



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NBI/2017/056  
Judgment No.: UNDT/2019/187  
Date: 26 December 2019  
Original: English

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**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

H AidAR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Paul Morcos  
Nour Audi

**Counsel for the Respondent:**

Matthias Schuster, AAS/ALD/OHR  
Miryounq An, AAS/ALD/OHR

## Introduction

1. The Applicant is a former Associate Liaison Officer at the United Nations Interim Force in Lebanon (“UNIFIL”).
2. In his application filed on 20 June 2017, he contests the Under-Secretary-General for Management’s (“USG/DM”) decision to impose on him the disciplinary measures of a fine of one-month of his net base salary and separation from service with compensation in lieu of notice and without termination indemnity, in accordance with staff rules 10.2(a)(v) and (viii) [REDACTED]  
[REDACTED]  
[REDACTED].
3. The Respondent filed a reply to the application on 24 July 2017.
4. The Tribunal heard the case from 17-21 June 2019. During the hearings, oral testimony was received from:
  - a. The Applicant;
  - b. The Complainant;
  - c. Ms. Eliane El-Dik, Language Assistant/UNIFIL;
  - d. Mr. Ali Takach, Training Officer/UNIFIL;
  - e. Ms. Monita Youssef, Welfare and Staff Counselling Unit/UNIFIL;
  - f. Ms. Odette Hajj - Language Assistant/UNIFIL; and
  - g. Mr. Christopher Wilkinson, Chief, Language Support Unit (“LSU”)/UNIFIL.
5. The Respondent and the Applicant filed their closing submissions on 20 and 21 August 2019 respectively.

## **Background facts**

6. The facts as described in the following paragraphs are either undisputed or based on the referenced testimony of witnesses, heard at the inquiry or before the Tribunal, whom the Tribunal found credible, unless otherwise indicated.

7. The Applicant began employment with the United Nations in UNIFIL on 12 September 1983. At the times material to this application, he was working as an Associate Liaison Officer within the office of the UNIFIL Force Commander (“UNIFIL/FC”).

8. The Complainant, a Language Assistant with the LSU, beginning 5 January 2015, was on a short-term assignment from the LSU to the Office of UNIFIL/FC, to work directly for the Applicant.

9. Assignments to the office of UNIFIL/FC were done by Mr. Wilkinson, usually on a request issued through Mr. Fabio Bendinelli, the Deputy Director of Mission Support. Requests filed by the Applicant himself were rare. Language assistants were directed to the UNIFIL/FC Office and on rotational basis.

10. On assignments, language assistants reported to the Applicant.<sup>1</sup> He, admittedly, at times acted in a temperamental manner and cursed in Arabic<sup>2</sup>, albeit not in front of higher-ranking staff.<sup>3</sup> There had, however, never been any complaints or negative feedback in regard to assignments to his office.<sup>4</sup> The Applicant had no input to the ePerformance of the language assistants as normally the support was short term in nature and, as such, no special performance reports were usually requested. However, usually LSU staff were happy with these assignments, because the exposure to the work they did in the UNIFIL/FC’s office was interesting, including networking, and directly

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<sup>1</sup> Ms. El-Dik’s interview, reply, annex 2, page 336 and her testimony before the Tribunal on 18 June 2019.

<sup>2</sup> Applicant’s interview, reply, annex 2, page 275; Mr. Takach’s interview, reply, annex 2, page 246.

<sup>3</sup> Mr. Wilkinson’s interview, reply, annex 2, page 184; Mr. Bendinelli’s interview reply, annex 2, page 196.

<sup>4</sup> Mr. Wilkinson’s interview, reply, annex 2, page 184; Mr. Bendinelli’s interview, reply, annex 2, page 199; and Ms. El-Dik’s interview, reply, annex 2, page 339.

related to the mission and its position in the community.<sup>5</sup> The Applicant was known to be well-connected to the Force Commander and to the Lebanese authorities, including the Chief of the Lebanese Armed Forces (“LAF”) Intelligence.<sup>6</sup> On the other hand, the LSU personnel, especially in the early years of the Mission (2007-2008), were exposed to interest from the LAF Intelligence, which shaped the dynamics within the Unit. The Complainant was among those who had been picked for questioning during that period.<sup>7</sup>

11. At the time of the incident, in the context of the downsizing of the Mission, the LSU was facing restructuration.<sup>8</sup> It was also formally known throughout the Mission that the Chief LSU post was being considered for nationalization and possibly taken over by the Applicant, and staff inquired about opportunities for themselves within the environment should his post be nationalized.<sup>9</sup> The Applicant enquired about that position for himself, even though in reality such possibility may have been remote.<sup>10</sup> Indisputably, the Applicant was being asked for comments on the matter of restructuring of the LSU.<sup>11</sup>

12. The Complainant prior to coming to the Mission had lived overseas and was, in the words of her colleague, “open minded”.<sup>12</sup> She was known as not a very good team player, generally uncooperative and did not integrate in the teams.<sup>13</sup> These issues

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<sup>5</sup> Mr. Wilkinson’s interview, reply, annex 2, page 185; Ms. El-Dik’s interview, reply, annex 2, page 339; Ms. Dorline Jirjis, Language Assistant, interview, reply, annex 2, page 342.

<sup>6</sup> Mr. Bendinelli’s interview, reply, annex 2, pages 194 and 197-198.

<sup>7</sup> Mr. Bendinelli’s interview, reply, annex 2, pages 198-199; the Complainant’s interview reply, annex 2, pages 159 and 160.

<sup>8</sup> Mr. Bendinelli’s interview, reply, annex 2, page 197; Applicant’s interview, reply, annex 2, page 173; Complainant’s interviews, reply, annex 2, pages 161 and 217-218; Complainant’s testimony before the Tribunal on 17 June 2019.

<sup>9</sup> Mr. Wilkinson’s interview, reply, annex 2, pages 185 and 186; Mr. Bendinelli’s interview, reply, annex 2, page 197 and 198; Ms. El-Dik’s interview, reply, annex 2, page 338; Applicant’s interview, reply, annex 2, page 173; Complainant’s interview on 27 July 2015, reply, annex 2, pages 217 and 218.

<sup>10</sup> Mr. Bendinelli’s interview, reply, annex 2, pages 197 and 198; Applicant’s interview, reply, annex 2, page 173.

<sup>11</sup> Applicant’s interview reply, annex 2, page 147; Complainant’s interview reply, annex 2, pages 217 and 218; Mr. Kafarani’s interview, reply, annex 2, page 239.

<sup>12</sup> Ms. Hajj’s testimony before the Tribunal on 19 June 2019.

<sup>13</sup> Mr. Wilkinson’s interview, reply, annex 2, page 185 and his testimony before the Tribunal on 20 June 2019; Mr. Takach’s interview, reply, annex 2, page 248; Ms. Rahal’s interview, reply, annex 2, page 261; Ms. Hajj’s testimony before the Tribunal on 19 June 2019.

were however resolved without affecting her performance appraisals.<sup>14</sup> Among others, in a matter involving inappropriate conduct of an Italian/Somali officer toward female staff of the LSU, she aligned with the officer and volunteered a written statement.<sup>15</sup> ■■■■■  
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13. Undisputedly, the Applicant had not requested the assignment of the Complainant to work with him.<sup>18</sup> Prior to the assignment, they had not had any professional relation, however the Complainant recalls a one-time brief exchange regarding a recruitment process in 2014, which indicated that the Applicant had known who she was.<sup>19</sup> On her part, the Complainant was interested in getting a national professional officer's post in the Civil Affairs.<sup>20</sup>

14. The Complainant's assignment to work with the Applicant was initially for one month but was extended, with her consent, for another month, until the end of February 2015. During the assignment, the Complainant reported to the Applicant and was concerned about his input in her performance appraisal.<sup>21</sup> Right from the start, the Applicant expressed irritation when the Complainant turned to LSU on the question of her attendance in office.<sup>22</sup> The Applicant also told the Complainant that he would not tolerate her speaking behind his back nor other people trying to influence their work relation ("putting a needle in her head").<sup>23</sup>

15. In the office, the Complainant worked alone with the Applicant albeit not in the

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<sup>14</sup> Mr. Wilkinson's interview, reply, annex 2, pages 184 and 185 and in his testimony before the Tribunal on 20 June 2019.

<sup>15</sup> Mr. Bendinelli's interview, reply, annex 2, page 199; Mr. Wilkinson's interview, page 183; Ms. Ivetic's interview, reply, annex 2, page 261.

<sup>16</sup> Applicant's interviews, reply, annex 2, pages 170 and 277.

<sup>17</sup> Ms. Rahal's interview, reply, annex 2, page 257.

<sup>18</sup> Mr. Wilkinson's interview, reply, annex 2, page 182; Applicant's interview, reply, annex 2, page 143.

<sup>19</sup> Complainant's interview, reply, annex 2, page 156.

<sup>20</sup> Complainant's interview, reply, annex 2, pages 217 and 218.

<sup>21</sup> Complainant's interviews, reply, annex 2, pages 159 and 224.

<sup>22</sup> Applicant's testimony before the Tribunal on 20 June 2017.

<sup>23</sup> Complainant's interview, reply, annex 2, pages 157 and 159 and in her testimony before the Tribunal on 17 June 2019.

same room. She was not pleased with the Applicant's manner, which included him cursing in Arabic, using crude language, ill-speaking of others, and calling her nicknames which she did not appreciate, such as "stubborn [REDACTED] woman" or "doktora" (the clever one). [REDACTED]

[REDACTED] He would tell jokes of sexual content. The Complainant complained about it to Ms. Kinsella from the Conduct and Discipline Unit ("CDU"), who offered to organize a targeted training, should the Complainant file a report. The Complainant refused, fearing negative consequences.<sup>24</sup> She also complained to Mr. Takach about the shouting and the use of sexual undertones; Mr. Takach advised her to tell the Applicant to stop.<sup>25</sup> She complained to Ms. Rahal<sup>26</sup> and to Ms. El-Dik.<sup>27</sup> [REDACTED]

[REDACTED]. When she indicated that she was not comfortable with this, he asked her when she was going to drop her innocent mask. The Complainant started making notes of inappropriate communications from the Applicant. These notes were subsequently edited after she made the complaint and submitted in the investigation.<sup>28</sup> Thus, the document which forms part of the investigative file had not been drawn up contemporaneously with the events, and reliance on it is limited.

16. The Applicant told the Complainant that people hated her and that the Chief LSU did not like her.<sup>29</sup> He criticized her personality and her communication skills.<sup>30</sup> He exposed her, on two occasions and without professional reason for it, to encounters with the officer of the LAF Intelligence who had previously detained the Complainant

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<sup>24</sup> Complainant's interview, reply, annex 2, page 158; Ms. Kinsella's interview, reply, annex 2, page 267.

<sup>25</sup> Mr. Takach's interview, reply, annex 2, page 246 and in his testimony before the Tribunal on 18 June 2019.

<sup>26</sup> Ms. Rahal's interview, reply, annex 2, page 258.

<sup>27</sup> Ms. El Dik's interview, reply, annex 2, page 338 and in her testimony before the Tribunal on 18 June 2019.

<sup>28</sup> Complainant's interviews, reply, annex 2, pages 160 and 306 and in her testimony before the Tribunal on 17 June 2019.

<sup>29</sup> Complainant's interview, reply, annex 2, page 159; Mr. Takach's interview, reply, annex 2, , page 247.

<sup>30</sup> Complainant's interview, reply, annex 2, pages 159 and 160 and in her testimony before the Tribunal on 17 June 2019.

for interrogation.<sup>31</sup> The Complainant describes that one day she felt appreciated, another day demeaned. But she was also eager to improve her personality and skills and saw working with the Applicant as an opportunity to progress and had hopes for securing a position in the restructured LSU. She repeatedly asked from the Applicant whether her contract with UNIFIL would be extended and the Applicant told her that he would help.<sup>32</sup> Notwithstanding her discomfort with the Applicant's manner, she admitted that the Applicant had some positive attributes and was happy about another one-month extension of her assignment.<sup>33</sup> At the time of the alleged incident, the Complainant was in the process of divorcing her husband. This fact was known around the Camp, mainly from the Complainant herself.<sup>34</sup> One time the Applicant heard the Complainant's telephone conversation with the [REDACTED] about the process and commented that she should not divorce since [REDACTED]. She told him about her husband losing money, that he stopped taking showers and was always dirty, and that she had to repay her husband's debt.<sup>35</sup> [REDACTED]

[REDACTED] Whereas the Complainant denies raising this subject, she mentioned the issue to Mr. Takach.<sup>37</sup>

17. People visiting the office did not notice anything inappropriate about the relation between the Applicant and the Complainant, and the communication that they witnessed between them was correct.<sup>38</sup>

18. The Applicant is said to have interest in massage.<sup>39</sup> He had massaged Mr.

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<sup>31</sup> Complainant's interview, reply, annex 2, page 160; Mr. Wilkinson's interview, reply, annex 2, page 185.

<sup>32</sup> Complainant's interview, reply, annex 2, pages 159 and 160.

<sup>33</sup> Ibid.; Mr. Kafarani's interview, reply, annex 2, page 241; Ms. Rahal's interview, reply, annex 2, page 258.

<sup>34</sup> Mr. Takach's interview, reply, annex 2, page 247 and in his testimony before the Tribunal on 18 June 2019; Ms. Rahal's interview, reply, annex 2, page 259; Ms. Hajj's interview, reply, annex 2, page 289.

<sup>35</sup> Complainant's interview, reply, annex 2, page 158.

<sup>36</sup> Applicant's interview, reply, annex 2, page 146.

<sup>37</sup> Mr. Takach's interview, reply, annex 2, page 246.

<sup>38</sup> Mr. Kafarani interview, reply, annex 2, page 236; Mr. Takach interview, reply, annex 2, page 251; Mr. Wilkinson interview, reply, annex 2, page 184 and in his testimony before the Tribunal on 20 June 2019; Ms. El-Dik interview, reply, annex 2, page; 337; Ms. Laudy Nassif's interview, reply, annex 2, page 329.

<sup>39</sup> Mr. Kafarani's interview, reply, annex 2, page 242; Mr. Bendinelli's interview, reply, annex 2, page 197; Complainant's interview, reply, annex 2, page 223.

Kafarani in front of the Complainant.<sup>40</sup>

### **The day of the incident**

19. It is undisputed that in the morning of 9 February 2015, around 8.30 – 9.00 a.m., the Complainant left the office and went with Mr. Kafarani to exchange service phones at the ICTS. As it turned out, the task required a trip to Tyre. The Complainant expressed a wish to accompany Mr. Kafarani to Tyre. But when they returned to the office, the Applicant objected to the Complainant's going. As such, she remained in the office.<sup>41</sup> Mr. Kafarani left for Tyre at 10.43 a.m.<sup>42</sup> Narration regarding subsequent events differs between the Applicant and the Complainant.

20. According to the Applicant, after Mr. Kafarani departed, he went to the UNIFIL/FC's office between 10.30 and 10.50 a.m. and met either Colonel Angelo Marucci or another staff member. He went because he wanted to know about an event planned for 17 February 2015. When he came back to the office, the Complainant was there. He called his wife to go for lunch before noon as was usual.<sup>43</sup>

21. Before the Tribunal, the Applicant testified that, after Mr. Kafarani departed, the Complainant sat at her computer writing something. He told her that he was going to see Colonel Constantine. She said she would be going to meet one of her LSU colleagues. He later learnt that it was Ms. Hajj. He went to the LAF building which was closed, then to the Mission Recreation Centre, a coffee place. He did not find Colonel Constantine. He could see five to ten people working on the yard opposite the FC office. They were trying to place a rock. He realized that they had not been updated about some change. He spoke to their supervisor to change things as he was not happy about this.<sup>44</sup>

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<sup>40</sup> Mr. Kafarani's interview, reply, annex 2, page 242; Complainant's interview, reply, annex 2, page 223.

<sup>41</sup> Complainant's interview, reply, annex 2, page 161 and in her testimony before the Tribunal on 17 June 2019; Applicant's interview, reply, annex 2, page 147 and in his testimony before the Tribunal on 20 June 2019; Mr. Kafarani's interview, reply, annex 2, page 238.

<sup>42</sup> Carlog data for the vehicle used by Mr. Kafarani, reply, annex 2 page 458.

<sup>43</sup> Applicant's interview, reply, annex 2, page 169.

<sup>44</sup> Applicant's testimony before the Tribunal on 20 June 2019.



22. According to the Complainant, after Mr. Kafarani's departure, at around 11.28 a.m. on 9 February 2015, she was in the office at her desk when the Applicant called her to his office by using the term "Doktora". She was wearing a blue shirt, scarf and leather pants. The Applicant said that he heard from someone that she liked to wear leather pants. He looked at his computer and asked her, "do you know Randy?" She said yes. He then did not follow up on the subject, but told her that she was living a stressful life. He asked her to put her hands down. He took a letter opener and held it above her hand and made comments about her being stressed. She moved one of her hands and he said, "see, see, that shows you are stressed" then he moved to the other hand and said, "this one is even worse, the nerves are damaged".

23. He moved her to the couch and said he would show her what he meant about her being stressed. She said that it was okay and that he should just tell her which doctor to go to. He told her she was too short, so he sat her on a pillow. He put his hands on her shoulders from behind and told her to relax. She said she didn't feel okay. He asked her "don't you trust me?" He told her that she had seen him giving massages to Mr. Kafarani many times. The previous language assistant had told her that the Applicant used to massage her and that he also massaged Mr. Bendinelli.

24. She was not comfortable but he said it was just like the doctor's office, so she tried to believe it was. He rubbed her collar bones then walked in front of her and said that there was much tension along her muscles, that there were many things she could do and suggested some exercises. He then walked back behind her and offered to put medicine (strips of tape) on her. She said that she would take it home and do it herself. He ran his hand down her back to her shoulder blade and indicated where he would put the tape. He went to her door and locked it and said that she should be comfortable.

25. He came back behind her and said, "let me massage you, close your eyes". She could not close her eyes. He then started to [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]”. She started shouting, he was asking her in Arabic and she was answering in English saying no. She told him she was leaving but he said, “no, I will go” and left the office.<sup>45</sup>

26. It is undisputed that after lunch the Complainant informed that she felt unwell and was not planning to come to the office the next day. The Applicant said that he was not coming either.

#### **Aftermath of the incident**

27. The Complainant contacted Mr. Takach over the phone in the afternoon on the day of the incident and said that the Applicant had touched her. As Mr. Takach was in a car with other people, he could not seek details. In the following days, in phone calls and meetings, however, the Complainant informed that she had been [REDACTED] [REDACTED] in the course of what had started as a massage. Mr. Takach advised her to forgive the Applicant, not to go to CDU but rather to the Staff Counsellor, whose telephone number he searched for her. Later, the Complainant described to Mr. Takach how she had phoned Ms. Ivetic’s office from the toilet, how she thought that her brothers may want to beat up the Applicant and that LAF was exerting pressure upon her, and how she suspected the Applicant of sending her threatening messages on her phone. She expressed annoyance about how the Applicant continued with his life and office routine as if nothing happened and rudely dismissed her suggestion that he should apologize. She also was concerned that the Applicant may become Chief LSU and anxious about how she would be able to work with him

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<sup>45</sup> Complainant’s interview, reply, annex 2, page 162 and in her testimony before the Tribunal on 17 June 2019.

as supervisor.<sup>46</sup>

28. On the next day after the incident, 10 February 2015, both the Complainant and the Applicant did not come to work. The Applicant called the Complainant at lunch time to check whether she had come to the office; there is a dispute whether calling her on this occasion a “stubborn”, or “tough”, ■■■ woman was disrespectful or not, which the Tribunal does not consider relevant. Undisputedly, the Applicant also asked that the next day she pay an instalment of his car loan. The Complainant complied, as she had done so before and the bank was on her way. The payment was later reimbursed through third parties.<sup>47</sup>

29. On 11 February 2015, the Applicant was preparing his comments on the reorganization of the LSU requested of him by Mr. Bendinelli. He called on the Complainant to print the organigram while he was conversing with Mr. Kafarani. She asked about eligibility of language assistants for the newly created posts. The Applicant stated that none of the language assistants were, in his opinion, suitable. The Complainant left his office visibly upset.<sup>48</sup> Soon thereafter she stepped out to the toilet to secretly make phone calls to Mr. Takach and Ms. Ivetic.<sup>49</sup>

30. As confirmed by the testimony of Ms. Youssef, the Complainant telephoned the office of the Staff Counsellor on 11 February 2015 at 10.45 a.m. wanting to schedule an appointment in relation to an issue with her supervisor. She did not specify what the issue was about, but she was in an emotional state; the tone of her voice was down, somehow stressed or depressed.<sup>50</sup> The Complainant met with Ms. Ivetic at 2.00 p.m. There was another meeting on 13 February.<sup>51</sup> Ms. Ivetic confirms that the

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<sup>46</sup> Mr. Takach’s interview, reply, annex 2, page 251 and his testimony before the Tribunal on 18 June 2019

<sup>47</sup> Applicant’s interview, reply, annex 2, pages 170 and 276; Complainant’s interview, reply, annex 2, page 217.

<sup>48</sup> Mr. Kafarani’s interview, reply, annex 2, pages 239 and 240; Complainant’s interview, reply, annex 2, pages 217 and 218; Mr. Kafarani’s interview, reply, annex 2, pages 239 and 240.

<sup>49</sup> Complainant’s interview, reply, annex 2, pages 163, 218 and in her testimony before the Tribunal on 17 June 2019.

<sup>50</sup> Ms. Youssef’s interview, reply, annex 2, page 230 and in her testimony before the Tribunal on 17 June 2019.

<sup>51</sup> Ms. Youssef’s interview, reply, annex 2, page 230.

Complainant called her office asking for a meeting, which took place on the next day in the afternoon and was about an incident that had happened a day or two earlier: Namely, the Applicant had offered her a massage, claiming expertise in this field. She accepted because he was much older than her and, culturally, she felt that she could not question him. The Applicant massaged her neck and then started touching her [REDACTED]. She asked him to stop and stepped out of the office. She also mentioned that the Applicant had played with her hands to measure the level of her anxiety.<sup>52</sup>

31. Ms. Ivetic found the Complainant confused as to what to do and afraid that the Applicant was very powerful and had a lot of contacts. She explained that she had not come to the Counsellor's office on the day of the incident because she feared being seen doing so. She had paid the Applicant's loan, as she had done it before and wanted to act as usual. She mentioned that her brother wanted to kill the Applicant; she also feared that the LAF would get involved. In the first meeting, they agreed that the Complainant would take some days off.<sup>53</sup> Mr. Wilkinson was called into the next meeting and, without being told the details, he advised that the Complainant be moved back to the Finnish-Irish Battalion.<sup>54</sup>

32. Ms. Hajj, the Complainant's colleague from LSU, testified that the Complainant told her about the incident on the same day that it happened. This appears inaccurate, given the persistent testimony of the Complainant that she had wanted to talk with Ms. Hajj but this had proved impossible, and Ms. Hajj's statement to the investigators that she could not remember when she had been told about the incident.<sup>55</sup> It is however, credible that on some later date Ms. Hajj was contacted by the Complainant who came to her office crying and told her that the Applicant had harassed her, i.e., had offered to give her massage and then proceeded to [REDACTED]. In later days, the Complainant called asking advice whether to resolve the issue

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<sup>52</sup> Ms. Ivetic's interview, reply, annex 2, pages 209 and 210.

<sup>53</sup> Ibid.

<sup>54</sup> Ms. Ivetic's interview, reply, annex 2, pages 207 and 209; Mr. Wilkinson's interview, reply, annex 2, page 182.

<sup>55</sup> Ms. Hajj's interview, reply, annex 2, page 289

informally.<sup>56</sup>

33. Mr. Wilkinson confirmed being called to a meeting by the Staff Counsellor, Ms. Ivetic. He subsequently informed Mr. Bendinelli that there might be a harassment complaint coming up and that further meetings followed. One of them involved the Complainant. She signalled that the issue was serious as her brothers wanted to beat up the Applicant. It was apparent that the Complainant did not know how she wanted to proceed.<sup>57</sup>

34. Mr. Bendinelli confirms the circumstances in which he was informed by Mr. Wilkinson of the issue. He participated in three meetings involving the Complainant. First, he met with the Complainant in the presence of Mr. Wilkinson and she was very upset and spoke of harassment, clearly of a sexual nature, suffered from the Applicant. He tried to impress upon her that she should file a formal complaint with the CDU, meanwhile, if she feared retaliation, she should come work in his office.<sup>58</sup> A few days later though, 17 or 18 February, the Complainant came to his office together with the Applicant, hugging each other and looking relaxed, which he welcomed with relief as a sign that the matter was closed.<sup>59</sup> A couple of days later, though, the Complainant came back crying, told him that she had been forced to withdraw her grievance by LAF Intelligence and suggested that there was a conspiracy against her. Mr. Bendinelli after some time enquired whether a formal complaint had been lodged but the Complainant advised that she had not filed a case. The Applicant threatened that he would go to a local court. In a subsequent conversation, Mr. Bendinelli insisted that the Complainant use the formal channel, that is, CDU or drop the case, because the situation was awkward: he was uneasy having the Applicant accused informally while there were young female language assistants working with him daily; on the other hand, should the Applicant win in a local court, it could have consequences for the Complainant at

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<sup>56</sup> Ms. Hajj's interview, reply, annex 2, pages 288 and 290.

<sup>57</sup> Mr. Wilkinson's interview, reply, annex 2, pages 182 and 183.

<sup>58</sup> Mr. Bendinelli's interview, reply, annex 2, pages 190 and 191; Mr. Wilkinson's interview, reply, annex 2, page 182.

<sup>59</sup> Mr. Bendinelli's interview, reply, annex 2, page 192; Complainant's testimony before the Tribunal; Applicant's interviews, reply, annex 2, pages 150 and 170 and in his testimony before the Tribunal on 20 June 2019.

UNIFIL. The Complainant advised that she had a complaint ready for signature deposited with the CDU. Instead, however, she wrote to the Force Commander. Mr. Bendinelli participated in an attempt to informally resolve the conflict, but the mediation failed. This prompted Mr. Bendinelli to further insist that the Complainant take formal steps; he was astonished that everybody was talking about the case on all levels, including the Force Commander, yet no complaint had been filed and it looked like some local games were being played.<sup>60</sup>

35. The Tribunal noted discrepancies in the Complainant's and Mr. Bendinelli's accounts as to whether Mr. Bendinelli pressurized her not to make a formal complaint and whether the Complainant indeed requested being moved back to the Battalion. Mr. Bendinelli recalls that indeed the Complainant expressed a wish to move, so he offered to move her to his office, but the issue of moving back to the Battalion did not arise, as on 17 February she seemingly reconciled with the Applicant and thereafter her assignment to his office was anyways coming to an end.<sup>61</sup> These discrepancies are not material for the case and do not reflect negatively on credibility of either witness as to that several meetings took place regarding the issue.

36. On 13 February 2015, the Complainant tried repeatedly to call Ms. Rahal and left her a message saying that it was urgent. When Ms. Rahal called back, the Complainant was crying and told her the story in detail, along the lines described above. Sometime later, Ms. Rahal was approached on the phone by the Applicant who denied the allegations and told her that the Force Commander and LAF had been involved and the Complainant's husband apologized to him. Months later, Ms. Rahal encountered the Complainant crying at the door of the office of the Legal Adviser. She spoke of the case again and added that she was worried that her brother, [REDACTED] [REDACTED] would get involved in defending her honour. She

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<sup>60</sup> Mr. Bendinelli's interview, reply, annex 2, page 198

<sup>61</sup> Mr. Bendinelli's interview, reply, annex 2, page 193

mentioned that LAF intelligence had taken her to Tyre for questioning.<sup>62</sup>

37. Ms. Kinsella from CDU was approached by the Complainant and they held a series of meetings, where the Complainant explained how the Applicant's behaviour, about which she had previously complained, culminated in him touching her hand, then telling her to close her eyes [REDACTED]. In response, Ms. Kinsella explained how the internal system of justice worked. She noticed that the Complainant was very stressed and concerned that no one see them meeting. According to Ms. Kinsella, the Complainant had a genuine fear for her safety and that of her family, her reputation and for her job, and the reason why she brought the issue to the attention of the Force Commander was the fear that the Applicant was going to be made her supervisor. Ms. Kinsella knew that there were many interventions in the process of making a formal complaint; it may have been the LAF calling the Complainant and her husband for meetings, the National Staff Union insisting on mediation or interventions from Mr. Bendinelli. During the CDU process, Ms. Kinsella herself received a warning from Ms. Ivetic, that the Applicant had indicated to her that he had been aware that the two of them had been pushing the Complainant to formalize her case against him.<sup>63</sup>

38. In the later period the Complainant also confided in Ms. El-Dik asking advice as to whether she should file a complaint.<sup>64</sup>

39. Persons around the Applicant and the Complainant were astonished at the incident given its cultural anomaly; they thought the allegations were as hard to believe as the supposition that the Complainant would have made them up.<sup>65</sup> Ms. Ivetic considered that when a woman is veiled, as was the Complainant, it sends a message that she abides by religious rules, she was astonished at the thought that the Applicant would have crossed the line. She, however, did not question that something happened

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<sup>62</sup> Ms. Rahal's interview, reply, annex 2, page 257.

<sup>63</sup> Ms. Kinsella's interview, reply, annex 2, page 269.

<sup>64</sup> Ms. El-Dik's testimony before the Tribunal.

<sup>65</sup> Mr. Takach's interview, page 248 and in his testimony before the Tribunal; Ms. Ivetic's interview, page 210, Ms. Rahal's interview, pages 257 and 258; Ms. Hajj's interview, page 292 and in her testimony before the Tribunal; Ms. El-Dik's testimony before the Tribunal.

between them.<sup>66</sup> Until the end of her assignment i.e., end of February 2015, the Complainant formally remained in the Applicant's office, she however, was mainly on a sick leave.

40. It is undisputed that from mid-February through beginning of April 2015 there were interventions by LAF Intelligence in the conflict. According to the Complainant, she was approached by the LAF on 13 February and Mr. Khazal of the LAF contacted her to meet with the LAF on 17 February. Present at the meeting were Mr. Khazal and Colonel Constantine. Colonel Constantine kept telling her that she should not report. Her response was that she just wanted to move office. As a result, however, on 17 February, she telephoned the Applicant and asked to meet with him in the office. During their conversation, the Applicant started to display respiratory problems and requested to go sit outside. He asked her what she wanted. She told him that she wanted an apology. He took a coin out of his pocket and gave it to her instead of apology. At that time Mr. Bendinelli was coming down the stairs and saw them. The Applicant told the Complainant to tell Mr. Bendinelli that it was all just a misunderstanding and so she said that in their meeting that followed.<sup>67</sup> The Applicant confirms the fact of a conversation and a meeting with Mr. Bendinelli about an unspecified complaint at which he told the Complainant to either confront the Applicant or stop spreading rumours, to which the Complainant declared that everything was fine.<sup>68</sup>

41. Admittedly, the Applicant had learned from LAF intelligence about the Complainant's grievance<sup>69</sup> and expected LAF Intelligence intervention in the case.<sup>70</sup> The Complainant's husband also made some calls to them.<sup>71</sup> On Wednesday, 4 March, the Complainant and her husband met with LAF General Shahrour who was asking about her intentions. She explained that she did not want to work with the Applicant.

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<sup>66</sup> Ms. Ivetic's interview, reply, annex 2, page 211.

<sup>67</sup> Complainant's interviews, reply, annex 2, pages 163 and 220 and in her testimony before the Tribunal on 17 June 2019.

<sup>68</sup> Applicant's interview 30 June 2015, reply, annex 2, p. 150

<sup>69</sup> Applicant's interview, 30 June 2015 reply, annex 2, p.149

<sup>70</sup> Applicant's interview 22 July 2015, reply, annex 2, p. 171

<sup>71</sup> Complainant's testimony before the Tribunal on 17 June 2019; Complainant's husband's interview, reply, annex 2, pages 297 and 299.



Another meeting was held in March 2015 involving the Applicant, the Complainant's husband and two senior LAF Intelligence officials. Admittedly, the Complainant's husband was required to make the Complainant substantiate her allegations or stop spreading them.<sup>72</sup> The last time the Complainant was contacted by LAF was in April 2015.<sup>73</sup>

42. On 27 March 2015, the Complainant sent an email to the UNIFIL Force Commander, Major General Luciano Portolano, copying Ms. Kinsella, and Gordon Wardley from CDU, making an informal complaint against the Applicant. She alleged, *inter alia*, that the Applicant had created a hostile working environment and that, on 9 February 2015, the Applicant had insisted on giving her a shoulder massage and then

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43. On 20 April and 11 June 2015, the Applicant filed a formal complaint against the Complainant to the UNIFIL/FC and to Mr. Wardley at CDU. The Applicant alleged that he felt “badly abused and unfairly subjected to a very untrue and very impolite, false and systematically deliberate unsubstantiated allegation without any formal or professional reasons which had been circulating since (sic) over 3 months”.<sup>75</sup>

44. In May 2015 the Complainant was approached by the UNIFIL National Staff Union (“NSU”) who suggested informal settlement arguing that since the conflict involved two national staff, it should be resolved informally, or it would have negative impact on the image of the national staff.<sup>76</sup> On 3 May 2015, the Complainant informed the NSU that she was willing to enter into an informal resolution process to solve the case with the Applicant amicably.<sup>77</sup> This process, however, failed.

### **Administrative procedure**

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<sup>72</sup> Applicant's interview, reply, annex 2, pages 171 and 172; Complainant's husband's interview, reply, annex 2, pages 297 and 299.

<sup>73</sup> Complainant's interview, reply, annex 2, pages 225 and 226.

<sup>74</sup> Reply, annex 2, page 122.

<sup>75</sup> Ibid., pages 78 and 91.

<sup>76</sup> Ibid., pages 381 and in the Complainant's testimony before the Tribunal.

<sup>77</sup> Ibid., page 381.

45. On 11 June 2015, the Complainant filed a formal complaint against the Applicant.<sup>78</sup>

46. On 11 June 2015, the UNIFIL/FC appointed a Panel to conduct a fact-finding investigation into allegations of prohibited conduct under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority) in connection with the two separate complaints filed by the Applicant against the Complainant and by the Complainant against the Applicant.<sup>79</sup> The fact-finding Panel interviewed the Applicant and the Complainant and several UNIFIL staff members in relation to the complaints between 30 June and 18 August 2015<sup>80</sup> and transmitted its report to the UNIFIL/FC on 15 September 2015<sup>81</sup> and a supplementary report on 19 November 2015.<sup>82</sup>

47. On 15 December 2015, the UNIFIL/FC recommended to Mr. Atul Khare, Under-Secretary-General/Department of Field Support (“USG/DFS”), that the allegations of prohibited conduct against the Applicant be submitted to the Office of Human Resources Management (“OHRM”) for appropriate disciplinary action pursuant to section 5.18(c) of ST/SGB.2008/5. At the same time, the UNIFIL/FC informed that he found no evidence to substantiate misconduct on the part of the Complainant and that the matter with respect to the allegations against the Complainant had been closed pursuant to section 5.18(a) of the SGB.<sup>83</sup>

48. On 28 November 2016, Mr. Mathew Sanidas, Chief, Human Resources Policy Services, OHRM, transmitted the allegations of misconduct to the Applicant for his comments.<sup>84</sup> The Applicant submitted his responses to the allegations on 15 December 2016 and on 23 and 24 January 2017.<sup>85</sup>

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<sup>78</sup> Ibid., page 100.

<sup>79</sup> Ibid., page 73.

<sup>80</sup> Ibid., pages 140 - 493.

<sup>81</sup> Ibid., page 18.

<sup>82</sup> Ibid., pages 66 and 68.

<sup>83</sup> Ibid., page 6.

<sup>84</sup> Reply, annex 6, page 518.

<sup>85</sup> Reply, annex 7, page 534 and annex 9, page 543.

49. By letter dated 31 March 2017, the Acting ASG/OHRM informed the Applicant that the USG/DM had decided to impose on him the disciplinary measures of a fine of one-month of his net base salary and separation from service with compensation in lieu of notice and without termination indemnity, in accordance with staff rules 10.2(a)(v) and (viii).

50. On 27 April 2017, the UNIFIL CDU brought to the attention of OHRM that UNIFIL Security had received a report from the Complainant and her husband that, after separation, the Applicant had been intimidating her to withdraw her complaint and retract her statements.<sup>86</sup> Following the communication, by email dated 10 May 2017 the CDU provided written statements from the Complainant and her husband.<sup>87</sup>

## **Considerations**

### ***Scope and standard of review***

51. In the context of disciplinary cases, the UNDT is to examine:

- a. whether the facts on which the sanction is based have been established;
- b. whether due process rights were observed.
- c. whether the established facts qualify as misconduct under the Staff Regulations and Rules;
- d. whether the sanction is proportionate to the offence;

52. The Tribunal recalls that as per the United Nations Appeals Tribunal (“UNAT/Appeals Tribunal”) full bench holding in *Applicant*, “[j]udicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration.”<sup>88</sup> In

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<sup>86</sup> Reply, annex 12, page 663.

<sup>87</sup> Reply, annexes 13 and 14, pages 665 and 675.

<sup>88</sup> *Applicant* 2013-UNAT-302 at para 29, citing to *Messinger* 2011-UNAT-123, presumably in that “it was not the task of the UNDT to conduct a fresh investigation into the harassment complaint; rather its task in this case was to determine if there was a proper investigation into the allegations”, and confirmed

its jurisprudence since *Applicant*, the UNAT has maintained that it is not the role of the UNDT to conduct a *de novo* review of the evidence and place itself “in the shoes of the decision-maker”<sup>89</sup>, as well as the definition of “judicial review” articulated in *Sanwidi* retains actuality:

During [its] process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. 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. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker’s administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.<sup>90</sup>

53. Notwithstanding the aforesaid, the Tribunal recalls the judgment by UNAT in *Mbaigolmem*, where a preference has been expressed for making determinations of misconduct in a hearing, especially in cases resulting in termination.<sup>91</sup> This Tribunal has earlier noted certain systemic and certain practical challenges in having the hearing as the principal tool of fact-finding, including the unfortunate but inescapable reality of a lag between the incidents and the time when the cases reach the Tribunal and the fact that the UNDT has neither subpoena nor sanctioning power over non-employees. As such, this Tribunal takes it that *Mbaigolmem* confirms an authorisation and not the obligation for the UNDT to carry out a re-determination and to seek evidence under certain circumstances. The use of this authorization is to be guided by what is necessary to determine the disputed and doubtful material facts in view of readily available evidence, without, however, placing the UNDT “in the shoes” of the entity responsible for discharging the burden of proof.

54. In this case, the Tribunal re-heard all witnesses whose testimony formed the basis for the sanctioning decision. It also heard witnesses requested by the Applicant.

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since in *e.g.*, *Nyambuza* 2013-UNAT-364, *Diabagate* 2014-UNAT-403, *Toukolon* 2014-UNAT-407, *Jahnsen Lecca* 2014-UNAT-408, *Khan* 2014-UNAT-486, *Mayut* 2018-UNAT-862 para 48,

<sup>89</sup> *Wishah*, 2015-UNAT-537, para. 21 and 23.

<sup>90</sup> See *Ouriques* 2017-UNAT-745 para 14 and 15, citing to *Sanwidi* 2010-UNAT-084

<sup>91</sup> *Mbaigolmem* 2018-UNAT-819, at paras. 26 and 27

It relied on the statements collected in the investigation to the extent they served to provide background information and/or verify evidence heard directly.

***Whether relevant facts have been established***

55. The 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 outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable.<sup>92</sup>

56. The Tribunal finds that there is clear and convincing evidence that on the morning of 9 February 2015, at his office, the Applicant repeatedly touched the Complainant [REDACTED] against her will.

57. The Complainant, who testified before the Tribunal over the course of several hours, gave a coherent, detailed, and consistent account of the events. The Complainant provided specific facts portraying the Applicant as an intense, controlling type, who was well connected to the Mission leadership and the Lebanese military intelligence while wide-spread rumours had him on track to become the Chief of LSU. She described her own vulnerability in the personal sphere (the ongoing divorce) and the professional sphere (reorganization of the LSU and uncertainty of employment). All these factual elements were confirmed by neutral witnesses. They form a coherent and detailed picture of a workplace where the power differential inherent to the Complainant's position subordinate to the Applicant was amplified by circumstances.

58. Regarding the incident in question, the Complainant related the details in a precise and straightforward manner even though she was visibly upset when recalling them. Her testimony was consistent with her initial complaint in 2015 and the statements given to the investigators. While there were a few minor differences, they

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<sup>92</sup> *Bagot* 2017-UNAT-718 at para. 46 citing *Mizyed* 2015-UNAT-550, para. 18, Applicant 2013-UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; *Molari* 2011-UNAT-164, paras. 29 and 30.

did not relate to the core of the incident but rather to its aftermath, for instance with respect to the number of meetings that she had with Mr. Bendinelli or at what time she called Mr. Takach on the day of the incident. This can be expected given that the events in question occurred more than four years ago. However, under questioning by the Tribunal and cross-examination by the Applicant's counsel, the Complainant never wavered in the description of the incident and her actions at the time, providing many details and specific recollections, instantly explaining any apparent inaccuracy and openly admitting to ambiguity in her motivations regarding issues such as whether she wanted to extend her assignment to work with the Applicant for the second month or not, or whether to settle the conflict or proceed with the complaint.

59. The Complainant had no reason or motive to wrongly accuse the Applicant of improperly touching her. No witness, including the Applicant, could provide any reason why the Complainant would make false allegations against him. In this respect, however, the Applicant's initial allegation in April 2015 that the Complainant made such false allegations was investigated and rejected and the Applicant did not contest the letter informing of the outcome of that investigation. Mr. Takach testified that in Lebanese culture, and particularly in [REDACTED] culture, a woman, who had been sexually harassed, would normally not speak about it, given the implications. The fact that the Complainant did so, risking her reputation and despite the considerable pressure to which she was subjected, speak against the Applicant's assertions that she would have done it without a valid reason. At the same time, the Complainant's conviction that the Applicant was likely to become her first reporting officer militates against the Complainant making unfounded complaints, considering the risk that she would alienate her future supervisor in doing so.

60. The quality of the Complainant's testimony, the overall coherence of the story and lack of any motive for fabrication leave no doubt for the Tribunal as to the truth of the facts asserted by her.

61. The Applicant challenges the Complainant's reliability on several counts, one of them being that it is hardly believable that any woman would accept the behaviour

of which she accused him without seeking help, defending herself or running away into her office. This assertion is entirely speculative and ignores the element of shock and embarrassment described by the Complainant. It also ignores the Complainant's testimony that she would deal with a stressful situation in a different manner. In this regard, the Complainant provided an example of how she simply froze up on an occasion when her child was in danger and compared this situation to the incident. It is also incorrect that the Complainant did not defend herself. She did resist, effectively albeit not violently; she also expressed a wish to walk out immediately, which however proved not necessary given that the Applicant offered to leave.

62. Further, it is the Applicant's case that the Complainant is not credible because she continued working with a man who allegedly had sexually harassed her, including that she paid his loan. This is inaccurate: the Applicant ignores the fact that immediately after the alleged incident the Complainant sought to leave early, absented herself from work the next day and called sick in the following days, which is all consistent with avoiding the Applicant as much as possible. The Complainant also explained that paying the loan for the Applicant had been her attempt to act routinely until she figured out what to do in the situation. This is an entirely legitimate explanation.

63. The Applicant holds against the Complainant the fact that she had kept a record of her exchanges with him since her first day at the office, which shows that she had bad intentions. In this regard, the Tribunal agrees that such practice signifies, at minimum, distrust. The Tribunal is, nonetheless, persuaded by the explanation of the Complainant that the reason for it had been her astonishment at the Applicant's manner, a sentiment expressed before several of her colleagues who testified about it at the hearing.

64. The Applicant also seeks to discredit the Complainant based on her past work-related issues, poor relations with colleagues, [REDACTED] and averment that she complained to him about [REDACTED] her marriage. The relevance, however, of these issues is such that they confirm the relative

alienation of the Complainant in the environment and hence her vulnerability. They neither undermine the Complainant's credibility nor excuse the Applicant's behavior.

65. The Applicant further impugns the fact that the Complainant did not bring her complaint instantly but waited several months. In this relation, the Complainant testified at length how the LAF officials had suggested to her to drop the matter. Whereas the Applicant relies on an unsworn statement from General Ali Shahrour that the Complainant was not threatened or intimidated, this statement, notwithstanding the issue of its credibility, does not take into account the pressure that the undisputed fact of the LAF's repeated intervention and questioning posed for the Complainant, even if no express threats were involved. In this respect, it is noteworthy that on the Applicant's own account, he had called one Lieutenant Colonel Fawzi Shamoun to find out what was going on because this had become "a life or death matter" and the latter told him, "if this is because of the Bitch [Complainant], let me handle it, do not tie my hands". Lieutenant Colonel Shamoun explained that he knew of the Complainant because a few years earlier she had been interrogated for nine hours in relation to an embarrassing situation. The Complainant's husband had her sign a document to say she would never repeat what she had done again.<sup>93</sup> As such, even if General Shahrour personally did not apply threats, the LAF environment clearly could have been intimidating to the Complainant.

66. The LAF was not the only entity intervening – as mentioned above, a stance that the formal process was inappropriate was also expressed by NSU, which wanted to solve the issue between the Complainant and the Applicant amicably. Moreover, the Complainant sought counsel through her religion and that she also consulted with her husband, her brother and several colleagues. All of them advised against resorting to investigation. In these circumstances, it is no surprise that the Complainant hesitated in coming forward and making a formal complaint. Her explanation that her principal concern was not to hurt the Applicant or take away his job, but rather to ensure that she did not have to work with him as Chief LSU, is entirely plausible.

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<sup>93</sup> Applicant's interview on 22 July 2015, Reply annex 2, p. 171



67. Another of the Applicant's contentions is that the charges were based principally on the testimony of the Complainant while the rest is hearsay. In this regard the Tribunal observes that it is typical in disputes concerning sexual harassment that the alleged conduct takes place in private, without direct evidence other than from the complainant. To require corroboration through direct evidence in order to prosecute would practically disable the protection accorded to victims. Rather, the evidentiary question in such cases centres on the credibility of the complainant's testimony, both in the aspect of internal consistency and probability in the circumstances. As discussed *supra*, the quality of the Complainant's testimony was very high. Moreover, her version of events was corroborated through indirect evidence from several witnesses, most prominently by Ms. Ivetic and Mr. Takach to whom she had turned promptly after the incident.

68. As concerns the Applicant's defence of alibi, the Tribunal notes, first, discrepancies in his statements. In the first one, 30 June 2015, the Applicant does not really provide account of his whereabouts following Mr. Kafarani's departure for Tyre. He only says that he "returned" to the office at 12.30 and then left for lunch.<sup>94</sup> Only on 22 July 2015 does the Applicant supply that he went to the UNIFIL/FC's office between 10.30 and 10.50 a.m. and met either Colonel Angelo Marucci or another staff member.<sup>95</sup> In describing the morning, the Applicant is very precise about the preceding facts, including interaction with Mr. Kafarani, and about the timing. His lapse of memory as to with which staff member he would have discussed at the UNIFIL/FC office does not lend credibility to this version. A statement from Col. Marucci half a year after the incident that he "does not exclude" that he had met the Applicant at the said time because they had met "several times", is far from constituting a solid alibi, beginning with the fact that the Applicant himself did not allege that they met several times but only once and only maybe.

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<sup>94</sup> Reply, annex 2, p. 140

<sup>95</sup> *Ibid.*, p. 167.

69. At the hearing, the Applicant began with denying that he had ever returned to the office before lunch, in contradiction with his initial statement in the investigation. Further, this time his version focuses not on a meeting at the UNIFIL/FC's office, but on other errands, i.e., at the time of the alleged incident he would have gone to the LAF building which was closed, then to the Mission Recreation Centre, a coffee place, looking for Colonel Constantine whom he did not find. He could see five to ten people working on the yard opposite the FC office, trying to place a rock. He realized that they had not been updated about some change and he spoke to their supervisor about this.

70. Given these shifting and internally contradictory explanations, the Tribunal agrees with the Respondent that the Applicant's testimony is not credible with respect to an essential element of the incident—i.e. his presence in the office at the time of the incident—casting doubt on the Applicant's testimony in general.

71. In this connection, the Tribunal does not place reliance on the statement by one Wissam Tanios, dated 5 July 2017, an English version of which was presented only at the hearing, in which that individual related information about his alleged interactions with the Applicant on 9 February 2015, between 11 am and 12 pm. No consistent and clear explanation was offered by the Applicant about how this statement had been obtained and why it was only introduced in these proceedings two years after it had been purportedly taken. However, it appears incredible that the individual would remember the precise timing of a chance interaction with the Applicant more than two years earlier. Altogether, the lack of credibility of the Applicant's alibi witnesses concerns not the fact whether the interaction happened at all, but, rather, the impossibility of pinning it down in time. Taking as a premise that the incident, as described by the Complainant, would have lasted not more than 30 minutes, the Applicant may well have gone to the UNIFIL/FC's office and talked to Mr. Tanios after the incident but prior to going for lunch. In conclusion, the Tribunal finds that the alibi has not been established.

### **Whether due process rights were respected**

72. With respect to due process, the Applicant's complaints are generalised and unsubstantiated.

73. One averment is that the Applicant was kept in the dark until December 2016 and was not given a chance to address the facts or defend himself. With this respect, the Tribunal notes that the Applicant was interviewed by the panel and asked about all material aspects of this case on 30 June 2015, 22 July 2015, and 10 August 2015; he reviewed and signed the three written statements in the record. In the allegations memorandum dated 28 November 2016, the Applicant was provided with all supporting documentation, was informed of his right to seek the assistance of counsel, and was given the opportunity to comment on the allegations against him. For approximately two months, i.e., between 30 November 2016 to 24 January 2017, the Applicant was afforded opportunities to put forward his comments and evidence and indeed did provide his comments. Further, he was invited to submit all the "proof" and "document" to which he had referred in his comments.

74. Another of the Applicant's contentions was that some of the witnesses mentioned in the Complainant's allegation were not interviewed, in particular General Shahrour and other LAF personnel who allegedly pressured her, which distorted the judgment on the Complainant's credibility. The Tribunal considers that this fact does not impeach the findings, given that LAF involvement in the case was admitted by the Applicant, whereas as to what exact kind of persuasion LAF had exerted upon the Complainant was peripheral to the main question. However, in accordance with the UNAT position in *Mbaigolmem* requiring a hearing *de novo*, the Tribunal heard all the witnesses relied on by the Respondent as well as all the witnesses requested by the Applicant, and assessed the Complainant's credibility, among other, in the light of this testimony. The Tribunal also reviewed documents as requested by the Applicant and, where appropriate, assessed their evidentiary value. Other documents, namely: chats between the Applicant and Gen. Portolano, a letter from the Applicant to Ms. Fraser, the statement of Col. Belladonna and photos of the offices, were not considered relevant.

75. Further, the Applicant impugns the investigation on the basis that the fact-finding Panel was created just a day after the Complainant filed her complaint, whereas such a procedure usually takes two to three weeks. The Tribunal agrees with the Respondent that under the circumstances, with UNIFIL management having been seized of informal complaints since February and, admittedly, UNIFIL-wide notoriety of the dispute, the formation of the panel may have been prepared in advance and effected immediately. The Tribunal considers it a reasonable and legitimate exercise of discretion.

76. In conclusion, the Tribunal does not find violation of the right to present a defence or any other due process rights.

### **Whether the established facts qualify as misconduct**

77. The established facts legally amount to misconduct, in violation of the norms consistently upheld by the Organization since at minimum 1992, where sexual harassment was described as unacceptable behaviour for the staff of the United Nations<sup>96</sup>, and reiterated through, among other, outlawing, in 2003, sexual exploitation and abuse as serious misconduct warranting a summary dismissal<sup>97</sup>, and through a detailed anti-harassment and abuse of authority at work regulation in 2008.<sup>98</sup>

78. The Tribunal finds that by [REDACTED] and improperly using a position of influence and power, the Applicant acted against staff regulations 1.2(a) and 1.2(f), staff rules and 1.2(f) and section 2.1 of ST/SGB/2008/5. The Tribunal

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<sup>96</sup> See ST/SGB/253 of 29 October 1992 stressing that sexual harassment constitutes unacceptable behaviour for staff working in the United Nations and ST/AI/379 of the same date which defines sexual harassment and establishes informal and formal procedures for dealing with incidents of sexual harassment.

<sup>97</sup> See ST/SGB/2003/13 providing that sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal; see also A/RES/59/287 of 21 April 2005 which stresses that sexual exploitation and abuse constitute serious misconduct and fall under category I and notes that sexual harassment constitutes a serious concern to Member States.

<sup>98</sup> See ST/SGB/2008/5 providing that 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 and stressing that harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

does not find a violation of staff rule 1.2(e), as it considers it applicable to sexual relations exploiting systemic inequality, such as between peacekeepers and local population, and particularly where transactional exchange is involved. Conversely, workplace relation between two staff members, even of uneven positions, are addressed under staff rule 1.2(f), where the conduct attributed to the Applicant fits snugly.

### **Whether the sanction is proportionate to the offence**

79. As determined by staff rule 10.3(b) “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”. In the practical aspect, the Appeals Tribunal, indicated that factors other than the impugned behavior to be considered in assessing the proportionality of a sanction include the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.<sup>99</sup>

80. Regarding the nature and gravity of the offence, the Appeals Tribunal recognized specifically:

Sexual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment.<sup>100</sup>

81. The Applicant does not make specific submissions on the sanctioning apart from generally requesting that the decision be set aside. Regarding arguments advanced by the Respondent, the Tribunal agrees that the misconduct in this case represented a serious attack on the Complainant’s dignity; the Tribunal could also observe that a mere recollection of the event several years afterwards still caused her great distress. Moreover, the Respondent correctly identified abuse of position of influence as an aggravating factor. The Respondent, furthermore, correctly identified the Applicant’s

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<sup>99</sup> *Rajan* 2017-UNAT-781 at para. 48.

<sup>100</sup> *Mbaigolmem*, *ibid.*, para. 33.

31 years of service, absent any prior disciplinary issues, as the mitigating circumstance.

82. The Tribunal recalls that, as elaborated by the Appeals Tribunal, proportionality is a jural postulate or ordering principle requiring teleological application, which derives from the postulate of reasonableness of all administrative decisions.<sup>101</sup> In relation to the previously expressed standard, i.e. that the Tribunals intervene in disciplinary measures only where they would be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in severity<sup>102</sup>, the Appeals Tribunal clarified that an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline.<sup>103</sup> This considered, the Tribunal is satisfied that the measure of separation from service without termination indemnity was not disproportionate, as the Applicant's remaining in service would be irreconcilable with core values professed by the United Nations and the gravity of the conduct justifies a severe measure.

83. Indeed, comparable matters involving sexual harassment and sexual exploitation/abuse normally resulted in disciplinary measures at the stricter end of the spectrum, namely separation or dismissal.<sup>104</sup>

84. The impugned decision, however, also imposes a fine equal to one-month's salary, for which no justification was offered, and the rationale of which is difficult to understand. Considering that termination of employment presents for the affected staff member a significant financial onerousness, if not loss of livelihood, combining termination with a fine does not seem to bear rational connection with either the retributive or preventive purpose of the sanction. Cumulative application of termination with a fine could seem possible in exceptional factual circumstances,

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<sup>101</sup> *Samandarov* 2018-UNAT-859, para 24.

<sup>102</sup> E.g., *Portillo Moya* 2015-UNAT-523 at para. 21.

<sup>103</sup> *Samandarov*, *ibid.* para 25.

<sup>104</sup> ST/IC/2016/26, ST/IC/2017/33, A/74/64.

where termination alone would not reflect the nature and gravity of the misconduct. In such cases, however, it would be rational that the form of termination be dismissal. In this regard, the Tribunal recalls that pursuant to staff rule 10.2, the Respondent has at his disposal the following disciplinary measures based on termination of employment:

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

85. As results from staff rules 9.7(e), 9.9(b), 9.10 and 9.11(a)(vi), the additional onerousness of dismissal, compared with separation without termination indemnity, is in illegibility for notice or compensation in lieu, and, where applicable, for commutation of accrued leave and repatriation grant. Since the Respondent opted not to resort to dismissing the Applicant, and thus to allow him to have the benefit of compensation in lieu of notice which, in the Applicant's fixed-term position, would be equivalent of one-month salary (and possibly also the commutation of accrued leave, whereas repatriation grant does not apply to him), then imposing at the same time a fine of one-month salary becomes indeed "arbitrary and irrational", lacking any teleological justification other than being a disguised dismissal. As such, it is illegal. This considered, the disciplinary measure of a fine is accordingly lifted.

86. Absent any other illegality in the impugned decision, the Applicant's claim for compensation is baseless.

## **JUDGMENT**

87. The application is granted to the extent that the disciplinary measure of a fine of one-month's net base salary is set aside. All other pleas are rejected.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 26<sup>th</sup> day of December 2019

Entered in the Register on this this 26<sup>th</sup> day of December 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi