



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/108
Judgment No.: UNDT/2021/078
Date: 30 June 2021
Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

VALME

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Sètondji Roland Adjovi

Counsel for the Respondent:
Miryoung An, AAS/ALD/OHR, UN Secretariat

Background

1. The Applicant commenced service with the Organization in 2007. At the time of his separation from service on 20 May 2019, he served as Chief of Technology Development, Design and Planning Section, at the P-5 level, at the United Nations Global Service Centre (“UNGSC”) in Valencia.
2. On 17 July 2019, he filed an application with the United Nations Dispute Tribunal in Nairobi challenging the Respondent’s decision to dismiss him from service for serious misconduct with compensation *in lieu* of notice and with termination indemnity, in accordance with staff rule 10.2(a)(viii) (“contested decision”). The events giving rise to the contested decision occurred when the Applicant was serving as Chief of Communications and Information Technology (“CITS”) and Geospatial Information and Telecommunication Technologies Services (“GITTS”) at the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”) between 2014 and 2017.
3. The Respondent filed his reply to the application on 15 August 2019.
4. The Tribunal heard the case on 23, 24, 25 November 2020; 15 and 16 December 2020; and on 13 April and 17 May 2021 where oral testimony was received from:
 - a. The Applicant;
 - b. Mr. Annandavel Kannan, GIS Officer, MINUSCA;
 - c. Mr. Milan Trojanovic, then MINUSCA Director of Mission Support;
 - d. Mr. Joseph Parareda, Chief Communications Officer, MINUSCA;
 - e. Mr. Lawi Ooko, then Chief of GITTS Operations, MINUSCA;
 - d. Mr. Alhaji Kemokai, Information Management Assistant, GITTS/MONUSCA;

- e. Mr. Mahesh Kumar, System Administrator, MINUSCA; and
 - f. Ms. FM, then working on temporary duty (“TDY”) in GITTS/MINUSCA.
5. The parties filed closing submissions on 18 June 2021.

Summary of the relevant facts

6. On 13 December 2016, the Investigations Division of the Office of Internal Oversight Services (“ID/OIOS”) received a report implicating the Applicant. Specifically, the complainant reported that on the evening of 12 February 2016, the Applicant drugged her and sexually abused her at his private residence in Bangui. During the course of the OIOS investigation, evidence emerged to indicate that the Applicant also engaged in recruitment irregularities and/or used his position of authority as the MINUSCA, Chief/GITTS to unduly, and continuously, influence the recruitment of the complainant, as well as another female staff member, Ms. FM.¹

7. The evidence also indicated that the Applicant, in conjunction with other key witnesses in the investigation, actively and unduly tried to influence the course of the OIOS investigation by, prior to the OIOS interviews, aligning their individual statements made to OIOS during interviews, and/or consulting with the Applicant as to which selective information would be shared with OIOS during the interviews, and maintaining an online shared drive containing key dates and evidence, by which they shared only selected information with OIOS.²

8. The OIOS investigation found:³

- a. Insufficient evidence to substantiate the allegation that the Applicant sexually abused the complainant;
- b. Evidence to substantiate the allegation that the Applicant engaged in

¹ Reply, annex R/2.

² Ibid.

³ Ibid.

recruitment irregularities and/or used his position of authority as the Chief/GITTS to unduly influence the recruitment of complainant;

c. Evidence that a sexual relationship existed between the Applicant and Ms. FM, which contributed to the Applicant using his position of authority as the Chief/GITTS to unduly, and continuously, influence the recruitment of Ms. FM; and,

d. Evidence that the Applicant, as well as other key witnesses, actively and unduly tried to influence the course of the OIOS investigation.

9. On 16 April 2018, OIOS finalized its Investigation Report and referred the report to the Department of Field Support for its consideration.⁴

10. On 21 December 2018, the Applicant received a memorandum from the Assistant Secretary-General for Human Resources Management (“ASG/HRM”) charging him with misconduct.⁵ Specifically, it was alleged that:

a. between 2014 and 2017, he used his position of authority as Chief/GITTS, MINUSCA, to unduly influence the continued employment of Ms. FM at GITTS, MINUSCA;

b. between 2015 and 2016, he used his position of authority as Chief/GITTS, MINUSCA, to unduly influence the recruitment of complainant as an individual contractor at GITTS, MINUSCA, by forwarding her resume for consideration, and providing interview questions to her before the job interview;

c. between 2014 and 2017, he failed to disclose a conflict of interest arising from his sexual relationship with Ms. FM and his continued involvement in her recruitment at GITTS, MINUSCA; and/or

⁴ Reply, annex 2.

⁵ Application, annex 2; reply, annex R/3.

- d. between December 2016 and December 2017, he attempted to interfere with the OIOS investigation into his conduct by asking possible witnesses to gather and share information pertaining to the alleged misconduct, and giving them suggestions on how to respond to the investigators during their interviews.
11. The Applicant responded to the allegations on 6 March 2019 having been granted extensions of time to do so.⁶ He filed additional responses to the allegations on 30 April 2019.⁷
12. On 20 May 2019, the Applicant was informed of the contested decision⁸ and effective 28 May 2019, he was separated from service.
- The Applicant's case**
13. The Applicant's case may be summarized as follows:
- a. The facts have not been established with clear and convincing evidence.
 - b. The witnesses were unreliable and lied throughout their testimonies.
 - c. He did not commit any irregularity in the recruitment of Ms. FM.
 - d. He did not commit any irregularity in the recruitment of the complainant.
 - e. He did not interfere with the investigation.
 - f. The investigation was biased, incompetent, and a "fishing expedition".
14. The Applicant prays the Tribunal to: (i) overturn the administration's sanction on the grounds that his due process rights were violated; (ii) conclude that the sanction was not based on any clear and convincing evidence; and (iii) overturn the decision to

⁶ Application, annex 3; reply, annex R/5.

⁷ Application, annex 4; reply, annex R/9.

⁸ Application, annex 9; reply, annex R/5.

separate him or alternatively to find that the sanction is disproportionate.

The Respondent's case

15. There was clear and convincing evidence establishing that: i) between 2014 and 2017, the Applicant used his position of authority as Chief/GITTS, to unduly influence the continued employment of Ms. FM at GITTS; and ii) between 2014 and 2017, the Applicant failed to disclose a conflict of interest arising from his sexual relationship with Ms. FM and his continued involvement in her recruitment at GITTS.

16. There was clear and convincing evidence establishing that, between 2015 and 2016, the Applicant used his position of authority as Chief of GITTS to unduly influence the recruitment of the complainant as an individual contractor at GITTS by forwarding her resume for consideration and providing interview questions to her before the job interview.

17. There was clear and convincing evidence establishing that, between December 2016 and December 2017, the Applicant attempted to interfere with the OIOS investigation into his conduct by asking possible witnesses to gather and share information pertaining to the alleged misconduct and giving them suggestions on how to respond to the investigators during their interviews.

18. The Applicant's actions amounted to serious misconduct under Chapter X of the Staff Rules. His conduct exhibited a serious lapse of integrity in contravention of staff regulation 1.2(b). The Applicant facilitated the hiring of his sexual partner and her friend at the mission at the expense of the fairness/integrity of the Organization's recruitment processes. This violates staff regulations 1.2(m), 1.2(e), 1.2(f), and 1.2(g). He misused his position as a Chief to his personal gain and personal gain for those he favoured, thereby betraying the trust placed in him by the Organization. In addition, the Applicant manipulated/controlled other staff members who were junior and subordinate to him and threatened the integrity of the Organization's investigation. This violated staff rule 1.2(g) and staff rule 1.2(c).

Considerations

Legal issues

The role of the UNDT in disciplinary cases

19. Jurisprudence of the United Nations Appeals Tribunal (“UNAT”)⁹ establishes that the standard for judicial review of a disciplinary sanction requires the examination of:

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

20. Part of the test in reviewing decisions imposing sanctions is whether due process rights were observed.¹⁰ The Tribunal will therefore, also examine whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

21. It is “only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity that the judicial review would conclude in its unlawfulness and change the consequence”.¹¹

⁹ *Majut* 2018-UNAT-862, para. 48; *Ibrahim* 2017-UNAT-776, para. 234; *Mizyed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; and *Molari* 2011-UNAT-164, paras. 29 and 30.

¹⁰ *Applicant* 2012-UNAT-209, para. 36.

¹¹ See *Portillo Moya*, UNAT-2015-523, para. 21; see also *Sall*, 2018-UNAT-889, para. 41.

Whether the facts on which the sanction is based have been established.

22. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.¹²

23. The Tribunal is cognizant of the principle that when termination is a possible outcome, the Administration must prove the facts underlying the alleged misconduct by “clear and convincing evidence”, which requires more than a preponderance of evidence but less than proof beyond reasonable doubt, and “means that the truth of the facts asserted is highly probable”.¹³

Whether the fact that the Applicant used his position of authority as Chief of Geospatial Information and Telecommunication Technologies Services (GITTS), United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) to unduly influence the continued employment of Ms. FM at GITTS, MINUSCA has been established by clear and convincing evidence.

24. The background to this allegation is that the Applicant was in a sexual relationship with Ms. FM when he was the chief at GITTS.¹⁴ It is in evidence that the Applicant, as Chief, made recruitment decisions for international staff.¹⁵

25. The Applicant admitted (in cross-examination) that he was the decision-maker in the process of extending and recommending the extension of Ms. FM’s TDYs and temporary job openings (“TJO”) which are the subject of this application. It is not disputed that although a TDY is typically for an initial period of three months, with the possibility of extension for another three months, the Applicant caused Ms. FM’s TDY (June to August 2014) to be extended from September to November 2014, and

¹² Nyambuza 2013-UNAT-364.

¹³ Molari 2011-UNAT-164.

¹⁴ Reply, annex R/2, Applicant’s interview (6 December 2017) lines 238-272, 449-456 [Doc 594]; Applicant’s interview (6 December 2017) lines 112-121 [Doc 595].

¹⁵ Reply, annex R/2, Ines Doh interview (7 November 2017) lines 291-295 [Doc 589]; Joseph Parareda interview (9 August 2017) lines 367-382, 1224-1226 [Doc 583].

thereafter brought her to GITTS, MINUSCA on “special measures” using a TJO from January to June 2015.¹⁶

26. Further evidence is that objections were raised by the Human Resources Section against Ms. FM’s recruitment on the TJO at the FS-4 level because she did not have the requisite work experience. Mr. Parareda consulted the Applicant over the issue but he still thought that Ms. FM had very strong expertise. She was appointed to the TJO in 2017.

27. The Applicant admitted that he applied special measures when he selected Ms. FM for the TJO FS-4 level position (i.e. brought her in for a short period of time without going through the whole process of selection), even though a minimum of six years of relevant work experience is required for the FS-4 level position. He again applied special measures when Ms. FM returned to MINUSCA for a one-month TJO in April 2016, and again recommended Ms. FM on another TJO from August 2016.

28. Both Ms. FM and the Applicant admitted that they had exchanged Viber messages about her recruitment processes at the United Nations and discussed his efforts to give her other work opportunities with the Organization. Some of the messages are reproduced here below:¹⁷

Applicant: “I will try to see about the FS-6 post.”

Applicant: “Did you receive an interview request?”

Ms. FM: “Yes.” “I forwarded you.”

Applicant: “Good.”

Ms. FM: “I’m so scared of the interview.”

Applicant: “When is it?”

Ms. FM: “I get to choose.” “Either from 22 to 30 or 1st to 2nd July.”

Applicant: “I just spoke with L about you and she told me of the interviews.”

Ms. FM: “Before it was just a test and now interview.”

¹⁶ Annex R/2, Applicant’s interview (6 December 2017) lines 282-290 [Doc 594]; Applicant’s interview (6 December 2017) lines 34-46, 76-82, [Doc 597].

¹⁷ Trial bundle at page 211.

Applicant: “I can coach you.”

Ms. FM: “I think they want to lower the chance.” “Competency-based interview.”

29. They again exchanged the following messages on 14 October 2015;

Ms. FM : “Please include the UNV in your next budget.”

Ms. FM : “For me.”

Applicant: “Okay.”

30. The above messages render the Applicant’s explanation that Ms. FM had the six years of relevant work experience in 2015, but that it was just not highlighted in her resume unconvincing, and they constitute clear and convincing evidence that the Applicant used his position of authority to unduly influence the continued employment of Ms. FM at GITTS, MINUSCA.

31. They moreover corroborate the Applicant’s admissions before the Tribunal and in his interview¹⁸ and Ms. FM and Parareda’s evidence, laid out above.

32. The Tribunal finds that there is clear and convincing evidence that the Applicant used his position of authority to unduly influence the continued employment of Ms. FM at GITTS, MINUSCA.

Whether the fact that the Applicant failed to disclose a conflict of interest arising from his sexual relationship with Ms. FM and his continued involvement in her recruitment at GITTS, MINUSCA has been established by clear and convincing evidence.

33. That the Applicant was in a sexual relationship with Ms. FM and that he was involved in her recruitment at GITTS, MINUSCA has been established. Staff regulation 1.2(m) explicitly states that a conflict of interest occurs when a staff member’s personal interests interfere with the integrity, independence and impartiality

¹⁸ Reply, annex R/2, Applicant’s interview (6 December 2017) lines 238-272, 449-456 [Doc 594]; Applicant’s interview (6 December 2017) lines 112-121 [Doc 595]); annex R/2, Applicant’s interview (6 December 2017) lines 260-272 [Doc 594].

required by the staff member's status as an international civil servant and that when an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

34. Mr. Trojanovic's testimony that the Applicant neither disclosed to him any conflict of interest in the context of a recruitment exercise at the Mission nor recused himself from any recruitment process at the Mission corroborates the Applicant's admission that he did not raise the issue of the potential conflict of interest with anyone in those recruitment processes.

35. It is in evidence that the Applicant actively sought and succeeded in getting Ms. FM recruited even when she didn't meet the job requirements. Clearly, the Applicant's personal interests of providing his sexual partner with employment directly interfered with his responsibility to act with integrity, independence and impartiality required by his status as an international civil servant.

36. The Tribunal finds that the fact that the Applicant failed to disclose a conflict of interest arising from his sexual relationship with Ms. FM and his continued involvement in her recruitment at GITTS, MINUSCA has been proved by clear and convincing evidence.

Whether the fact that between 2015 and 2016, the Applicant used his position of authority as Chief of GITTS, MINUSCA, to unduly influence the recruitment of the complainant as an individual contractor at GITTS, MINUSCA has been established by clear and convincing evidence.

37. The impugned decision was based on evidence that in October 2014, the complainant sent her friend Ms. FM, her resume. Ms. FM sought advice from the Applicant about the resume, and they exchanged messages in which she asked him to send her interview questions for the complainant, which the Applicant did on the same day.

38. In his testimony, the Applicant confirmed that the complainant was referred to

him by Ms. FM, and that the referral was in terms of her resume which he gave to Mr. Kannan. Also, that he gave advice to Ms. FM on the complainant's resume, and that prior to the interview Ms. FM asked him to send to her interview questions for the complainant.

39. Their exchanges went as follows:¹⁹

Ms. FM: “[the complainant] has interview on Friday.” “Any advice.” “Can we prepare her.”

Applicant: “We’ll give her the questions.”

Ms. FM: “Thanks love.”

Ms. FM: “Questions please.” “[the complainant] needs to get ready.”

Applicant: “I call you.”

Ms. FM: “????” “Hi.”

Applicant: “Cool.”

40. And about the Resume;

Applicant: “She should amend.” “She can amend and we will deal with it.” “Check with [the complainant].” “Okay, so she will be hired.”

41. Mr. Kannan informed the investigators,²⁰ which information he affirmed at the hearing, that he received the complainant's resume from the Applicant and he forwarded it to the administrative assistant who in turn forwarded it to Trigyn for inclusion in the interview. Further, that he drafted the interview questions and forwarded them to the Applicant before the interview.²¹

42. In his interview, the Applicant admitted that he forwarded these questions to Ms. FM via Viber on 10 December 2015.²² Ms. FM then provided the questions to the

¹⁹ Trial bundle, p. 79 (message of 9th December 2015).

²⁰ Trial bundle, pp. 288, 468 (line 405) & 470 (lines 447 to 458) [Doc 571]; reply, annex R/2 (email from Mr. Kannan to the Applicant).

²¹ Reply, annex R/2, email from Kannan to the Applicant with questions for interview of the complainant (10 Dec 2015) [Doc 565].

²² Applicant's interview (6 December 2017) lines 362-364, 401-404, 412, 432, [Doc 596]. See also trial bundle, pp. 176-181 and 1244 (lines 353, 362-364, 367, 401-404, 408-412).

complainant.²³

43. Mr. Kannan's further evidence was that the complainant performed well during the interview and she was recommended for the post of GIS Technician. On 19 January 2016, she was deployed to Bangui as GIS Technician. According to Mr. Kannan, the complainant's performance was not up to standard. He therefore requested other GIS staff to train her.²⁴

44. Around this time, Mr. Ooko heard the complainant say that her background was not GIS, and that she had studied geology. She was also heard saying that when she was being recruited, she had indicated that she had no background in GIS, but the chief (the Applicant) had said that she would be trained, and he sent her the interview questions.

45. The Applicant admits the material facts which formed the basis of the Respondent's complaint. His admission lends credence to the evidence of Mr. Kannan, Mr. Ooko, aspects of Ms. FM and the recorded messages above.

46. Ms. FM's evidence that the questions which the Applicant sent to her for onward transmittal to the complainant were generic and available on the United Nations intranet, and that they related to United Nations core values is belied by the specific nature of the questions which are reproduced below:²⁵

1. “In what GIS software you are experienced the most and what is the depth of your expertise. Explain technically.
2. Tell us about the best two maps you have produced and in what way it was different than the others cartographically and technically?
3. Explain your experience in conducting GPS survey and what innovation will you introduce if you have to conduct one in the future?”

47. The Applicant's argument that the questions were never sent to the complainant must fail. That he got the questions from Mr. Kannan and sent them to Ms. FM is not denied. The messages Ms. FM exchanged with the Applicant show that their intention

²³ Reply, annex R/2, Ms. LY interview (24 November 2017) lines 367-377 [Doc 590]; Email from the complainant regarding questions received before her interview [Doc 470]; Attachment [Doc 468].

²⁴ Reply, annex R/2, Documents received from Kannan [Doc 101, 102]; Transcript Kannan (8 June 2017) [Doc 572].

²⁵ Trial bundle, p. 121.

was to transmit the questions to the complainant. Ms. FM's assertion that she only used the questions to prepare the complainant for the interview contradicts the stated plan of sending questions to the complainant, and is rejected. Mr. Ooko's evidence that he overheard the complainant tell Mr. Kannan that the Applicant had sent her questions before her interview resonates with the information in the messages the Applicant exchanged with Ms. FM.

48. The Tribunal finds that the Applicant sent interview questions to the complainant, and that there is clear and convincing evidence that the Applicant used his position of authority as Chief of GITTS, MINUSCA, to unduly influence the recruitment of the complainant as an individual contractor at GITTS, MINUSCA.

Whether the fact that between December 2016 and December 2017, the Applicant attempted to interfere with the investigation by OIOS into his conduct by asking possible witnesses to gather and share information pertaining to the alleged misconduct, and gave them suggestions on how to respond to the investigators during their interviews has been established by clear and convincing evidence.

49. It is common cause that when the allegations of sexual misconduct first surfaced, a shared Google drive was set up on the instance of the Applicant. Information relating to the complainant's stay in the house (pictures, documents, videos, audios, and "stays" in the house) was uploaded on the Google drive which was shared by all house mates.

50. The Applicant maintains that he was advised by his lawyer to gather first-hand evidence on life in the house before a formal investigation begun as a defence strategy. He partially reaffirmed this in his evidence in chief in which he states that the Google drive was set up for collection and sharing of information in a shared facility which they could all access whenever they needed to.

51. The Tribunal however rejects the Applicant's explanations since he admitted (in cross examination) that he was in constant contact with his housemates before and after their OIOS interview, further that prior to their interviews with OIOS he discussed

with Messrs. Kemokai, Kumar and Bah about the investigation and told them to focus on the evidence that they all put together in the folder. This points to a different motive from the one he is advancing.

52. He in fact made further admissions which support the above finding. He, for example, admits that he told Ms. FM to deny her relationship with him in her OIOS interview and told her in exchanged messages that he had deleted his text messages with her. In his interview, the Applicant admitted that he had discussions with various witnesses, including Messrs. Kemokai, Bah, Haroun, Kumar and Ms. FM, in preparation for their pending OIOS interviews focusing on which facts they would divulge to OIOS during their respective interviews.²⁶

53. He also admitted that on 9 November 2016, he asked Ms. FM if she deleted “[their] chats on Viber”. On the same day, he told her that he had deleted his “chats at some point”.²⁷ Before her interview with OIOS, the Applicant instructed Ms. FM not to disclose his relationship with her to the investigators.²⁸

54. Mr. Kemokai’s testimony, which reaffirms his interview statement,²⁹ was that around the end of November/early December 2016, the Applicant informed him that the complainant had raised an accusation of sexual exploitation against him (the Applicant), and requested him to create a Google drive is instructive.

55. The Applicant asked him (Kemokai) to gather information relating to the complainant’s stay in the house (pictures, documents, videos, audios, and “stays” in the house), upload and share the drive with other members of the house. Mr. Kemokai’s evidence that during the investigations and before his interview, he discussed with the Applicant about his interview, and specifically about the information in the Google drive (information about the complainant’s visits, her stay in the house, when she came

²⁶ Reply, annex R/2, Applicant’s interview (6 December 2017) lines 417-429 [Doc 598].

²⁷ Reply, annex R/2, Applicant’s interview (6 December 2017) lines 825-848 [Doc 595]; Exhibit 10 [Doc 564].

²⁸ Reply, annex R/2, Applicant’s interview (6 December 2017) lines 239-240, 271 [Doc 598].

²⁹ Reply, annex R/2, Mr. Kemokai’s interview (16 November 2017) lines 29-71, 93-112, 815-837 [Doc 579].

to the house and the timelines), and they talked about what Mr. Kemokai should tell the OIOS investigators about his relationship with Ms. FM, and that the Applicant told him not to disclose his (the Applicant's) relationship with Ms. FM to the investigator, leaves no doubt that the setting up of the drive was for the purpose of enabling, gathering and sharing of information in preparation for witness interviews.

56. Mr. Kumar's testimony that the Applicant told him that they were putting all relevant information in the Google drive so that they could all access it, further that the Applicant informed him that he will be interviewed, and asked him to ask Mr. Kemokai to grant him access before his interview leaves no doubt that the purpose of setting up the drive was to ensure that witnesses align their interview statements.

57. The Tribunal considers that the Applicant's admissions are corroborated by the evidence of the above witnesses. The timing of the setting up of the Google drive and the fact that it was shared with all house mates who were potential witnesses leaves no doubt that it was set up to gather information to which witnesses were to refer, to ensure that they aligned their responses to the investigator's questions. The evidence that before their respective OIOS interviews, Messrs. Kumar and Bah asked Mr. Kemokai for access to the Google drive in order for them to view the files and information therein galvanises the above finding.

58. The Applicant's evidence in chief in which he contradicts his admissions is against the weight of evidence and is rejected. The Tribunal finds that the allegation that between December 2016 and December 2017, the Applicant attempted to interfere with the OIOS investigation into his conduct by asking possible witnesses to gather and share information pertaining to the alleged misconduct, and gave them suggestions on how to respond to the investigators during their interviews has been established by clear and convincing evidence.

Whether the Applicant's actions amount to misconduct.

59. The Applicant's argument that his actions did not amount to misconduct are premised on the assertion that there is no clear and convincing evidence to support the

allegations of misconduct. Findings have however been made that there is clear and convincing evidence to support each of the allegations against the Applicant.

Recruitment of Ms. FM and the complainant.

60. The Applicant facilitated the hiring of his sexual partner (Ms. FM) and her friend (the complainant) at the mission at the expense of the fairness/integrity of the Organization's recruitment processes. This violates staff regulations 1.2(e) (by failing to regulate his conduct with the interest of the Organization in view), 1.2(f) (by engaging in activities that are incompatible with the proper discharge of his duties with the United Nations), 1.2(g) (by using his office and his knowledge gained from his official functions for his private gain and for private gain of Ms. FM and the complainant) and 1.2(m) which states that a conflict of interest occurs "when a staff member's personal interests interfere with [...] the integrity, independence and impartiality required by the staff member's status as an international civil servant"). He also violated staff rule 1.2(c) when he manipulated/controlled other staff members who were junior and subordinate to him.

Interference with investigations.

61. The Applicant's actions, attempting to interfere with the proper discharge of OIOS's official functions of conducting an investigation, directly conflict with staff rule 1.2(g). He exhibited a marked disregard of his duty to cooperate with an authorized investigation (staff rule 1.2(c)).

62. The Tribunal finds that the Applicant's actions amounted to misconduct in violation of staff regulations 1.2(b), 1.2(e), 1.2(f), 1.2(g), 1.2(m), and staff rules 1.2(c) and 1.2(g).

Whether there were any due process violations.

63. The Applicant raised a number of complaints under this head. His assertion that the Administration did not inform him of the nature of the allegations against him as required under section 5.15 of ST/SGB/2008/5 (Prohibition of discrimination,

harassment, including sexual harassment, and abuse of authority) is based on the fact that the OIOS expanded its inquiry to include new allegations which came to light during the investigations following a report of sexual abuse. It is however not true that the allegations letter of 4 December 2017 in which the Applicant was informed that OIOS was also pursuing allegations of abuse of authority in the recruitment process and interference with an investigation came up **two years after** the Applicant was informed that he was the subject of a formal investigation into SEA allegations, which took place in December of 2016 (a period of one year).

64. It is instructive that the allegations letter of 4 December 2017³⁰ clearly stated that during the course of the investigation, it was determined that the Applicant may have engaged in recruitment irregularities by unduly influencing the recruitment process of the complainant and Ms. FM. The fact that the new developments were communicated to the Applicant early enough, and that before his interview with OIOS he was informed that the investigation was not limited to the complainant's allegations of sexual abuse but also included alleged recruitment irregularities,³¹ further that during the interview he was asked about all material aspects of the case that came to light during the course of the investigation and he was given the opportunity to put forward his account of events as to the information obtained during the investigation, leaves no doubt that his due process rights were afforded to him.

65. The assertion that the Applicant's right to legal assistance was denied to him is without merit. Established jurisprudence is that a staff member's right to legal counsel applies once the allegations of misconduct are issued to the staff member, i.e. not at the investigation stage.³²

³⁰ Reply, annex R/11, OIOS e-mail to the Applicant inviting him to an interview (4 December 2017).

³¹ Ibid. The Applicant's signed pre-interview information sheet (5 December 2017), removes any doubt that his process rights were afforded to the Applicant.

³² See Powell, 2013-UNAT-295, para.23 citing Applicant, 2012-UNAT-209, para. 43. "Obviously, all the due process rights provided in former Staff Rule 110.4 and ST/AI/371 cannot apply during the preliminary investigation because they would hinder it. These provisions only apply in their entirety once disciplinary proceedings have been initiated". See Akello, 2013-UNAT-336, para. 35-36. See also Benamar, UNDT/2017/025, paras 73, 74. "Similarly, the right to seek the assistance of counsel applies only from the moment that the disciplinary process is initiated, i.e., from the point at which the charge letter is sent to the staff member concerned".

66. The complaint that the OIOS “violated attorney-client privileges and attorney-work-product privileges” in accessing the Google Drive is not substantiated, since the Applicant has not shown that OIOS accessed any particular communication between him and legal counsel or that reliance was made on such communication to his detriment.

67. The complaint that there were undue delays in investigation is without merit. Any delays are accounted for by the complex nature of the facts of the case, the large number of witnesses and the number of incidents which span a period of about four years (2014-2017).

68. The argument that OIOS’s forensic analysis of digital evidence was a “fishing expedition” is also not substantiated. The steps taken by the investigators in compiling the forensic report are well documented.

69. The Tribunal finds that there were no due process violations in this regard.

70. The Applicant raised several complaints relating to the disciplinary process. Suffice it to say that his due process rights were observed even in this regard. He was for example informed of his right to seek the assistance of counsel in the Allegations Memorandum. He was also given the opportunity to comment on the allegations, which he did, and his comments were duly considered. Upon the Applicant’s request, additional information, which related to the allegations of sexual abuse was provided to him and he was given the opportunity to provide further comments. The Applicant’s contention that the additional documents on the record, provided to him following his initial comments, “affected the mindset of the decision-maker who had access to the totality of the evidence” is baseless and ignores that the allegations of sexual abuse were not pursued as part of the allegations against him.

Whether the imposed sanction was proportionate to the misconduct

71. The Applicant’s misconduct compromised the objectivity and integrity of the selection process and damaged the reputation of the Organization. His conduct

irrecoverably breached the trust of the Organization, which is essential in maintaining the employment relationship.

72. The Tribunal agrees with the submission that in similar cases involving recruitment irregularities, measures at the stricter end of the spectrum have normally been imposed by the Organization.³³

73. Cases involving cheating on, or assisting in the cheating on, an examination resulted in disciplinary sanctions ranging from a fine to separation from service.³⁴

74. The Tribunal determines that the sanction of separation from service with compensation *in lieu* of notice and with termination indemnity is reflective of the gravity of the Applicant's misconduct and consistent with the past practice of the Organization. The Applicant's reliance on his history of satisfactory service with no disciplinary record does not constitute a mitigating factor, since the Charter of the United Nations requires staff members of the Organization to demonstrate "the highest standards of efficiency, competence and integrity."

75. Refraining from misconduct, therefore, reflects the most basic and minimum standard that staff members are expected to meet. For the same reason, the Applicant's positive performance is not a mitigating factor. As a Chief heading a Section, the Applicant was expected to conduct himself as a role model and hold himself to a higher standard of conduct. He breached this fundamental duty as a manager by his conduct.

76. It is also correct to say that the sanction imposed on the Applicant was not the most severe sanction available to the Respondent, i.e. a sanction of dismissal under staff rule 10.2(a) (ix).

³³ See Compendium of disciplinary measures, lines 437 (1 July 2017-31 December 2017), 398 (1 July 2016-30 June 2017), 309, 311 (1 July 2015-30 June 2016). The practice of the Secretary-General in disciplinary matters shows that in cases in which a staff member offered to assist an individual external to the United Nations with securing United Nations employment in exchange for payment resulted in termination of the staff member's employment.

³⁴ See Compendium of disciplinary measures, lines 286, 310 (1 July 2015-30 June 2016), 411 (1 July 2016-30 June 2017).

77. All relevant factors considered; the Tribunal finds no merit in this application.

Judgment

78. The application is dismissed.

(Signed)
Judge Margaret Tibulya

Dated this 30th day of June 2021

Entered in the Register on this 30th day of June 2021

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi