



**Before:** Judge Coral Shaw  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

ALEXANDRIAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for the Applicant:**  
Marisa MacLennan, OSLA

**Counsel for the Respondent:**  
Elizabeth Brown, UNHCR  
Karen Madeleine Farkas, UNHCR

## **Introduction**

1. The Applicant challenges decisions dated 14 July 2014 taken by the Division of Human Resources Management (DHRM), United Nations High Commissioner for Refugees (UNHCR) following a complaint that he had sexually harassed a staff member.

2. He described these decisions as follows: to impose the disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity and the related decision that the allegations against him of misconduct amounted to sexual harassment.

## **Procedural history**

3. The Applicant filed his Application with the Tribunal on 30 September 2014. The Respondent replied to the Application on 7 November 2014.

4. On 6 August 2015, the Applicant filed a Motion requesting that the Tribunal order the physical presence of the Complainant at the hearing on the merits. The Respondent submitted a response on 21 August 2015. The Tribunal rejected the Motion and ordered that the Complainant appear by video link.<sup>1</sup>

5. The Tribunal held a case management discussion on 3 September 2015 and oral hearings from 14 to 17 September 2015.

## **Issues**

6. The issues to be determined by the Tribunal in this case are:

- a. Whether the procedure followed in the investigation into the allegations of sexual harassment and subsequent disciplinary process was regular.
- b. Whether the facts in question were properly established.

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<sup>1</sup> Order No. 269 (NBI/2015).

- c. Whether the established facts constituted sexual harassment and, if so,
- d. Whether the sanction imposed on the Applicant was proportionate.

## **Facts**

7. The Parties submitted a joint statement of facts which were supplemented by oral and documentary evidence adduced at the oral hearings.

8. The Applicant joined UNHCR in 2002 as a Clerk at the G3 level, at Geneva Headquarters. Following some years of service on mission at the P-2 level, he served UNHCR as a Field Officer at the P-3 level in Yemen and Kirkuk, Iraq.

9. In February 2012, the Applicant was appointed Head of Field Office, P-3, in Basra, Iraq, and served there until 15 January 2014.

10. At the material time to this case there were three international staff members and 23 national staff members at the UNHCR Basra office. The international staff members comprised the Applicant, a UNHCR programme officer (SC), and an associate protection officer (the Complainant) who was contracted from UNOPS for the period of 15 October 2012 to 30 June 2013.

11. Initially UNHCR Basra operated out of a compound of the United Nations Mission for Iraq (UNAMI) that was shared with other United Nations agencies. The offices and living accommodation consisted of containers in a fortified compound surrounded by United Nations peacekeepers and security personnel. The international staff members lived in individual containers. Other containers were used as offices, cafeteria and gym. Staff members could not leave the compound unless escorted by security.

12. In November 2012, UNHCR moved to a converted villa/guest house with offices on the ground floor and accommodation for international staff upstairs. The premises were shared with UNICEF one of whose international staff members (MW) lived in the upstairs accommodation with the three UNHCR staff.

## **Complaint of Sexual Harassment**

13. Around late February/early March 2013 while she was in Baghdad, the Complainant told a colleague, AB, that her relationship with the Applicant was overall positive but she had some reservations which she outlined to AB.

14. The Complainant travelled to Erbil at the end of March 2013. While there she contacted the Ethics Office to ask about filing a complaint. She authorised the referral of her complaint to the UNHCR Inspector General's Office (IGO). While in Erbil she spoke to the Assistant Representative for Protection in Iraq, AP, about her allegations.

15. On 9 April 2013, in response to an enquiry made in early February by the then UNHCR Representative in Iraq, (CB), about her intentions beyond June 2013 and asking for her agreement to extend for another six months, the Complainant replied:

As I was deployed to Basra in October, I was expecting my contract to end in April so I planned to undergo a course in June and spend some time with my family and fiancé in July. Therefore I will unfortunately not be available during that time but I would be more than happy to return to Basra afterwards if I am still needed there. I really enjoy my work and would be happy to continue working with the team there until the end of the year.

16. On 17 April 2013, the Complainant advised the IGO that she would like to file a complaint against the Applicant for sexual harassment and summarized her allegations. On 18 April 2013, she emailed the IGO an unsigned nine page complaint of sexual harassment to which she attached a list of nine persons and their contact details whom she referred to as "useful contacts". This list included CB, AP and two of the international staff at Basra, SC and MW. Her statement did not contain a declaration as to its accuracy.

17. Following this the Complainant corresponded with a senior coordinator at the IGO about her temporary relocation and administrative matters. Her complaint was assigned to an investigator with the IGO Investigation Unit (the Investigator) on 24 April 2013.

## **The Investigation**

18. The Investigator contacted the Complainant about a month after she filed her complaint to confirm that she had submitted a complaint and to advise that her complaint would be investigated. This was the only contact that the Investigator had with the Complainant. The Complainant later tried to contact the Investigator to seek her assistance with the transportation of her luggage from Basra but heard nothing more from her. The investigation did not commence until August 2013 because the Investigator was engaged in other investigations.

19. On 15 August 2013, the Investigator informed AP that she was a potential witness in the investigation.

20. On 15 August 2013, the Investigator also emailed SC. She asked him about the living conditions in Basra; if there were issues between staff assigned there and if so what kind of issues and the staff members involved. In his email response on the same day SC briefly described the living conditions and then stated:

About the issues between staff members I heard a bit both from the Head of Office and another international colleague. Frankly speaking, I had not sensed a bit of tension/friction between them and I was a bit surprise [sic] to hear that the female colleague instead of returning back to Basra, has reported to office in Erbil. Later, she called me one day saying she won't come to Basra and if I can help her pack her stuffs [sic]. She mentioned to me that 'she suffered a lot in Basra' and has decided not to come.

21. SC referred to the Complainant's emails to him about her shipments and went on: "I really don't know how this issue has been resolved. My wild guess has been perhaps the issue was very shallow and 'handled' by the senior management in Baghdad level".

22. On 28 August 2013, the Investigator emailed the Applicant informing him that "the IGO has received allegations implicating you. You will see you are entitled to be accompanied during the interview, if you wish...". She enclosed documentation including an information sheet entitled "Subject notice of Investigation".

23. The Applicant received this email while he was on leave in Italy but agreed to an interview the following day and told the Investigator that he “did not need a subject to accompany him”.

24. On 29 August 2013, the Investigator interviewed the Applicant by audio Skype for approximately 69 minutes. Her non-verbatim record of interview shows that she began with the standard prepared formalities including telling him that he was the subject of the investigation, that IGO had received allegations or information that implicated him in possible misconduct and that he had decided not to be accompanied by another staff member during the interview.

25. The Investigator asked the Applicant ten general questions about his work and responsibilities and the staff at Basra. She then asked who the incumbent of the P2 protection post was. In his answer the Applicant said “[The Complainant] left, the reasons you probably know why...” The Investigator asked “what do you mean by I know why [the Complainant] left?”. The Applicant said “No, I want you to elaborate on the allegations. I heard [she] was not coming back at the request of the IGO”. The Investigator did not respond to that request but continued to ask about his working relationship with the Complainant and SC and the living conditions in Basra.

26. At question 27 she asked “How did your relationship with [the Complainant] develop?” He asked again “...please can you tell me what this is all about?” She answered “I will tell you more about the allegations but before I go into more detail, please could you tell us about your perspective of your relationship with [the Complainant] professionally and personally”.

27. The Applicant described how he and the Complainant had met at training in Baghdad. She was later recruited to Basra where they spent a lot of time together. He said that after she arrived she had confessed to being attracted to him and he was attracted to her too. “She even said she dreamt about me when she first saw me”. He said they had exchanged several “quite flirty” text messages. He said that in the new compound the context was different. Their private life was more exposed to the others. He spoke about massaging her back in the presence of SC. He said, “Twice, after insisting a bit I convinced her, with her consent in my

opinion, that we continue the massage sessions in her room”.

28. At the end of the interview, having reviewed the record of interview, the Applicant added in the following at this point:

The first time I left right after the massage, which was becoming more sexual than friendly, I left the room at her request. The second time I might have been slightly more insisting, but surely not aggressive or forcing, in my opinion. The second massage session happened also with her consent. And once again I left her room at her request... Probably those are the only times that I might have exceed the limit (If I did) and this might be the only acts that that I may be accused of. Frankly speaking I did not see this coming...”

29. At question 30 the Investigator said, “the allegations that the IGO has received about you are that you sexually harassed [the Complainant], Do you have any comment?” He replied, “What harassment?” The investigator answered, “More specifically that you made sexual advances to her without her consent”. He replied, “This is very subjective, I gave my opinion. I think others would be in a better position to comment”. He referred her to SC or “the UNICEF guy” (MW). He went on to say that, “[y]es it is true that I can do things behind their back, but they would be in a better position on the dynamic in the house and office”.

30. When the Investigator asked him if he and the Complainant had ever discussed having more intimate personal relationship, the Applicant referred to her boyfriend and said “I did not convince her to have a relationship. I like girls, I do not deny that. I am also a very affective [sic] and touchy person, but I do not think this was sexual harassment. I do not think that I would do things that are not welcomed by the other. I surely don’t consider that [the Complainant] was a victim of sexual harassment. I discussed with [SC] about the issue and he was also shocked to hear this. We both felt disappointed that she never shared her concern with us (or at least SC) and went directly to the IGO office. It’s a subjective matter, and apart from those two massages, I cannot see that there was anything. Not to the level of sexual harassment. Preparing dinners, feet massages, yes, but not more”.

31. He agreed he tried to kiss the Complainant in the course of the massages, and he stopped when she declined. He said that after the second massage she wrote a note to him saying she felt uncomfortable with this. He could not remember other exchanges between them after the note. “I think she did not spend too much time after that in Basra”. He reiterated:

When I say consent I really want to emphasise on that. If it is not consent, and if I want to blame myself, maybe I would say that I was persistent Maybe I need to get into a more defensive mode as I don't like the way this is going. I remember being conscious as I was her supervisor. I remember she once told me she dreamt of me in Bagdad [sic], there were these little things which I consider her pulling me. Knowing me and my track record, when there is no interest on the other side, and that was not always apparent in this situation, I know when to stop.”

32. The Investigator asked whether his behaviour changed after getting the note from the Complainant. He said no, he remained as he was. He did not think he criticised her work more after she refused his sexual advances.

33. At the conclusion of the interview the Applicant signed the transcript as a true and accurate record of the interview.

34. On 29 August 2013, the Investigator interviewed AP via Skype for approximately 51 minutes and asked her 20 questions. The first five related to her capacity as Assistant Representative for Protection in Iraq. She described the dynamics in the Basra office in the first half of 2013 as having an excellent atmosphere and a generally very good spirit. The performance of the Applicant was very good, on the whole excellent. She said the Complainant was a bright young lady and everyone had put her on a high pedestal. Her general protection experience was limited and her learning curve was steep. She was doing well enough. She was managing. AP said that the Complainant was not one of the easiest staff to manage but not the most difficult either. She had heard comments that she was difficult but that she was a team player and worked well.

35. The rest of the Investigator's questions related to what the Complainant had told her. AP said the Complainant twice confided in her as a friend about “some intimate issues”, telling her that she just wanted to talk and spoke about the

Applicant's behaviour towards her. When AP told her she should report it the Complainant told her that she had a high regard for him, he was really a nice person and she could manage it. The Complainant told AP of the difficult time she was having in relation to her family and her boyfriend. She said the Applicant was quite demanding of her in her work.

36. AP told the Investigator about the two conversations she had had with the Complainant:

[...] One might have been in Amman, and the other time in Erbil just before her contract break. On each occasion she would make allegations but on the other hand she would also protect/defend him as she respected him professionally. She is very strong minded so I thought she would return to work and not report it.

37. AP told the Investigator that she was shocked and dumbfounded to hear of the allegations from the Complainant. She said the Applicant was mature and extremely respectful of women.

38. At the conclusion of her interview AP signed the record of her interview as a true and accurate record.

39. On 2 September 2013, CB responded by email to the Investigator's earlier request for a statement. The Investigator's request was not produced to the Tribunal but in her oral evidence CB recalled that she had asked for a written statement from her in relation to the complaint from the Complainant to the IGO relating to the work environment. She was asked to include what information the Complainant had shared with her and the nature of the incident. She was not told it was a case of sexual harassment but told the Tribunal that she assumed she was being asked about the Complainant's story.

40. In her email statement to the Investigator CB said she understood from the Complainant that initially she was very content with her new role in Protection, had experienced a steep learning curve and had a good relationship with the Applicant who was easy to get on with. She found the new location a big improvement. CB described the two times the Complainant had told her about the Applicant's behaviour. The first was in a five minute superficial interaction in

Baghdad around February 2013 (she could not recall more exactly). The second was in a call around March/April 2013.

41. On 22 September 2013, the Investigator sent the Applicant her draft Investigation Report (draft IR) under cover of the following email. She asked him to reply by 27 September:

Please find attached a DRAFT investigation report for your review and comments. As you can see there are still some aspects which need to be completed, and the conclusion will only be reached once we have received your comments on this draft report. Any edits should be done in the document in track change mode. More substantive comments can be made in a covering email.

### **The Draft Investigation Report**

42. Part I consisted of preliminary procedural observations. Part II was headed “investigation findings and analysis of findings”. It recorded the receipt of the initial report of sexual harassment against the Applicant and of the subsequent full statement obtained from the Complainant. The Investigation Report then quoted verbatim extracts from the full statement.

43. The first two extracts were from the Complainant’s account of the close friendship between her and the Applicant and the “extremely difficult circumstances” they were living in. She said “at the very beginning, I have to admit that I also felt physically attracted to him”. She said they discussed their attraction and that it would be hard to resist the temptation but they had to do it, “that it would be against UNHCR’s Code of Conduct and that it would create all kinds of problems in our professional and personal relationships, that it would affect our work, etc.”

44. The Investigator then commented: “[The Complainant] goes on to explain that over the next few weeks, [the Applicant] was very physically affectionate towards her, giving her massages on occasions, and reiterated at different times that he knew she would in the end agree to have a sexual relationship”. The Draft IR then quoted the part of the complaint in which the Complainant said that she made it clear to him on numerous occasions that she did not want to have sexual

relations with him.

45. The Investigator then commented: “[The Complainant] also describes two specific incidents during which [the Applicant] tried to kiss her and touch her. The first one occurred before her departure on R and R, though [the Complainant] does not recall the specific date”.

46. Next, the draft IR quoted from the part of the complaint in which the Complainant says (in summary) that the Applicant insisted on giving her a back massage in her room which she first resisted but then accepted. She then describes him attempting to kiss her several times and touching her underneath her shirt. She said she pushed his hands away, told him he had crossed the line and then he stopped. Her fiancé called her at that stage. The Applicant would not leave the room while she was talking which made her feel extremely uncomfortable. He eventually left.

47. The draft IR quotes another section from the complaint which begins: “On Thursday March 7 (it could also be March 8, I am not 100% sure) the last incident took place”. In that extract, the Complainant alleged that after dinner they both went upstairs and the Applicant tried to enter her room. She resisted but he insisted so she raised her voice saying ‘non, arrête’. She finally entered her room and he entered right behind her. He pushed her on the bed, lay on top of her and tried to kiss her. She told him to stop and he did. He asked to give her a massage and promised he would not try to do anything. She said she lay down on the bed and he gave her a massage. When he was finished, he held her down by her wrists and started to rub against her imitating a penetration. She turned over and told him to stop. She told him she was tired of telling him over and over again and that she did not understand how he could still insist.

48. The Investigator then commented: [the Complainant] also explains that following her refusal to respond to [the Applicant’s] advances, he began to criticise her performance. Although, according to her, he was not very specific, he told her that she was not making a difference and that her presence in Basra was “useless”.

49. The draft IR described and set out extracts from the interview of AP and from the statement of AB. It stated that SC had been contacted but he “did not appear to know any details of what had transpired between [the Complainant] and the [Applicant] although he confirmed he knew there were some issues”.

50. In the last part of the draft IR, the Investigator quoted two passages from the Applicant’s interview. The first was his description of the friendly relations between him and the Complainant, text messages between them and the massages he gave her. The second was his account of the two massages in her room.

51. The draft IR summarized briefly the Applicant’s account of his discussion with the Complainant when she said she did not want to have a relationship with him and his statement that when she told him to stop he did.

52. The draft IR then stated:

The IGO considers that the following facts have been established in the course of this investigation:

- [The Complainant] and [the Applicant] were respectively supervisee and supervisor;
- [The Complainant] and [the Applicant] had a friendly relationship and both accepted that they found each other attractive;
- [The Complainant] and [the Applicant] considered having a sexual relationship but did not do so as [the Complainant] did not want to in view of her existing relationship with her boyfriend;
- [The Applicant] used to give [the Complainant] massages;
- On at least two occasions [the Applicant] tried to kiss [the Complainant] when he was giving her massages;
- [The Applicant] stopped trying to kiss [the Complainant] when she asked him;
- [The Applicant] admits that he may have been persistent however he indicated that he believed she was consenting;
- [The Complainant] was uncomfortable with [the Applicant’s] behavior and told him so.

53. The draft IR ended with the heading: “III. Conclusions and recommendations [to be inserted]”.

54. The Investigator sent her draft report and a copy of the complaint to the Applicant on 22 September 2013.

55. The Applicant replied the same day: “I have no comment. We surely have different perspectives, but I think overall we are saying the same things. Please let’s conclude”.

56. On 3 October 2013, the IR was finalised. It was unchanged from the draft IR apart from the inclusion of ‘Conclusions and Recommendations’ which stated:

The Inspector General’s Office considers that the facts established support a conclusion that [the Applicant’s] conduct was inconsistent with his obligations under Staff Regulation 1.2(b), Staff Rule 1.2(e) and ST/SGB/2008/5. The IGO further notes that [the Applicant] has been cooperative and forthcoming throughout this investigation.

57. The IR was sent to the Director, DHRM (D/DHRM) on 4 October 2013 for a final decision to be made. The IR also included the following annexes:

- a. The Fact sheet of the Applicant;
  - b. The Complainant’s written complaint;
  - c. The record of the interview with AP;
  - d. The record of the interview with the Applicant;
  - e. The email statement by AB;
  - f. A note from the Complainant to the Applicant, December 2012;
- and
- g. The Applicant’s response to the Draft Investigation report.

58. On 9 December 2013, the Investigation Report and an accompanying letter from the Director/DHRM were sent to the Applicant at the Basra office. As he was on home leave he did not receive them until 20 January 2014.

59. The letter from the D/DHRM stated: “Please find attached an Investigation Report issued by the Inspector General’s Office (IGO) dated 3 October 2013. The

report contains allegations of sexual harassment. If proven, this would constitute misconduct as defined in staff Rule 10.1 of the Staff Regulations and Rules of the United Nations”.

60. The letter informed the Applicant of his right to respond in writing and invited him to answer the allegations and to produce countervailing evidence, if any, within two weeks of receipt of the letter. It told him that he could seek legal advice from the Office of Staff Legal Assistance.

61. On 21 January 2014, the Applicant responded to DHRM as follows:

[...] I understand that the IGO office concluded that “the facts established support a conclusion that [the Applicant’s] conduct was inconsistent with his obligations under Staff Regulation 1.2(b) Staff Rule 1.2(e) and ST/SGB/2008/5. The IGO further notes that [the Applicant] has been cooperative and forthcoming throughout this investigation”.

I was interviewed on 29/08/13, and gave my version of the story with facts, by explaining the context and by describing the dynamic in the office/compound. My position has not changed since. I am not a lawyer, but I can say with a clear conscience that I am not guilty of the sexual harassment allegations. Whether or not my conduct was inconsistent with my professional obligations is, obviously, a different matter. The context is clear, the facts are there, even if they sometimes remain subjective.

Yes, in retrospect, I regret what I have done, but I am certainly not the only person to be blamed for those two incidents. I think [the Complainant] (the colleague who is accusing me of sexual harassment) should also bear responsibility. The incidents were triggered by her, consensual and reciprocal. The statement that whatever took place was “unwelcome” is exaggerated.”

I am not considering to be assisted by a counsel or a private firm.

I will be grateful if we could proceed, and conclude, and I’m willing to accept any disciplinary measures, if any, and if appropriate.

62. On 14 July 2014, the Applicant received a letter from the D/DHRM. It referred to the previous communication to him pertaining to allegations of misconduct made against him and to his comments on the investigation report. It went on:

I hereby inform you that the High Commissioner has decided to

impose upon you the disciplinary measure of separation from service with compensation in lieu of notice, and without termination indemnity, pursuant to Staff Rule 10.2(a)(viii), for serious misconduct. The decision of the High Commissioner is based on the fact that you failed to conduct yourself in a manner befitting your status as an international civil servant by sexually harassing a colleague while you were the Head of Office in Basra, Iraq.

63. The rest of the letter dealt with administrative matters and advised him of his 'possibility' to appeal. His separation was effective from the date of his receipt of the letter.

### **Evidence at the Oral Hearing**

#### *Complainant's evidence*

64. The Complainant reiterated her complaint and was further questioned about her account.

65. She said they were living in very difficult circumstances and the Applicant quickly became the closest person to her there. They communicated in French. They worked together every day and practiced yoga two or three times together. She told the Tribunal that she joined him each evening after work outside his container for a cigarette. They talked about many things including personal matters and family issues. She agreed that first at the compound and later at the villa, they discussed their physical attraction to each other and how this would be impacted on and by their professional relationship.

66. She agreed that the Applicant had massaged her back in the common room once or twice after she told him she had back problems.

67. She stated that she had accepted the first massage in her room and let the Applicant into her room. She lay on the bed and he gave her the massage.

68. After the massage, while they were standing up he tried to kiss and touch her. Her phone rang. Her boyfriend was calling and she asked him to leave. She had told her boyfriend about the friendship (between her and the Applicant) and he was sensitive to it. The Applicant did not leave which annoyed her.

69. She said that in a car going to the supermarket she and the Applicant discussed their relationship and she told him she had no sexual attraction to him.

70. The Complainant described the Applicant as being insistent about entering her room before the second massage incident. He promised her it would just be a massage and she let him enter in order for him to stop insisting. He left the room when his phone rang.

71. She could not remember the flirtatious text messages the Applicant had said they had exchanged. She accepted she had told him he was “sexy in a meeting” but this was before she wrote the note to him and was no longer attracted to him after the first incident.

72. The Complainant said that, having filed her complaint she heard nothing, about it until she was contacted by Counsel for the Respondent to tell her that the case was appealed. She had no idea what had happened except rumours that the Applicant was leaving Basra for another post and an email from him that said that as a result of her complaint he had received a separation letter from the UNHCR, “an organisation I love and a mandate I live for”.

*Applicant’s evidence*

73. The Applicant told the Tribunal that when he got the Investigator’s email of 28 August 2013 he had no idea what it might relate to. He did not know officially that there was a complaint against him. Unofficially he knew that [the Complainant] had made a complaint and that was why the IGO asked her not to return to Basra”. He thought the investigation might relate to the Complainant but not necessarily against him. The email said the allegations implicated him. As a French speaker he understood that to mean he was involved, not that the allegations were against him.

74. He said that when he was interviewed by the Investigator he felt extremely guilty because of the way the questions were being asked. He was constantly bombarded by questions as if he had committed a crime. He said he was questioned without knowing what was happening. He did not know at that time

that that [the Complainant] had filed a complaint. He did not see the written complaint until he received the draft IR in September 2013.

75. The Applicant told the Tribunal that when he was asked to comment on the draft IR he believed he was being asked to comment on the list of established facts at the end of the report.

76. He did not feel the need to counter the Complainant's allegations in the draft IR because it was a subjective matter. He told the Tribunal, "I clearly took the point of the investigation report, point 29, on which the fact findings are clearly fixed and I agree with, and I thought the fact findings are the final solution and the rest is either [the Complainant's] opinion or my opinion".

77. He told the Tribunal that the Complainant's account of the first incident in her bedroom was incorrect. His version was that she was the one suffering from back problems. She was the one who initiated the massage, which was with her consent.

78. He said that in the note from the Complainant which she left for him in December, the day before she left for Rest and Recuperation (R and R), she told him that it was not her intention to create any expectations and begged him to stop insisting. She thanked him for a book and for looking after her goldfish. He interpreted that note as the Complainant telling him that they had made a mistake and she was sorry for raising his expectations.

79. The Applicant told the Tribunal that when the Complainant returned from R and R, their friendly relationship started again, -"the tap on the shoulders, the kisses, the laughter... including the massage sessions in front of the TV". In February 2013 they attended a meeting with NGOs and after the meeting went to the supermarket in the company of the close protection guy and the driver. It was his evidence that during that journey the Complainant told him that she had found him "*tres tres sexy*" during the meeting.

80. He said that the Complainant's allegations about the second incident in her bedroom were an exaggeration if not a lie. On his account, he offered to massage

her because she had back pain. She initially refused but he convinced her and they went into her room where she lay on the bed and he massaged her. He said he might have insisted verbally but was never forceful or aggressive. He denied holding her arms or wrists. He denied any sexual contact including touching her inappropriately. He said she never directly addressed him about her concerns of sexual harassment or an uncomfortable working environment.

81. The Applicant said he had suffered enormous stress since being separated in July 2014 and it has taken an emotional toll on him. He has managed to overcome that with the moral and financial help of some former colleagues and family. He was saddened to leave the Organization for which he had worked for several years and has not been able to obtain employment since. He recently was tentatively offered a P4 contract with another United Nations agency but this did not proceed when he answered honestly about having a past disciplinary issue.

82. He incurred the loss of approximately USD7000 of pre-paid accommodation costs when he was suddenly separated while working in Myanmar.

*SC's evidence*

83. In his evidence to the Tribunal, SC described both UNHCR locations in Basra as having a family atmosphere. He said the international staff members were more friends than colleagues. They ate at least two meals a day and watched movies and TV together. He said the Complainant was new to the difficult living conditions and had some health and food issues but after a time became a good friend who interacted regularly. She and the Applicant exercised together sometimes and on about three occasions SC observed the Applicant massaging her back and shoulders while they were all watching movies. These were "very much mutual". He said the Applicant and the Complainant were good colleagues.

84. SC said he observed a bit of a change in the Complainant's behaviour to the Applicant at the later stage of her stay at Basra, arguing and raising her voice about office matters.

85. SC noted that after three months of work, the Complainant's colleagues in Protection and the Head of Office started to ask more of her professionally. She told SC she had some doubts about renewing her contract because she had some family issues and other problems which meant she could not renew beyond 2013. She did not complain to him that the Applicant was sexually harassing her. He only became aware of any issues when approached by the IGO.

*CB's evidence*

86. CB gave a statement to the Investigator but was not interviewed by her. She gave evidence to the Tribunal about her discussions with the Complainant when she entered into the contract in September 2012 and again when the Complainant decided not to renew. She produced their email correspondence including that of 9 April 2013 in which the Complainant told CB that she would be more than happy to return to Basra after a planned break to continue working there with the team until the end of the year.

87. CB told the Tribunal that everything in her statement to the investigator was based on what she had been told by the Complainant and not personal observation apart from the brief Baghdad meeting. Her statement was not signed nor did it contain a declaration as to its accuracy.

*The IGO Investigator's evidence*

88. The Investigator told the Tribunal that she conducted the investigation in accordance with the IGO investigation guidelines and UNHCR's sexual harassment policy; that the investigation was regular and the due process rights of the Applicant were respected throughout. She said that she conducted the investigation between 29 August and 1 September 2013 although the Tribunal notes that she contacted two witnesses on 15 August.

89. Because a number of the witnesses were in different locations it was decided to conduct the interviews remotely. Of the nine witnesses suggested by the Complainant she interviewed only AP and emailed CB for a statement. She did not contact the only other international staff member, MW, who had lived and

worked in Basra with the Applicant, Complainant and SC. She did not think it was necessary to interview SC. She stated: “SC had very limited responses to the email questions and nothing seemed to be of direct relevance to the investigation”.

90. She confirmed that apart from the Applicant and AP she did not get signed declarations from the Complainant or the other witnesses as to the accuracy of their statements. She said that unsigned statements which had been submitted in writing are considered to “be at least accurate from [the maker’s] perspective”.

91. She said that she told the Applicant before his interview that he was under investigation by telling him in writing that the IGO had received allegations implicating him and by sending him the standard “subject notice of interview” form.

92. The Investigator agreed that she did not inform the Applicant of the allegations until well into the interview. She said this was quite common in investigations in order to establish the facts in a neutral way. She did not put the details of the Complainant’s specific allegations of sexual harassment to him during the interview, apart from asking whether he had tried to kiss the Complainant, whether she had indicated that she was uncomfortable about his behaviour, and whether he had maybe discussed having a more personal relationship. She did not show the Applicant the complaint during the interview. She said that the details from the complaint were quoted at length in the investigation reports and the Applicant could have commented or corrected them when invited to comment on the draft IR.

93. When questioned about her assessment of the Applicant’s belief that the Complainant consented when he tried to kiss her, the Investigator said that she accepted that “on various occasions or on one occasion I think it was quite clear that he did stop and then there was this other incident where [the Complainant] goes into more detail, and then it is not so clear”. The Applicant told her that he was not aggressive or forceful and that this contradicts the Complainant’s opinion where she states that she did feel force.

94. The Investigator agreed that there was certainly a difference between the two accounts and that in hindsight it may have been prudent to have checked this with the Complainant so that she, as the Investigator, could form a considered evaluation of what had happened. However, the Investigator believed that there was enough evidence without going that far. She said that “the least serious incidents were still serious enough for the purposes of the investigation”. She said she relied on the list of facts that had been established at the end of the IR as sexual harassment but not in isolation from what she referred to as “the other accounts”.

95. She also said that having read the clear and detailed statement of the Complainant she did not recall any specific questions or major issues that needed to be clarified with her. She said that the Complainant had made a complaint involving two incidents that she described as sexual harassment which were not disputed by the Applicant and the surrounding facts did not seem key at that point.

96. The Investigator referred to the established facts in paragraph 29 of the Draft IR as “the bare bones” and the details were in the previous pages of the Draft IR. She said that the IR is a whole report not just the final page. When she asked for comments on the Draft IR from the Applicant she meant that he was to comment on the whole report. She regarded the details alleged by the Complainant (and contained in the report) as important to the finding of whether sexual harassment had occurred.

97. The Investigator relied on the unwelcome nature of the sexual advances in reaching her conclusion that the facts met the definition of sexual harassment. She said “I think that the physical contact that [the Complainant] describes and which was not disputed by [the Applicant] would fit into the ST/SGB”. She did not make a finding of fact on whether the behaviour interfered with the working environment or created an intimidating or hostile work environment. She said that the evidence on changes to the professional relationship was mainly from the Complainant and that this was not concluded in the investigation.

98. Having completed the draft IR, the Investigator gave the Applicant five days to go through the facts the IGO considered to be established, to look at the

other evidence and to comment on that.

99. The Applicant's reply was short and did not provide any substantive comments on the report. From his interview and the fact that he did not dispute any of the statements in the draft IR she took it that the Applicant accepted that those things had happened but questioned the interpretation and perspective.

### **Submissions of parties**

100. Both Parties presented written and oral submissions at the close of the evidence.

#### *Summary of the Applicant's submissions*

101. The disciplinary procedure is quasi-criminal and was procedurally flawed. This affected which facts were proven and which were not investigated.

102. The Investigation proceeded on the written statement of the Complainant, which was not given under oath or affirmed, and she was never interviewed. Two out of four witnesses did not swear or sign their statements. Two witnesses had only hearsay evidence.

103. Witnesses suggested by the Applicant and the Complainant were not interviewed.

104. Interview techniques by the Investigator were irregular.<sup>2</sup> There was a delay of four months in interviewing the Applicant and the Applicant was not apprised of the allegations before questioning.

105. The Applicant was not shown the complaint so he could directly address the allegations during his interview.

106. The investigation was not conducted in a thorough manner and the IR was biased.

107. The investigation was not consistent with IGO guidelines 4.1 and 6.

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<sup>2</sup> *Flores* UNDT/2014/025 (upheld in *Flores* 2015-UNAT-525).

108. The Investigator did not set points of inquiry and follow up based on an objective and critical assessment of the entire picture and did not examine both inculpatory and exculpatory avenues independent of suggestions by witnesses.

109. The 'established facts' in the report were not established. The facts established do not constitute misconduct in light of the Tribunals' jurisprudence.

110. The facts were not established by clear and convincing evidence. Oral testimony illustrated that there were more disputed than agreed facts. The disputed facts were not addressed by the Investigator in the IR. The Investigator assumed that if the Applicant did not comment on the disputed facts he must have agreed with them.

111. DHRM erred in accepting the IGO recommendation in spite of flaws in the investigation and conclusion.

112. The sanction imposed was disproportionate.

*Summary of the Respondent's submissions*

113. The facts on which the disciplinary measure was based were established by clear and convincing evidence based on the statement of the Complainant and the interview of the Applicant.

114. If the Tribunal accepts the Complainant's version of the facts including the note she wrote to the Applicant those facts constituted misconduct.

115. The Respondent accepts that failure to conduct an investigation in accordance with the applicable investigation procedures could constitute a breach of the Applicant's due process rights but it must be shown that such breach caused prejudice to the Applicant.

116. A failure to advise a subject of the allegations is not a procedural irregularity which vitiates the decision to dismiss.

117. The Applicant was not taken by surprise by the specific allegations because he referred to them himself.

118. The Applicant had a fair and reasonable opportunity to correct the record and provide explanations for his behaviour when sent the draft IR. The wording of the letter sent to him with that report cannot be reasonably construed to mean that his comments should be limited to the paragraph containing the established facts.

119. Reliance on unsworn testimony does not constitute a breach of due process as the Applicant has the opportunity to cross examine the witness before the Tribunal.

120. The sanction imposed was proportionate to the misconduct and took into account mitigating factors by giving him payment in lieu of notice.

### **Considerations**

121. In *Nyambuza* 2013-UNAT-364, the United Nations Appeals Tribunal (the Appeals Tribunal) held:

Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT must “examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”.

[T]he Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.” When termination is a possible sanction, the “misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.

122. Staff Rule 10.2 empowers the Secretary-General, in his discretion, to launch an investigation into allegations of misconduct, institute a disciplinary process and, where misconduct by a staff member is established, to impose disciplinary measures.

123. Pursuant to UNHCR Inter-Office Memorandum No. 009/2012 and Field Office Memorandum No. 010/2012 (IOM/009/2012–FOM/010/2012), the conduct of investigations into allegations of misconduct against UNHCR personnel is delegated to the IGO while the conduct of disciplinary processes is delegated to DHRM. The IGO is mandated to act as an independent internal body.

124. The procedural and implementation aspects of the IGO’s investigation process are set out in the IGO’s Guidelines on Conducting Investigations and Preparing Investigation Reports (the Guidelines).<sup>3</sup>

125. In the hierarchy of United Nations instruments, a Secretary-General’s Bulletin (SGB) takes precedence over internal guidelines.<sup>4</sup>

126. In this case the alleged misconduct was sexual harassment as defined in ST/SGB/2008/5 which prescribes procedures for the investigation of complaints of sexual harassment.

127. The stated purpose of the Guidelines is to assist in ensuring that investigations by the IGO are conducted thoroughly, objectively and effectively in accordance with professional standards and good investigative practice, and that due process is applied and appropriate rights are afforded to all parties involved in an investigation.

128. Section 6.2 of the Guidelines states that the investigator’s role is “to obtain and evaluate information and evidence related to the alleged misconduct”. The IGO then “draws conclusions based on the established facts”.

129. If the investigation produces a preponderance of evidence to reasonably conclude that it is probable that misconduct has occurred, the investigator prepares an investigation report<sup>5</sup> (para 9.4.1). This report is submitted to the D/DHRM for further action including initiation of disciplinary proceedings.

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<sup>3</sup> The version of these Guidelines relevant to this case is dated 28 September 2012.

<sup>4</sup> See *Villamorán* UNDT/2011/126 (affirmed in *Villamorán* 2011-UNAT160); *Manco* UNDT/2012/135 (affirmed in *Manco* 2013-UNAT-342).

<sup>5</sup> Section 9.4.1 of the Guidelines.

***The rights of the Subject of an investigation***

130. Section 6.23 states that:

- a. If the Subject has not already been informed that he/she is under investigation, the investigator must do so at the time of the interview.
- b. The Subject should normally be informed about the alleged facts and be given an opportunity to respond during the interview.

131. Section 6.7.1 stipulates that “[...] the subject of an investigation should normally be informed both verbally and in writing by the IGO that an allegation brought against him/her is being investigated. This notification will normally take place at the earliest possible time and no later than the Subject’s interview”.

132. In *Flores* 2015-UNAT-525, the Appeals Tribunal found that the manual on conducting investigations<sup>6</sup> applicable to that case required that the subject of any allegations should be informed of those allegations by the investigators prior to being interviewed. The Appeals Tribunal distinguished this requirement from the disciplinary process under staff rule 110.4, which limits the requirement to inform a subject of allegations until the disciplinary proceeding are instituted, that is, after the fact finding investigations.

133. Para 6.23 of the IGO Guidelines does not state when the subject of a complaint should be informed of the allegations. Section 5.15 of ST/SGB/2008/5 requires the fact finding panel to inform the subject of the nature of the allegations against him or her at the beginning of the fact finding investigation.

***Collection of Evidence***

134. An IGO investigation proceeds with the collection of evidence which is defined in the Guidelines as any type of proof which tends to establish a fact material to the case.

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<sup>6</sup> The World Food Programme’s Office of Inspections and Investigations (OSDI) Quality Assurance Manual on Investigations.

135. Section 6.21 states that interviews are aimed at obtaining testimonial evidence, which are statements from individuals who actually saw an event or have direct or indirect knowledge of anything relevant to the investigation.

136. Interviews are conducted by an IGO investigator. Potential witnesses are provided with a witness notice of interview and should normally be given preliminary information. UNHCR staff members who are interviewed should sign the written record of interview as a true reflection of what is said in the interview.

137. When a person who is a non-UNHCR staff member is interviewed a written record of conversation is normally prepared by the investigator which should be signed by the investigator and the witness. The Guidelines further state: “[w]henver possible, however, the investigator should strive to obtain a signed Record of Conversation when statements or evidence that are critical to the investigation are obtained”.<sup>7</sup>

138. The importance of authentication of witness statements was discussed by the Appeals Tribunal in *Diabagate* 2014-UNAT-403. In that case, the complainant, who alleged she had been raped, was not placed under oath by the investigator before interviewing her and she did not sign the transcribed version of her interview statement. The Appeals Tribunal held that the complainant’s statement was neither reliable nor trustworthy as it was solely hearsay and insufficient by itself to prove the charge. The Appeals Tribunal also found that other written documents relied on in that case to establish the charge were “replete with hearsay and multiple hearsay and were neither trustworthy nor sufficient to prove [the charge]”.

139. The Guidelines state that where operational constraints prevent the IGO from being able to conduct interviews face to face they may be conducted by telephone or audio-visual conferencing.

140. There is no provision in the Guidelines for obtaining testimonial evidence from witnesses other than by these means. Section 5.16 of the SGB imposes a

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<sup>7</sup> Section 6.24.1 of the Guidelines.

mandatory requirement to interview witnesses who include the aggrieved individual, the alleged offender and any other individuals who may have relevant information about the conduct alleged.

141. In the case of an allegation of sexual harassment there can be no doubt that the statement of the complainant and the aggrieved individual are critical to the investigation.

142. The Tribunal finds that the fundamental procedural and due process requirements for an investigation of an allegation of sexual harassment, as set out in ST/SGB/2008/5 and the Guidelines, are :

- a. The subject of the allegations should be informed of the allegations at the beginning of the investigation.<sup>8</sup>
- b. The subject should normally be informed during the interview about the alleged facts and be given an opportunity to respond to them.<sup>9</sup>
- c. All relevant witnesses including the complainant should be interviewed and their evidence recorded in an authenticated statement.<sup>10</sup>

***Was the correct procedure followed?***

143. The Investigator was obliged by para 5.15 of ST/SGB/2008/5 to inform the Applicant of the nature of the allegations against him at the beginning of the fact-finding investigation. The Investigator commenced her investigation on 15 August 2013 by contacting AP and emailing SC but did not tell the Applicant about the investigation at that stage.

144. When she wrote to him on 28 August 2013, the Investigator informed the Applicant that the IGO had received allegations implicating him. This was unclear and, as she accepted, could be misunderstood.

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<sup>8</sup> Section 5.15 of ST/SGB/2008/5.

<sup>9</sup> Section 6.23 of the Guidelines.

<sup>10</sup> Section 5.16 of ST/SGB/2008/5.

145. The Tribunal finds that the Applicant was not fairly informed that he was under investigation until he was being interviewed, which was in breach of section 6.23 of the Guidelines.

146. The Investigator deliberately did not inform the Applicant of the allegations against him at the beginning of the investigation or even when he asked twice during the first part of the interview on 29 August 2013. As the Appeals Tribunal stated in *Flores* “Questioning is not informing”.

147. When the Investigator finally told him at Question 30 that the allegations were that he had sexually harassed the Complainant his surprise was apparent when he asked: “What harassment?”

148. The Investigator did not inform the Applicant during his interview about many of the facts alleged by the Complainant or put to him the specific details of her allegations of sexual harassment. He therefore did not have an opportunity afforded by section 6.23 of the Guidelines to respond to those allegations during the interview.

149. Of the witness testimonies relied on by the Investigator and ultimately the decision maker only those of the Applicant and AP were obtained by interview and properly authenticated.

150. In *Nyambuza* the Appeals Tribunal stated:

Written witness statements taken under oath can be sufficient to establish by clear and convincing evidence the facts underlying the charges of misconduct to support the dismissal of a staff member. When a statement is not made under oath or affirmation, however, there must be some other indicia of reliability or truthfulness for the statement to have probative value.

151. The Tribunal rejects the Respondent’s submission that reliance on unsworn testimony does not constitute a breach of due process if the Applicant has had the opportunity to cross examine the witness before the Tribunal.

152. Evidence given at a hearing after the decision enables the Tribunal to evaluate the evidence adduced and the procedures utilized during the course of the

investigation by the Administration.<sup>11</sup> It is not to afford the Respondent the chance to cure procedural errors. The Tribunal's role is to review the contested decision on the basis of the evidence that was before the decision maker at the time the decision was made.

153. The critical statement of the Complainant upon which the entire disciplinary action was initiated was not obtained by interview as required by Section 5.16 of ST/SGB/2008/5. It was not signed and the Complainant did not attest to the accuracy of its contents. In the words of the Appeals Tribunal in *Diabagate*, it was solely hearsay and insufficient by itself to prove the charge.

154. The statement of CB, produced by the Respondent to support the reliability or truthfulness of the Complainant's statement, was a hearsay account of what the Complainant had told her. It was unsigned and unattested.

155. The Investigator conducted a formal interview with AP, but, apart from her professional opinion about the work performances of the Applicant and the Complainant which was based on her own observations, the balance of the evidence obtained from CB was her hearsay account of what the Complainant had told her.

156. The repetition of a hearsay complaint does not increase its reliability or its probative value. A complaint that is in a form which makes it inherently unreliable cannot be bolstered or enhanced to the required standard of clear and convincing evidence by hearsay evidence. The inclusion of these statements in the IR was prejudicial and unfair to the Applicant.

157. In *Flores* the Appeals Tribunal held that the failure of the Administration to interview witnesses referred to by the applicant in that case "was an undeniable breach of the Applicant's right to due process".

158. SC and the UNICEF international staff member, MW, were referred to as sources of relevant information by both the Complainant in her list of contacts and the Applicant at his interview.

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<sup>11</sup> *Nyambuza* 2013-UNAT-364.

159. The Investigator dismissed the importance of SC as a witness on the basis of his emailed answers to her extremely general emailed questions. Having heard his oral sworn testimony during the hearing, the Tribunal finds that if he had been properly interviewed about what he observed during the time that the Complainant was at Basra, he could have provided valuable impartial and objective evidence about the working and living conditions there and the relationship between the Applicant and the Complainant.

160. The Investigator did not interview MW who lived with the Complainant and the Applicant in the same close living quarters at the relevant time. This was a missed opportunity to obtain and evaluate relevant evidence.

161. The Tribunal holds that the failure of the Investigator to make proper investigations into the testimony of these two witnesses meant that the Applicant was denied due process.

162. The differences in the accounts of the Complainant and the Applicant to the Tribunal demonstrated significant areas of dispute between them about what actually occurred; whether the Complainant consented to the alleged behaviour and whether the Applicant had grounds to believe that his behaviour was welcome. The Investigator accepted that the unwelcome nature of the behaviour was a matter in dispute.

163. Such issues are subtle and complex. They require careful assessment of the accounts of both parties against as much independent, relevant evidence as is available. The conduct of the investigation, which took place over just three or four days, did not reflect this complexity.

164. The Investigator was charged by section 6 of the Guidelines not only to obtain but to evaluate information and evidence related to the alleged misconduct. The IR does not demonstrate any evaluation of such evidence as was obtained. The IR simply consisted of verbatim extracts from statements and summaries of the evidence. The Investigator listed what she called established facts but did not evaluate how they met the definition of sexual harassment in the SGB.

165. In conclusion, the Tribunal finds that the investigation did not meet the fundamental due process requirements of ST/SGB/2008/5 and the Guidelines. The Complainant's statement was not obtained according to the correct procedure; the Applicant was not informed of the allegations at the beginning of the investigation; he was not informed about the alleged facts and given an opportunity to respond to them during his interview; the evidence of relevant witnesses was not obtained; the Investigator included hearsay evidence in the IR and failed to evaluate the evidence as required.

***Whether the facts relied on by the Administration were properly established***

166. The IR listed established facts which the Investigator told the Tribunal were sufficient to establish misconduct but, she also stated that the IR needed to be considered as a whole including the details of the two main incidents taken from the Complainant's statement which were not included in the list of established facts.

167. The Investigator also said that the Complainant's claim that the actions of the Applicant had affected their professional relationship was part of the report but not one of the key concluding factors.

168. The 9 December 2013 letter to the Applicant from the D/DHRM entitled "Allegations of misconduct" referred to the IR and stated that it contained allegations of sexual harassment. It did not specify what those allegations were or the facts that had been established to support them.

169. Similarly, the D/DHRM's 14 July 2014 letter entitled "Disciplinary measure" stated that the Applicant failed to conduct himself in a manner befitting his status as an international civil servant by sexually harassing a colleague, without any indication which facts were relied on to reach this conclusion.

170. The Tribunal finds that the facts relied on by the Administration were not properly established and that the lack of clarity about which facts and conclusions were relied on by the IGO and the failure to particularize the charges against the

Applicant at any stage of the investigation prejudiced his ability to make meaningful comments at any stage of the investigation process.

***Whether the established facts constituted sexual harassment***

171. The burden of proof lies with the Respondent to show by clear and convincing evidence that the alleged misconduct occurred.<sup>12</sup>

172. The definition of sexual harassment relied on in this case was that in ST/SGB/2008/5 para 1.3:

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, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

173. The statutory elements required to establish misconduct by sexual harassment are:

- a. One or more sexual advances, requests for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature.
- b. The conduct complained of must be unwelcome.<sup>13</sup>
- c. The behaviour might reasonably be expected to cause offence or humiliation to another; or the behaviour interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment.

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<sup>12</sup> *Molari* 2011-UNAT-164.

<sup>13</sup> *Perelli* 2013-UNAT-291.

174. It is for the Respondent to demonstrate to the standard of high probability that the established facts prove each of these elements.

175. Although the Applicant disputed the nature and extent of his behavior as alleged by the Complainant, he did not dispute he had made sexual advances towards her. To that extent the first element was established.

176. In relation to the second element, the Applicant made it clear during the investigation that his position was that anything he did was with the consent of the Complainant. He asked the Investigator to consider his perspective and the context of their relationship. In his letter to the D/DHRM he stated “the incidents were triggered by [the Complainant], consensual and reciprocal”.

177. The Investigator agreed in her evidence to the Tribunal that there was a dispute about whether the Complainant was consenting and the degree of insistence by the Applicant. She relied on the Complainant’s statement and did not investigate this issue further.

178. The Complainant’s statement and other evidence relied on by the Respondent to prove the second element was either unsworn, unsigned or hearsay and is therefore insufficient to establish to a high probability that the Applicant’s behaviour was unwelcome.

179. The IR did not reach a clear conclusion on the third element.

180. The Tribunal finds the Respondent failed to prove to the standard of high probability that the behaviour of the Applicant towards the Complainant fulfilled two of the three required elements of sexual harassment.

### **Conclusions**

181. The investigation into the allegations of sexual harassment and the subsequent disciplinary process was in breach of the procedures required by ST/SGB/2008/5 and the IGO Guidelines for Conducting Investigations. Taken together, these procedural errors amounted to breaches of due process which were

prejudicial to the rights of the Applicant. and sufficiently grave to render the disciplinary process null and void.

182. The evidence relied on by the Administration lacked probative value as it was obtained in breach of the prescribed processes. Accordingly the Tribunal holds that the Respondent failed to prove to a high standard of probability by clear and convincing evidence that the Applicant sexually harassed the Complainant.

183. For these reasons the Tribunal holds that the separation of the Applicant by reason of misconduct was unlawful.

### **Remedies**

184. The Applicant requested the following relief.

- a. The decision to separate him to be rescinded;
- b. The decision to find that the allegations of sexual harassment were founded be rescinded;
- c. That he be reinstated as of the date of his separation; and
- d. That he be compensated 6 month's salary for moral injury, stress and damage to reputation; or
- e. In the alternative that the Tribunal impose a lesser sanction.
- f. In his statement The Applicant claimed that he suffered monetary loss of pre-paid accommodation in the sum of USD7000 (not contested) as a direct consequence of his unlawful separation.

185. The unlawful decision to impose on the Applicant the disciplinary measure of separation from service with compensation in lieu of notice, and without termination indemnity is rescinded.

186. As this is a matter of termination, in accordance with art. 10.5(a) of its Statute, the Tribunal must set an amount of compensation that the Respondent may elect to pay as an alternative to rescission of the contested decision. This

amount must take into account the nature of the Applicant's employment with the UN including the fact that he was engaged on a fixed term appointments of more or less one year duration.<sup>14</sup>

187. The Applicant took up a one year fixed-term appointment as Programme Officer, P-3, step V, with UNHCR in Myanmar, from 16 January 2014.

188. At the time of his separation in July 2014, the Applicant had 6 months remaining on his one year fixed term appointment. In the absence of any evidence of a legitimate expectation that his appointment would be renewed, the Tribunal sets the amount that the Respondent may elect to pay the Applicant as alternative to rescission of the decision as six months net base salary plus benefits to which he would have been entitled during the remainder of his fixed term appointment. These benefits will include but are not limited to the notice (or payment in lieu) and termination expenses which he was denied by reason of the unlawful separation.

189. The Applicant's claim for approximately US\$7000 for pre-paid accommodation forfeited by him as a result of the early termination of his fixed term appointment was referred to by him in his sworn statement of evidence to the Tribunal. The fact of this loss was not questioned or contested by the Respondent but the Applicant did not produce evidence of the precise amount of his loss. The Applicant is entitled to compensation for this claim upon production of documentary proof of the exact amount of his loss.

### ***Moral damages***

190. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal referred to the nature of evidence which the UNDT can rely on in assessing an entitlement to moral damages.

An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights

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<sup>14</sup> *Gakumba* 2013-UNAT-387.

and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

191. While the Tribunal finds that that the breaches of process and lack of probative evidence to support the disciplinary proceeding and subsequent decision were serious and fundamental, his evidence of stress, harm or damage caused as a result of the decision was scant and unspecified. It is not sufficient to support an entitlement.

### **Judgment**

192. The finding of misconduct against the Applicant is unlawful.

193. The Tribunal rescinds the administrative decision to separate the Applicant without notice or termination indemnity and orders the Respondent to reinstate the Applicant. In the event that reinstatement/rescission is not possible, the Respondent is to pay compensation in an amount equal to six month's net base salary, based on the salary that the Applicant was receiving on the date of his separation from service and termination indemnity.

194. The Respondent is to pay the Applicant compensation for the amount of pre-paid accommodation forfeited by him as a result of the early termination of his fixed term appointment upon receipt of documentary evidence to support his claim.

195. The Applicant is to provide the Respondent with this documentary evidence within 30 days of this judgment.

*(Signed)*

Judge Coral Shaw

Dated this 18<sup>th</sup> day of December 2015

Entered in the Register on this 18<sup>th</sup> day of December 2015

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi