

Case No.:

## **Introduction**

1. The Applicant previously served as a Senior Protection Officer with the Office of the United Nations High Commissioner for Refugees (“UNHCR”). He held a fixed-term appointment at the P-4 level and was based in Aru, Democratic Republic of Congo.
2. On 16 October 2023, he filed an application contesting the Respondent’s 17 August 2023 decision to enter his name into the ClearCheck database.
3. On 13 August 2024, the Respondent filed a reply
4. During the Case Management Discussion held on 3 September 2024, the parties said that there was no need for any additional evidence and no need for a hearing to take any testimony. Accordingly, the Tribunal instructed the Applicant and the Respondent to file their closing submissions by 18 and 25 September 2024, which they did.
5. Thus, the case is ripe for ruling. For the reasons set out below, the Application is rejected.

## **Facts**

6. On 16 June 2020, the Applicant was appointed as a Senior Protection Officer at the P-4 level in Aru.
7. Once the Applicant arrived, he became acquainted with a female National UN Volunteer working under his direct supervision (“the Complainant”).
8. On occasion they would meet after work and discuss both work and personal matters on WhatsApp.
9. On 25 November 2021, the Complainant was appointed as a Senior Resettlement Assistant in Kinshasa. Soon thereafter, she filed a complaint against the Applicant with UNHCR’s Inspector General’s Office (the IGO).

10. The complaint alleged misconduct and sexual harassment. It also reported that the Applicant repeatedly degraded the Complainant at work, including unjustified criticism and bullying, sometimes in the presence of other colleagues.

sexual relationship with [him]. It has also been established that the WhatsApp messages provided by [the Complainant] were exchanged between [the Applicant] and her and that they are authentic. It has been found that these messages were incriminating and that [the Applicant] failed to provide a consistent alternative version of events in relation to the messages.

As a result, the High Commissioner decided that “had [the Applicant] not ended [his] service with the Organization, he would have exercised his prerogative under regulation 10.1 (a) of the Staff Regulations of the United Nations ...to impose a disciplinary measure.” Instead, the High Commissioner decided to enter the Applicant’s name in the ClearCheck database, along with the note “Final Determination of sexual harassment”.

### **Parties’ submissions**

16. The Applicant’s principal contentions<sup>1</sup> are:

- a. The Complainant was manipulated by the Applicant’s supervisor, the Head of the UNHCR Sub-Office in Aru, against whom the Applicant had complained of abuse of authority to the IGO on 8 May 2021.
- b. The allegations of sexual harassment were based on messages of which he is not the author and the complaint of sexual harassment was orchestrated by the Applicant’s supervisor.
- c. The measure imposed is unreasonable in light of the circumstances of the case.

17. The Respondent’s principal contentions are:

- a. The Applicant’s behaviour meets the elements of sexual harassment provided by UNHCR/HCP/2014/4 “Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority.”

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<sup>1</sup> The Applicant also complains of a breach of confidentiality. Specifically, he alleges that his 8 May 2021 complaint of abuse of authority by his supervisor was subsequently brought to the attention of UNHCR senior management. That issue is not part of the contested decision and thus not subject to review as a stand-alone claim in this case. See, paras. 50-52 below.



determination that he committed sexual harassment warranting termination of employment, the decision is subject to the same elements of judicial review as a disciplinary measure.”

21. The Tribunal doubts that the position taken by the Respondent is legally correct, since entry into ClearCheck is not a disciplinary measure defined in Staff Rule 10.2(a). However, since the Respondent has willingly taken upon himself the higher standard required in disciplinary cases, the Tribunal will apply that standard to this case. In so doing, the Tribunal notes that the result would be the same if the standard for reviewing non-disciplinary decisions were applied instead. (See, paras. 62-66 below.)

*Was the decision valid under the standard for reviewing a decision imposing a disciplinary measure?*

22. The Tribunal’s Statute, as amended on 22 December 2023, provides that in reviewing disciplinary cases:

the Dispute Tribunal shall consider the record assembled by the Secretary-General and may admit other evidence to make an assessment on whether the facts on which the disciplinary measure was based have been established by evidence; whether the established facts legally amount to misconduct; whether the applicant’s due process rights were observed; and whether the disciplinary measure imposed was proportionate to the offence. *Id.* Art. 9.4

23. The Tribunal’s Statute generally reflects the jurisprudence of the United Nations Appeals Tribunal (“UNAT” or “Appeals Tribunal”). See, e.g., AAC 2023-UNAT-1370, para. 38; *Miyzed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024.

24. In particular, the Tribunal’s Statute essentially codified the Appeals Tribunal ruling that:

When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered,

and also examine whether the decision is absurd or perverse. (*Sanwidi* 2010-UNAT-084, para. 40)

25. The Appeals Tribunal has underlined that “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” or otherwise “substitute its own decision for that of the Secretary-General”. *Id.* In this regard, “the Tribunal is not conducting a “merit-based review, but a “judicial review” explaining that a “judicial review” is more concerned with examining how the decision-maker reached the impugned decision, and not the merits of the decision-maker’s decision.” *Id.*, para.42.

*Were the facts established that the Applicant committed sexual harassment?*

26. The contested decision was based on a finding that the Applicant sexually harassed his supervisee (the Complainant) “by repeatedly making advances and unwelcome comments of a sexual nature, ... even though she had clearly stated multiple times ... that she was not interested in a romantic or sexual relationship with [him].”

27. UNHCR/HCP/2014/4 “Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority” defines sexual harassment at para. 5.3:

Sexual Harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another. Sexual harassment is particularly serious when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. Sexual harassment may be unintentional and may occur outside the workplace and or outside working hours. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between or amongst persons of the opposite or same sex.

28. To determine whether sexual harassment occurred, the Tribunal reviewed the evidence on record, including the investigation report dated 5 July 2022, and its annexes along with the Applicant’s response to the allegations of misconduct.

29. According to the Complainant, she and the Applicant initially had a cordial relationship. However, after some weeks the Applicant “suddenly, at a certain point...started to ask for an intimacy that I didn’t want.” She told him ““well listen, I can't do this but don't worry, the work, we have to continue, and we can keep the friendship, but I can't do that." He insisted and continued calling her “a lot...even late at night.” She consistently told him “no”.

30. Some of their conversations were recorded in WhatsApp messages. One of these conversations is illustrious. On 25 August 2020 at 23:15:24 (45 minutes before midnight), the Applicant messaged the Complainant; and part of the conversation went as follows:

Applicant: “I like you a lot”

Complainant: “you can’t court me.”

Applicant: “Why? Aren’t I a man and you a woman?”

Complainant: “What’s the point of putting your P4 in the bin?.. I don’t see why someone would take the risk of going out with his or her supervisee with all the sanctions...especially when it’s not even for a serious relationship”

Applicant: “Who told you all that...The conflict of interest, I can solve it...”

Complainant: “How can a relationship be serious with an expat who is also married”

Applicant: “Hmmm, everyone has their own problems... I’m an expat but African.... But I need you, seriously.

Complainant: I’m here but not for kisses or the rest.”

Applicant: “No I manage don’t worry, Please [Complainant], I want it.”

Complainant: “oh no...I promise that I am protecting you and protecting myself”

Applicant: “A conflict exists when there is a direct supervisory relationship. I can always change if needed. Failing that, I have several options...”



31. This conversation alone amounts to sexual harassment as defined by UNHCR/HCP/2014/4. The Applicant claims that he is not the author of this and the other messages. However, the evidence contradicts his claim.

32. When confronted with the WhatsApp messages, the Applicant's first response was "I admit to being greatly surprised by these messages from 2020 of which I am no longer so aware of the context". He then said "I'm surprised why? I'm surprised first of all that it's now that she [inaudible 0.42.30] first and it's now that she is bringing this up. Being someone who, you know, is in charge of educating people on the PSEA herself, being the one that we trust to report, that she is only bringing this up now really strengthens my position of a conspiracy."

33. When directly asked again if he wrote the WhatsApp conversation, the Applicant repeatedly said that "I don't recognize myself, honestly." He went on to say "However, yes, there are messages in which I don't recognize myself. And yet, that's what I said earlier, so that I can really remember the context, I really don't recognize myself in some of the messages." He then repeated his own rhetorical question: "Why has it waited since 2020?"

34. When the investigators pressed the Applicant about whether he authored the WhatsApp messages, his responses switched to statements like "There are messages I sent to [Complainant]. But not about sexual relations, no, I didn't send any message to [Complainant] going in the direction of sexual relations." He admitted that "Nonetheless, little teasing comments, such as 'I like you', I admit that I told her that. Really. But there was no sexual connotation, I am not lying to you, no. But she told me that day... She said this: 'Oh no! You are taken'. I said, 'No! Everyone has their own difficulties in life. I can't explain everything.'"

35. After multiple questions asking whether he denied writing the WhatsApp messages, the Applicant ultimately ended with "What I can deny relay [*sic*] in this message is the intention to have sex with her.... It is that intention that I'm denying in this message."

36. Later in his interview, the Applicant changed his theme. Without explicitly admitting his authorship, the Applicant started explaining away the messages.

According to him, the comments “I like you a lot” and “I need you, seriously!” were innocent in the context of how she helped him furnish his house when he arrived. As for the comment “Am I not a man and you a woman?”, he said “if I remember correctly it was a way of telling her.. to tell her that: do I think that if you want to hit on a man or a woman, is it... Is it forbidden?”

37. The Tribunal finds that the clear implication of the Applicant’s interview responses is that he does not and cannot deny authorship of the messages. Instead, he tried to rationalize them.

38. It was only weeks later, having received the interview report and had time to think about the implications of these messages, that the Applicant definitively denied being the author. Even then he added a curious fall-back position: “In the event that these were my messages, saying *you are strong, intelligent and good from the bottom of the Heart. You please me would* not be interpreted as a request for sex.” (italics in original, but underlining added)

39. Further it is noteworthy that, when asked during his interview if he had the WhatsApp conversation on his phone, the Applicant said “To be honest, when I got your message, I immediately gave my phone to be repaired. It's a very broken, crushed phone. This phone went to Kampala. It didn't come back.” In other words, the Applicant had no evidence that the messages were altered or tampered with in any way.

40. In his interview, the Applicant denied that the phone number (+225056475184) from which most of the messages at issue originated was his, but admitted he knew the exchange was for Cote d’Ivoire. When the investigators checked, they learned that prefixes had been changed to mobile telephone numbers in Cote d’Ivoire in January 2021, so +225056475184 was the same account as +22576475184. That account was registered to “Eric Ngueto”.

41. Additionally, in three official emails he sent during 2020, the Applicant listed +22576475184 as his mobile/WhatsApp number.

42. Thus, the Tribunal finds that there is clear and convincing evidence that the Applicant authored the subject WhatsApp messages. The Tribunal further finds that parts of the messages were sexual in nature and amounted to unwelcome sexual advances.

43. The Applicant also argues that the Complainant was manipulated by the Applicant's supervisor, the Head of the UNHCR Sub-Office in Aru, against whom he complained of abuse of authority to the IGO on 8 May 2021.

44. The Applicant claims that he had a difficult relationship with his supervisor and that the supervisor engaged in "plots of evil intent against [the Applicant]". He further adds that the Complainant and the Applicant's supervisor were seen spending time together. He says that the Complainant's behavior towards him changed after she was seen with his supervisor.

45. Assuming, *arguendo*, that the supervisor was plotting against the Applicant, that does not establish that the supervisor manipulated the Complainant. Indeed, there is no direct evidence of any manipulation. And it is mere speculation that Complainant's behavior was linked to her being seen with the supervisor. There are multiple other reasons why the Complainant's behavior toward the Applicant may have changed, not the least of which is a reaction to his sexual harassment.

46. Additionally, according to the application, after the supervisor left his post and the Applicant replaced him as Chief of the Sub-Office, the Applicant had the electricity to the Complainant's house cut off because "it was being fraudulently share with the neighbours." Whether the justification is true or not, cutting off the Complainant's electricity also might explain any change in her behavior towards him.

47. Moreover, even if the Applicant's speculation is correct and the former supervisor's manipulation caused the Complainant to file the instant complaint, that does not change matters. Some of the strongest evidence of sexual harassment are the Applicant's own words in the WhatsApp messages. These are not subject to any manipulation by the Applicant's supervisor.

48. Thus, the Tribunal rejects the Applicant's allegations of manipulation, and finds that the facts were established by clear and convincing evidence.

*Do the established facts legally amount to misconduct?*

49. UNHCR/AI/2018/18/Rev/1, at para. 5.2 (c) clearly defines sexual harassment as a form of "Misconduct for which disciplinary measures may be imposed.". As such, it is axiomatic that the established facts amount to misconduct. UNHCR/HCP/2014/4 also states at para. 4.1.1 that:

In accordance with the provision of Article 101 (3) of the Charter of the United Nations, and the core values set out in Staff Regulation 1.2 (a) and (b) as well as Staff Rule 1.2(e), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, any form of discrimination, harassment, including sexual harassment and abuse of authority is prohibited and may lead to administrative or disciplinary action.

*Were the Applicant's due process rights observed?*

50. Although the Applicant does not characterize them as violations of his due process rights, he raised two issues which seem to fit in this category. In his words at para. 4.1.1 that:

whether they affected the Applicant's due process rights in the challenged decision to enter his name in ClearCheck.

53. The essence of the "breach of confidentiality clause" argument is that when the Applicant reported his complaints of abuse of authority against his supervisor, he requested confidentiality and anonymity for fear of reprisals. However, later he was informed that his complaint had been brought to the attention of UNHC senior management, which he feels violated his request for confidentiality.

54. As evidence he submits an email correspondence between "Rian Zikewe<sup>3</sup>" and the UNHCR Inspector General's Office. The email chain begins on 8 May 2021 with "Rian Zikewe" complaining about the abuse of power by the Applicant's

57. The latter is also true regarding the alleged errors in how the Applicant was separated. Any error in the separation procedure did not affect the evidence of sexual harassment, nor the propriety of placing his name on ClearCheck.

*Was the decision imposed proportionate?*

58. Proportionality is a factor to be examined in the judicial review of decisions imposing a disciplinary measure. See, *Sanwidi, supra*, the cases cited in para. 23 above, and Article 9.4 of the Dispute Tribunal Statute. However, proportionality does not apply in reviewing this decision.

59. The decision to list a staff member in ClearCheck is a binary decision, a choice between two alternatives. Either the Applicant's name is to be entered in ClearCheck or it is not. There is no intermediate option, so the concept of proportionality (balancing multiple factors to determine a just result from various options) really does not come into play. The decision seems not even discretionary; the Applicant either fits the ClearCheck criteria and must be entered, or he does not meet the criteria and cannot be entered.

60. In this case the evidence indicates that the Applicant does meet the criteria and thus was properly entered into the ClearCheck database.

61. In sum, the Tribunal finds that the contested decision is based on facts established by clear and convincing evidence of sexual harassment, that the

administrative decisions.<sup>4</sup> Under the general standard, the “role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate”. *Sanwidi* 2010-UNAT-084, para. 42. In doing so, the Tribunal can “consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse” *Id.*, para. 40.

63. Again, it is not “the role of the Tribunal to substitute its own decision for that of the Secretary-General” *Id.* Instead, the Tribunal is to conduct a judicial review into how the decision was reached and not the merits of that decision. As a result of this judicial review, the Tribunal “may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate”. *Id.*

64. The Applicant clearly is an individual against whom allegations of sexual harassment, while in service of the United Nations, were raised. As a result, he was the subject of an investigation which substantiated the allegations. The disciplinary process began, but the Applicant was no longer employed with the United Nations before a final disciplinary decision could be imposed. Thus, the Applicant clearly comes within the requirements to be recorded in the ClearCheck database.

65. The Tribunal has determined that the facts of sexual harassment were established by clear and convincing evidence (para. 48 above), which includes the lesser standard of preponderance of the evidence. The Applicant was given several opportunities to refute the allegations prior to the decision, and the Administration considered all relevant matters and nothing that was irrelevant.

66. Accordingly, the Tribunal concludes that the decision to record the Applicant in the ClearCheck database was reasonable, fair, lawful, rational, and procedurally

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<sup>4</sup> Of course, this case is somewhat unique. Usually, the ClearCheck decision is made along with

correct. Hence, it would be upheld under the standard applicable to non-disciplinary decisions.

**Conclusion**

67. In view of the foregoing, the Tribunal DECIDES that the Application is rejected.

*(Signed)*

Judge Sean Wallace

Dated this 5<sup>th</sup> day of November 2024

Entered in the Register on this 5<sup>th</sup> day of November 2024

*(Signed)*

Wanda L. Carter, Registrar, Nairobi