, RV downgraded the Applicant's performance rating and guided and supported AM in filing a formal misconduct complaint against the Applicant.

b. The work relationship between the Applicant, on one side, and AJ and BP, on the other side, was unfriendly, if not even antagonistic. From the testimonies, it follows that this was, in part, a reflection of the Applicant's perception of BP's suboptimal work performance, the Applicant's managerial style and attitude, and AJ's and BP's general dissatisfaction with their roles and status in the UNDSS office after the Applicant assumed his functions. Also, conflicting personalities added to the tensions.

c. The Applicant made inappropriate comments about VM's age and professional skills, but stopped doing so as soon as she confronted him therewith.

d. The Applicant greeted some female colleagues in flattering and affectionate ways. Whereas it followed from some testimonies that the Applicant's greetings were not always welcome, they also revealed that such behavior was considered socially acceptable and normal in the cultural context, and when asked to stop, the Applicant immediately did so.

*Whether the established facts amount to misconduct and the sanction is proportionate to the offence*

54. The Applicant essentially contends that the established facts did not amount to misconduct and that the sanction was "entirely disproportionate" given "the serious implications of being labeled as a sexual harasser", including stating that his name is included in "Clear Check which excludes him from any further [United Nations] work". He further contends that in "the absence of credible and proven sexual harassment charges, the remaining allegations appear to be at most a criticism of management style by disgruntled staff rather than any acts of misconduct".

55. The Respondent's contentions on misconduct and proportionality may be summarized as follows (references to footnotes omitted):

a. By "making unwelcome, offensive and humiliating remarks and gestures towards [AM], including by commenting on her underwear intimating an intention to kiss her, touching her waist, and suggesting eating her leg [the Applicant] failed to respect [AM's] dignity and abused his authority over her". His "remarks and gestures were sexually charged and involved close physical contact and/or intimacy, which was not welcome or appropriate". His "conduct constituted sexual harassment, and constituted a violation of Staff Regulation 1.2(a), Staff Rule 1.2(f), and Section 16 of the UNDP HR User Guide on Workplace Harassment and Abuse of Authority".

b. By "greeting female colleagues with unwelcome salutations and physical contact, and by making unwelcome, offensive, threatening, and aggressive remarks toward [VM, BP, and AJ], the Applicant created a hostile work environment and abused his authority". The Applicant's "conduct was unwelcomed by the staff members concerned, who had informed him that they felt uncomfortable, offended, and/or threatened by it". Such "feelings were reasonable, considering the content of [the Applicant's] remarks and gestures towards each staff member and his position of authority over them". The Applicant's "conduct constituted workplace harassment, and violated Staff Regulation 1.2(a), Staff Rule 1.2(f), and Section 16 of the UNDP HR User Guide on Workplace Harassment and Abuse of Authority".

c. The Applicant's "conduct, in respect of [AM] and other staff members, which led to at least two resignations, constitutes a failure to uphold the highest standards of efficiency, competence and integrity, in violation of Staff Regulation 1.2(b).

d. The "sanction of separation from service with compensation in lieu of notice and without termination indemnity, in accordance with Staff Rule

10.2(a)(viii), is proportionate to Applicant’s misconduct and consistent with the Organization’s past practice in similar matters”. Applicable “aggravating and mitigating factors were also considered”.

e. The “sanction imposed on the Applicant is within the range of reasonable disciplinary options available to the Secretary-General for the particular kinds of misconduct and is consistent with [the Appeals Tribunal’s] jurisprudence on similar matters”, referring to *Szvetko* 2023-UNAT-1311 and *Reiterer* 2023-UNAT-1341.

56. The Tribunal notes that in the contested decision, the USG/DMSPC determined that the Applicant’s “actions constituted misconduct in violation of Staff Regulations 1.2(a) and 1.2(b) and Staff Rule 1.2(f), as well as Section 3, paragraphs 23 and 24(c) of the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct [“the UNDP Legal Framework”], read in conjunction with Sections 1, 2, 5, 6, and 16 of the UNDP HR User Guide on Workplace Harassment and Abuse of Authority [“the UNDP HR User Guide”]”.

57. Staff regulations 1.2(a) and (b) provides that,

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

58. Staff rule 1.2(f) prohibits “[a]ny form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work”.

59. Paragraphs 23 and 24(c) of the UNDP Legal Framework of January 2010, which was applicable at the time of the Applicant's alleged misconduct, provides as follows:

23. Misconduct is defined in Staff Rule 10.1 as "failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant." Such a failure could be deliberate (intentional or willful act), or result from an extreme or aggravated failure to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk (gross negligence) or from a complete disregard of a risk which is likely to cause harm (recklessness).

...

24. Misconduct may include, but is not limited to, the following categories whether willful, reckless or grossly negligent: ... (c) ... workplace harassment"

60. Sections 1, 2 and 16 of the UNDP HR User Guide of January 2010 (secs. 5 and 6 are not mentioned as they concern sexual harassment), also as applicable at the relevant time, state that (emphasis in original omitted):

1. UNDP does not tolerate harassment and/or abuse of authority at the workplace or in connection with work in any form. Such behaviour or conduct is contrary to the Charter of the United Nations, the Staff Rules and to the Standards of Conduct for the International Civil Service. Staff Rule 1.2 (e) provides that "any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited." Staff members and non-staff personnel exhibiting such behaviour or conduct may be subject to administrative, disciplinary or contractual measures, as appropriate.

2. Workplace harassment is any improper and unwelcome conduct by a staff member or non-staff personnel against another staff member or non-staff personnel or a group thereof that has or that might reasonably be expected or be perceived to cause offence or humiliation to another.

...

16. Managers and Supervisors must:

a) Create a harmonious working environment, free of intimidation, hostility, offence and any form of harassment and abuse of authority. In order to achieve such an environment, managers and supervisors must act as role models by upholding only the highest standards of conduct;

b) Communicate the policy on workplace harassment and abuse of authority to all staff members, ensure that staff take the compulsory on-line Training and Certification Programme on the Prevention of Harassment and Abuse of Authority, and the Training Course on Ethics, and act as a resource for staff members and non-staff personnel;

c) Ensure that staff and non-staff personnel do not engage in workplace harassment or abuse of authority. Special attention needs to be given to staff members supervising others.

d) Take measures consistent with the present policy should they witness any acts of workplace harassment or abuse of authority;

e) Ensure that incidents of workplace harassment or abuse of authority are promptly addressed. In such cases, managers and supervisors must demonstrate fairness, impartiality, and be free from intimidation or favouritism;

f) Ensure that all discussion, communications and actions are handled with extreme sensitivity and utmost confidentiality; and

g) Ensure that no staff is retaliated against.

61. The question is if, based on the facts established above, the Applicant's actions and behavior amounted to misconduct in accordance with the relevant legal framework.

62. From the established facts it follows that the Applicant was not solely responsible for the hostile work environment in UNDSS's office in Bolivia and the toxic relationships with his subordinates, BP, AJ and VM. As shown by the testimonies of the Applicant, VM, BP, AJ, LC, AB and GC's activity report, different strong personalities worked in the office, and some were involved in interpersonal conflicts and/or had experienced professional disappointments. This also negatively influenced the work environment.

63. In this context, the Tribunal finds that the Applicant's initiatives with daily operational meetings and weekly training sessions were only appropriate, also because,



as evidenced by the Applicant and LC's testimonies, the UNDSS office in Bolivia was underperforming at the time when the Applicant began his tenure. The Applicant's managerial style was, however, also heavy-handed, in particular towards BP, and he occasionally used improper and offensive language towards both BP and VM.

64. When RV assumed office as the UNDP Resident Coordinator and became the Applicant's manager, he admitted that he was aware of the problems in the UNDSS office. Contrary to secs. 16(c), (d) and (e) of the UNDP HR User Guide, RV did, nevertheless, not promptly follow-up in order to resolve the issues with the Applicant as he was otherwise required to do. In fact, according to RV's own testimony, despite having frequent meetings with the Applicant, he never raised any issue about this with him, and it was only at the performance appraisal discussion that RV advised the Applicant that he would give him a substandard performance rating due to his alleged managerial deficiencies. Instead, RV encouraged, at least AM, to file a formal complaint against the Applicant.

65. The Tribunal finds that the negative situation in the UNDSS office in Bolivia was of a nature that would, from the very beginning, have benefitted from being addressed through the outlined informal conflict resolution mechanisms, which is also advocated in secs. 23 to 36 of the UNDP HR User Guide.

66. The Tribunal notes that whereas moving directly to the formal process is optional for the offended person under sec. 37 of the UNDP HR User Guide, RV had a duty as the Applicant's manager to ensure a harmonious working environment, communicate the policy on workplace harassment and abuse of authority to him and also give him special attention as a supervisor according to secs. 16(a), (b) and (c). RV, however, did not do so even if various informal options were available to him in accordance with sec. 29, in particular in terms of "Approaching the alleged offender" and "Consulting the Office of the Ombudsman that is also offering professional mediation".

67. Rather, when upon the agreement of the UNDP Ombudsman and UNDSS, GC then came on mission from the New York Headquarters to amicably resolve the difficult work relationship between the Applicant and BP, LC testified that RV had mocked the mission and accused GC of being biased in favour of the Applicant. Also, it does not follow from the facts that RV did anything to ensure that GC's recommendations were followed up on.

68. In addition, no one in UNDSS's office in Bolivia, other than AM, actually filed a formal complaint against the Applicant for creating a hostile work environment or abuse of authority. Instead, these charges only arose out of the OAI investigation into AM's sexual harassment complaint. In the same vein, regarding the Applicant's greetings to some female colleagues, they did not, in and by themselves, constitute any wrongdoing—such behavior was apparently culturally normal in Bolivia and he stopped the moment he was requested to do so (in line herewith, see the Appeals Tribunal in AAN 2023-UNAT-1366 on considering the cultural appropriateness and context).

69. In conclusion, the Tribunal finds that whereas the Applicant's actions and behavior towards, in particular BP but also VM, was not up to the standard to be expected of a supervisor working for the United Nations, they did not amount to misconduct in the given circumstances. RV should instead, at least, have intended to resolve problems within the office environment informally and consistently addressed them as performance issues with the Applicant during the entire performance cycle, instead of only doing so in his final performance appraisal and escalating the situation into a disciplinary matter. In essence, as also follows from the UNDP HR User Guide, the job of a United Nations senior official is to build bridges and not to dig trenches in the office environment.

70. Since the Tribunal finds that the Applicant did not commit misconduct, it is not necessary for the Tribunal to further consider the proportionality of the disciplinary sanction.

*Was the Respondent afforded due process by the Tribunal?*

71. In the Respondent's closing statement, he submits that he "regretfully notes that he has not been afforded a fair and equal opportunity to present his case to the Tribunal, in comparison to the Applicant".

72. The Respondent contends that the Tribunal "has afforded the Applicant more opportunities to address the Tribunal than the Respondent". Not only "was the Applicant allowed to file a Rejoinder, which the Tribunal did not permit the Respondent to address, the Applicant is now given one additional opportunity to further comment on the Respondent's closing submissions". This "creates an uneven playing field for the Respondent, who not only has the onus to prove the lawfulness of the contested decision but is also being confronted with arguments to which he is not even allowed to respond, in violation of the principle of *audi alteram partem*".

73. The Tribunal observes that the question of how the parties are to file written closing statements is nowhere dealt with in the statutory framework governing the proceedings of the Dispute Tribunal, namely its Statute, Rules of Procedure and Practice Directions, or in the Appeals Tribunal's jurisprudence.

74. Overall, the Appeals Tribunal has affirmed that the Dispute Tribunal is "an inquisitorial and not a solely adversarial tribunal" (see *AAK 2023-UNAT-1348*, para. 71). Also, the Appeals Tribunal has consistently reaffirmed that the Dispute Tribunal has "wide case management powers" (see *Farhadi 2022-UNAT*, para. 43) as it "is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to do justice to the parties" (see *Hussein 2022-UNAT-1283*, para. 38).

75. This "wide margin of discretion in all matters relating to case management" (*ibid.*) is also reflected in art. 19 of its Rules of Procedure by which the "Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue *any* order or give *any* direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties" (emphasis added). In addition, art. 36 of its Rules of Procedure provides that "[a]ll matters that

are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute”.

76. In the present case, the parties filed their closing statements in accordance with Order No. 130 (NY/2023) dated 17 November 2023. A three-step approach was applied during which neither of them was allowed to introduce any new pleadings or evidence: (a) the Applicant was first to summarize his submissions in a seven-page closing statement, (b) the Respondent was then to respond to the Applicant’s closing statement in a seven-page closing statement, and (c) the Applicant was eventually to provide his final observations, if any, to the Respondent’s closing statement in a two-page submission.

77. The Tribunal notes that since the onset of the current internal justice system in July 2009, this three-step approach has been a standard practice among various Judges in many cases before the Dispute Tribunal. To this Tribunal’s knowledge, the Respondent has never objected to the practice and is quite surprised that he does so now. In this Tribunal’s view, by allowing the Applicant the final word (note, this filing was only two pages and strictly limited to be a response to the Respondent’s closing statement), there is no issue in terms of the principle of *audi alteram partem*. Rather, in litigation, if the moving party so desires, he or she is typically allowed such final word. When closing statements are provided orally at the hearing, the three-step approach is the only applicable method as the parties cannot speak at the same time.

78. Also, the Respondent only filed his objection against the Applicant’s final observations as part of his closing statement even if Counsel for the Respondent had ample time (more than a month) from the issuance of Order No. 130 (NY/2023) on 17 November 2023 to file a separate motion to object against the three-step approach (his closing statement was only due on 18 December 2023). Without prior leave from the Tribunal, in his closing statement, the Respondent instead exceeded the seven-page limit with three additional pages (it was 10 pages, not counting the front page).

79. The Tribunal further notes that in the Applicant's final observations, aside from raising the issue of costs, which is dealt with further below, his submissions merely responded to the Respondent's closing statement. Subsequently, the Respondent has filed no objection against the Applicant's final observations in accordance with art. 6 of Practice Direction No. 5.

80. Regarding the Respondent's objection against the Applicant's rejoinder dated 6 April 2023, the Tribunal notes that his Counsel only objected against not having had the opportunity to comment thereon in his 18 December 2023 closing statement. This is more than eight months after the Applicant filed the relevant rejoinder. Subsequent to this rejoinder, the case underwent extensive case management during which the Respondent could have made such request but never did so. The Tribunal, once again, also recalls art. 6 of Practice Direction No. 5 on filing of motions and responses and the five working day deadline, if not otherwise ordered by the Tribunal, to respond to an opponent party's written submission.

81. Accordingly, the Tribunal rejects all the Respondent's claims regarding not being offered the same writing space as the Applicant in the present case.

82. The Respondent further submits that the Tribunal "has already pronounced publicly, in a very critical manner towards the Respondent, on the issue of the timeliness of informing the Tribunal of the requirement for interpretation for the Respondent's witnesses, which the Tribunal considered 'belated'". The Respondent has "already addressed this issue of timeliness, by means of his 18 October 2023 submission in Compliance with Order No. 104, whereby the Tribunal's own extensive references in three prior Orders (Nos. 56, 78, and 70) to the oral hearing as possible, but not yet confirmed, was analyzed". The Respondent notes that the Tribunal "did not retract its public and undue admonishment of the Respondent, either by a subsequent Order or by a pronouncement during the oral proceedings".

83. The Tribunal observes that Counsel for the Respondent should be aware that the courtroom has no language interpretation facilities, and if a case requires

interpretation, the Dispute Tribunal therefore needs to reserve a conference room in the main Secretariat building and also request the assistance of interpreters and technicians, who are all unassociated with the New York Registry.

84. Already on 11 August 2023, Counsel for the Applicant requested a hearing to be held and also requested Spanish-English interpretation of MU's testimony. In the subsequent Order No. 078 (NY/2023) dated 6 September 2023, the Tribunal ordered this hearing to be held from 6 to 10 November 2024, during the busy time period of the sessions of the Committees of the General Assembly, which use the same conference rooms, interpreters and technicians as those available to the Tribunal.

85. However, only on 6 October 2023, more than a month later and just a month before the hearing, did Counsel for the Respondent request Spanish-English interpretation of the testimonies of eight of the Respondent's witnesses, whom the Tribunal had otherwise scheduled to provide testimonies without interpretation over three full days in Order No. 090 (NY/2023) dated 22 September 2023. Counsel for the Respondent provided no explanation for why this request was submitted so late even if the need for interpretation should have been evident already when proposing the relevant witnesses in the submission dated 11 August 2023.

86. As expected, in response the Respondent's interpretation requests of 6 October 2023, the requisite interpretation facilities were no longer fully available due to the work of the General Assembly's Committees. In Order No. 104 (NY/2023) dated 16 October 2023, the Tribunal therefore had to amend the tentative agenda for the hearing, as compared to the previous one set out in Order No. 090 (NY/2023). As a result, the Tribunal had to shorten the time available for (a) the parties to hear the witnesses who required interpretation, and (b) the technicians to connect the witnesses to the hearing and, from a technical point of view, ensure that their testimonies were appropriately interpreted. In Order No. 104 (NY/2023), para. 6, the Tribunal therefore stated that:

... In response to the belated request of Counsel for the Respondent for Spanish-English interpretation of all his eight witnesses, the Tribunal has been informed that the requested interpretation can only

be offered in two-hour slots in the morning and afternoon in Conference Room 5, located in the Secretariat building. No conference room, however, is available on Wednesday, 8 November 2023 in the afternoon.

87. The Tribunal, in no possible manner, used the word “belated” to publicly express in “very critical manner” any “admonishment” of Counsel for the Respondent, as stated in his closing statement. Rather, it was an indication to Counsel for the Respondent that, for practical and logistical reasons, the Tribunal would have preferred if the request had been made earlier in the proceedings. Further, the Tribunal notes that neither party subsequently objected to any of the amendments to the hearing schedule made in Order No. 104 (NY/2023).

88. At the hearing, recognizing the impact of the amended hearing schedule, Counsel for the Respondent also requested some witnesses to keep their testimonies short due to the limited time available. Also, the assisting technicians experienced various difficulties with connecting witnesses with the interpretation services and could not connect them all in time.

89. Consequently, the Tribunal therefore sees no reason to apologize for the use of the word “belated” in Order No. 104 (NY/2023). For future references, it rather encourages Counsel for the Respondent to submit any request for interpretation as early as possible in order to avoid schedule changes and technical difficulties.

90. The Respondent argues that “at the very beginning of the oral proceedings, the Tribunal advised both parties that it would not entertain any objections, unless exceptional circumstances warranted it”. The Tribunal “did not define what would be such an exceptional circumstance”, and “[n]o objections were raised by either side”. The “result of this practice was that irrelevant matters were discussed before the Tribunal, such as the alleged animosity between the Applicant and ... RV, and the non-investigation of the Applicant’s complaint against ... RV”. The Respondent notes that “these matters were discussed at length, even though the Tribunal had already held, in Order No. 56 (NY/2023) that ‘the contested decision is the Applicant’s ‘separation

from service” and that the issues relating to the Applicant’s complaint against ... RV were ‘not under judicial review in the present case’”.

91. The Tribunal observes that in art. 17.5 of its Rules of Procedure is stated that, “Any party *may* object to the testimony of a given witness ... stating reasons for such objection. The Dispute Tribunal shall decide on the matter. Its decision shall be final” (emphasis added). The use of “may” indicates that the right to object is not absolute. Rather, the Tribunal can, at its own discretion, decide how to best conduct the witness questioning for “the fair and expeditious disposal of the case” and to do “justice to the parties” as per art. 19 of the Rules of Procedure (as quoted in the above).

92. It is further noted nowhere in the jurisprudence of the Appeals Tribunal is a party granted an unconditional right to state an objection to an opponent party’s question to a witness during a hearing. This makes sense as the need for objecting against certain questions is of less importance before the Dispute Tribunal than it would be in cases decided by laymen juries (as opposed to professional and experienced Judges) conducted before an adversarial, and not an inquisitorial, court of law.

93. In the present case, with reference to its above findings, the Tribunal instructed the parties that due to the time constraints caused by the need to shorten the witness testimonies requiring Spanish/English interpretation, objections would only be allowed in exceptional circumstances. The parties were therefore not forbidden from stating objections, but guided to limit any such objections to the most crucial issues.

94. The Tribunal further notes that the questions regarding the relationship between the Applicant and RV, against which the Respondent would have liked to object, were indeed relevant to the determination of the present case. On the other hand, the Tribunal also notes that Counsel for the Respondent posed various hypothetical questions to, for instance, MU and AB, which, in a common law tradition, could have been considered objectionable, but which were, nevertheless, allowed by the Tribunal.



95. In conclusion, the Tribunal rejects Counsel for the Respondent's criticism of the alleged limited opportunity to object against questions posed by the Applicant's Counsel to the witnesses providing testimony at the hearing.

96. The Respondent, finally, avers that the Tribunal had "offered the parties the possibility of adopting the witnesses' written statements as the examination-in-chief of the witness concerned". The Respondent "never indicated a wish to adopt the witnesses' statements to OAI as their examination-in-chief". In contrast, "in his 11 August 2023 submission, the Applicant stated: 'The attached witness statement is proposed for adoption as the examination-in-chief of ... [MU] ...'". Despite "having adopted MU's written statement as his examination-in-chief, the Applicant was nevertheless allowed to also lead an oral examination-in-chief of ... MU". Given the Tribunal's "instructions prohibiting any objections, the Respondent had no means of reaction at the time of ... MU's testimony". However, "given that ... MU was a brand-new witness, who the Respondent had never deposed before, allowing the Applicant to lead him in oral examination, in addition to his stated adoption of the written statement as the examination-in-chief, meant that the Respondent was given unequal opportunity to engage with ... MU". Since "the Applicant had already adopted the written statement as ... MU's examination-in-chief, all the available time for his oral testimony should have been allocated to the Respondent".

97. The Tribunal observes that Counsel for the Applicant did not propose MU's written statement to be accepted as his examination-in-chief but instead heard MU in direct examination. This approach was proposed by the Tribunal in Order No. 078 (NY/2023) to remedy the concerns of the Respondent regarding the authenticity of MU's written statement, as stated in the Respondent's 11 September 2023 submission. Thereafter, Counsel for the Respondent made no further objections regarding MU's testimony before the closing statement.

98. The Tribunal further notes that even if Counsel for the Respondent had not questioned MU before the hearing, which in and by itself does not hinder the Applicant from calling him as witness in direct examination, his written statement actually

provided the Respondent with a useful indication of what MU would likely testify before the Tribunal. The written statement therefore worked in Counsel for Respondent's favour in that it provided Counsel with the possibility of preparing the cross-examination before the hearing.

99. Accordingly, the Tribunal rejects Counsel for the Respondent's objections against MU's written statement and witness testimony.

*Remedies and costs*

100. In light of the Tribunal's findings above, the parties will be allowed to file updated submissions on the question of remedies and costs as claimed by the Applicant. The Tribunal will issue the relevant instructions in a separate written Order in due course.

**Conclusion**

101. The application is granted on liability. A written Order is to follow on the parties' further submissions on remedies and costs.

*(Signed)*

Judge Joelle Adda

Dated this 26<sup>th</sup> day of February 2024

Entered in the Register on this 26<sup>th</sup> day of February 2024

*(Signed)*

Isaac Endeley, Registrar, New York