

Background

1. On 28 April 2020, the Applicant, Representative, South Sudan Country Office
filed

14. motion on 9 June 2020 asserting that no justification was provided for an additional filing, which is not foreseen in the UNDT Rules of Procedure.

15. On 5 August 2020, the Applicant filed another motion requesting for anonymity in the judgment on the merits of this case on the grounds that the nature of the alleged misconduct is very sensitive and, if revealed, could cause greater harm to his career, reputation, and emotional and mental health.

16. The parties filed their closing statements on 30 April 2021.

17. additional evidence from the record. The Applicant filed a response to the said motion on 4 May 2021.

Considerations

Preliminary motions

a. Applicant's request for anonymity

Legal framework

18.

Procedure provide that the judgments of the Dispute Tribunal shall protect personal data and shall be made available by the Registry of the Dispute s27>2100aCigi2.(i)18(s)9(put)-21(e)4()-Bo

whether or not the evidence lacks probative value and whether it is relevant to the facts in issue.

24. The proposed evidence (especially email messages) were not declared in time to allow the Investigators to probe, test and corroborate it (for example by putting it to relevant witnesses to explain, accept, contradict or deny it). The proposed evidence therefore remains as mere assertions which come as an afterthought by the Applicant. Worse still is the fact that it was not considered by the decision-maker in arriving at the impugned decision.

25. It was moreover not within the scope of (NBI/2020) for the Applicant to adduce additional evidence. The proposed evidence is irrelevant and not probative of the issues before the Tribunal concerning the lawfulness of the contested decision. The submission that it is common practice to allow the parties to submit evidence along with their pleadings is not backed by any legal authority. The application to allow the evidence is rejected.

Case No.

allegations.

31. Measured along the parameters of s. EB and all the witnesses who testified to the investigators about the Applicant s personality and conduct in the work place (for example, that Ms. EB had been shy but became confident on account of the Applicant s frequent public compliments to her, also that he offered vital assistance and re-assurance to her when she was preparing to join the institution, further that her first impression of him was that he was dynamic, he was saving the world and he was a paternal figure who she looked up to), the Applicant was **probably** possibility that he committed the breaches which formed the basis for the impugned decision.

Incidents in London

32. was that shortly after she was Office where the Applicant was the head of office, the Applicant **pressured** her to go use [she] felt weird going she lied to him that she had a class the following morning).

33. employee which was not meant as anything more than a **friendly** gesture must fail on the basis that Ms. EB was certainly not his **friend** at that point in time. Before their interaction in London, their last relationship had been that of interviewer/interviewee. If the Applicant is ascribing his one-sided **friendship** with Ms. EB to the fact that soon after he had interviewed her he offered her a job, then that points to an even more serious problem.

34. It is noteworthy that he was **dynamicö, õso coolö and he is õsaving the worldö**, was obviously from a , the aspects of their conversation she recalls were about life and work in Bangui where she had been posted.

35. In these circumstances, the Applicant s assertion that as two adults, they were free to go their own ways, and that the Applicant did not threaten reprisal or anger if she had refused his invitation misses the point that Applicant was the head of the office to which Ms. EB had just been hired as a consultant. In her mind therefore, Ms. EB was interacting with her supervisor. He did not need to directly threaten reprisal or anger in order to exert pressure on her. It was reasonable for Ms. EB to feel pressured to go along with his request.

36. Since the Applicant has not denied that this incident took place¹⁷ but merely there obviously existed power imbalance between them by virtue of their relationship, the Tribunal accepts Ms. and that she felt weird going clubbing with the head of UNICEF, and finds that the facts supporting the allegation that the Applicant pressured Ms. EB to go clubbing in London were established by clear and convincing evidence.

Incidents in the Central African Republic (“CAR”)

37. It was in evidence that around July 2007, at a restaurant called *Relais des Chasse* in Bangui, the Applicant pressured Ms. EB to drink alcohol, and after dinner at the same restaurant, he ignored her requests to take her home but instead took her to his home where he insisted to take a shower, and then returned to Ms. EB wearing her once on her lips before she pushed him away.¹⁸ He then commented that she was so uptight.

¹⁷ Application, section VIII, para. 2. See also page 17, paras. 80-82 of Annex R3 to the reply.

¹⁸ Pages 2 and 3 of Annex R1.1 to the reply, paras. 7 – 10.

38. While the Applicant accepted that it was possible that he invited Ms. EB for a drink¹⁹ he maintained that he did not remember any of the events Ms. EB alluded to

42. The Tribunal finds that the facts supporting the allegation that the Applicant sexually harassed Ms. EB in the Central African Republic have been established by clear and convincing evidence.

Incidents in Sierra Leone

43. It is in evidence that in 2008, the Applicant asked Ms. EB to visit his home and help babysit his daughter. While at his home, the Applicant asked Ms. EB if she declined. The Applicant proceeded to snort cocaine in front her.²⁴

44. The Applicant maintained that he had no recollection of such event.²⁵ Again, the fact that he could not recollect the occurrence of this event does not mean that it did not happen. He points to the impossibility of occurrence of the incident given that even to Ms. -time nanny and so he could not have asked Ms. EB to go and babysit his child.

45.

the home after being there for less than an hour.

47. The assertion that it was unlikely that Ms. EB would go to the Applicant's home given her evidence of a previous negative incident with him²⁸ is not only speculative but also

distance from the Applicant in Sierra Leone and that when she went to his house, she

the assertion does not engage with the specific evidence from Ms. EB that her relationship with the Applicant had improved and that she went because, at the time, the Applicant had told her, and she had believed, that he required assistance babysitting his daughter.²⁹

48. The Tribunal believes Ms.

supporting the allegation that the Applicant engaged in unwelcome behavior towards Ms. EB in Sierra Leone have been established by clear and convincing evidence.

Incidents in New York

49. The Applicant did not contest the evidence that in June 2011 Ms. EB met him in New York and he invited her for drinks and dinner. At the end of the evening he

her apartment with other roommates, and had no spare bed, he asked to share her bed with her and swore that he would not do anything. The Applicant argued with Ms. EB until she hailed a taxi to take him to his hotel. He argues that his conduct did not amount to sexual harassment.³⁰

50. There can be no doubt that asking Ms. EB to allow him to share her bed with him even though he was staying at a hotel, constituted a sexual advance. The fact that the Applicant's advances were unwelcome was obvious given that Ms. EB even hailed a taxi to take him to his hotel. Ms. EB had repeatedly rejected the advances

²⁸ See pages 21-22, paras. 102-109 of Annex 3 to the reply.

²⁹ Annex R/1.1 of the reply, Statement of Ms. EB, signed 16 October 2018, pages 4-5, paras. 15-17.

³⁰ Application, Section VIII, para. 5; Annex R1.1 of the reply, Transcript of interview with the Applicant, 14 November 2018, page 195, lines 2650-2657.

58. It is noteworthy that even then, VO1 clearly came out to say that it was the only time in her life she engaged in the conduct, and that she had never tried drugs before in her life. She also said that she did not know whether the Applicant used drugs to force her to have sex with him, but she knows that the set up in a way was wrong, because he had authority. Also, that after taking drugs she was not herself, she felt helpless, and that these were mind altering substances. This shows that she was not completely blind to the fact that the Applicant abused authority, and to the possibility that he manipulated her and introduced her to drugs in order to have sexual intercourse with her.

59. Suffice it to say the facts she presents indeed disclose manipulation, sexual abuse and harassment and abuse of authority bordering on coercion, and justify the Respondent's portrayal of the Applicant as a sexual predator.

60.

67. The charge against the Applicant was that after OIAI commenced investigations into the allegations against him but before he was notified, he discussed the investigation with Ms. AG. He informed her that he was reprimanded

their relationship started and his visit to Cologne, Germany. In addition, before he was notified of the investigations by OIAI, he was in contact with at least four individuals with whom OIAI interacted.

68. The Tribunal notes that the Applicant admitted the above facts³⁶ and stated that Ms. AG contacted him via messages on WhatsApp stating that she had been asked to speak to investigators about him. He further stated that he had a phone call with Ms. AG and informed her that he had told UNICEF that they had been in a consensual relationship and that he had been reprimanded for it. The Applicant further admitted that he told Ms. AG that it was important for her to tell the investigators what had happened and not to say that they were not in a relationship.

69. The Tribunal finds that the facts relating to the allegation that the Applicant inappropriately conducted himself when he interfered with the OIAI investigation have been established by clear and convincing evidence.

Whether the facts relating to the allegation that the Applicant inappropriately conducted himself when he accessed pornographic material on a UNICEF device have been established by clear and convincing evidence.

70. It was alleged that the Applicant viewed pornographic material on one of the mobile telephones UNICEF had assigned to hi

alleged activity took place during a very narrow window, indicating an anomaly in usage, and that the forensic team could not establish the identity of the user, also that the Applicant had had some difficulty with his phone.

72. He also asserts that the 18 November 2019 Supplemental Digital Forensic Report³⁷ found that there were hits and sites not attributed to him, and his own forensic analysis showed redirected searches through Kyrgyzstan.

73. The Applicant's assertions, however, must fail. That the phone which was used was his UNICEF-assigned phone was not contested, and there is nothing on the record to suggest that anyone other than him had access to it, nor did he claim this.

74. Secondly, the Supplemental Forensic Report states that the browsing of

Case No. UNDT/NBI/2020/031

Judgment No.: UNDT/2021/065

conflicted. It was a violation of staff regulation 1.2(m), staff rule 1.2(q) and section 23 of the SCICS.

84. The Applicant contention that his relationship with AG formed the basis of an earlier reprimand has already been found to be factually incorrect (paragraph 65 above).

85. The Applicant interference with the OIAI investigation was in violation of staff rule 1.2(g), and by accessing pornographic material on the mobile phone issued to him by UNICEF, the Applicant failed to use UNICEF property for official purposes only, in violation of staff rule 1.2(g).

c. Whether the sanction is proportionate to the offence

86. The legal principle is that the proportionality principle limits discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.⁴⁰

87. Other relevant principles are that; the Secretary-General has wide discretion in determining the appropriate disciplinary measure, due deference should be shown to the Secretary-

illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity that the judicial review would conclude in its unlawfulness and change the consequence.⁴²

89. The Applicant

placing his details in the Screening Database is disproportionate to the offence is, *inter-alia*, based on the erroneous argument that the misconduct for which he was summarily dismissed was not proven through clear and convincing evidence. Considering the Tribunal's finding that the facts relating to each allegation against the Applicant has been established by clear and convincing evidence, the Applicant's assertion must fail.

90.

warrants the sanction of dismissal from service with respect to the sexual harassment alone. The evidence that he might have introduced mind altering substances to VO1 with the aim of having sexual intercourse with her is particularly disturbing. There is evidence that some mitigating factors

UNICEF and his good past performance were considered, but the several aggravating factors including that he engaged in sexual harassment of at least two individuals and that he was a senior UNICEF official whose actions undermined the trust and confidence placed in him, were such that the most severe sanction was warranted. The Tribunal finds that the disciplinary sanction was proportionate to the conduct.

d. Whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

91. The Tribunal is cognisant of the requirement that an internal disciplinary process complies with the principles of fairness and natural justice.⁴³

92. The Applicant maintains that there were due process violations which resulted

⁴² *Portillo Moya* UNAT-2015-523; *Aqel* UNAT-2010-040; *Konaté* UNAT-2013-334.

⁴³ *Mmata* UNDT/2010/053.

Case No. UNDT/NBI/2020/031

Judgment No.: UNDT/2021/065

97. In any event, the fact that the Investigators provided a detailed File Note of the circumstances in which the computer was seized, noting that they had tried several times to meet with the Applicant to inform him of the investigation earlier⁴⁵ is evidence that he suffered no prejudice at all.

98. The explanation that the possibility of interference with e to disclose the investigation before seizing the Applicant with

Case No. UNDT/NBI/2020/031

Judgment No