

Judgment No. 2023-



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6. At his new duty station, the Appellant had a house in a secure and guarded compound and had access to United Nations motor vehicles for his work. Initially the Complainant rented a room elsewhere the cost of which the Appellant paid, and she travelled to his accommodation to undertake her housekeeping duties and also attended university. The Appellant assisted the Complainant with payment of her university and associated expenses and made some further and regular financial contributions to her family, as well as paying her for her housework. Increasingly, however, the Complainant stayed for periods, including overnight at the Appellant's accommodation, and subsequently had a room and her possessions there. The Appellant and the Complainant, together with some of the Appellant's work colleagues, socialised together on occasions.

7. One late December night in 2018, there was a disruptive incident at the residence after the arrival of several young women as a result of which the Complainant moved out of the house. At about the same time, the Appellant moved the Complainant's possessions out of the house. She complained to both United Nations officials and the local Guinea-Bissau Judicial Police about the Appellant's conduct towards her, both on that night and previously. The Judicial Police decided to take no action against the Appellant. Later, a referral about these matters was also made to the authorities in the Appellant's home country. It is unclear what, if anything, happened to the matter, but the fact of making the referral upset the Appellant. There was an internal United Nations investigation of these complaints and allegations by t

8. In the course of the investigation into these allegations/complaints, a further charge was added, namely that the Appellant interfered with the investigation by again attempting to persuade the Complainant (through the medium of one of his own security guards) to withdraw her complaints/allegations in return for money.

9. The Appellant was formally charged with serious misconduct by the Officer-in-Charge, Office of Human Resources (OHR), Department of Management Strategy, Policy and Compliance (DMSPC). While these charges were being investigated, the Appellant was placed on ALWOP. After being advised on 23 September 2019 that his temporary appointment would not be extended beyond its expiry on 31 October 2019, on 23 October 2019 he was advised that, with one exception, the allegations against him of serious misconduct had been upheld and the sanctions referred to above were imposed. That exception was that there was no reference in the formal charges that the sexual relations between the Appellant and the Complainant were “forced at times”. His employment was terminated immediately, that is about a week before the scheduled expiry of his temporary role.

10. Because, in addition to general denials of the facts of the alleged misconduct against him, the Appellant takes issue with numerous procedural or due process issues, we begin with a recitation of the procedure that led to the sanctions imposed on him.

11. On 4 January 2019, OIOS began investigating the report of alleged serious misconduct by the Appellant. For convenience, we set out the following account of these events reproduced

b. Physically assaulted the complainant on the above-mentioned night and treated her

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By letter dated 23 October 2019, the ASG, OHR, DMSPC, informed the Applicant of the imposition of the disciplinary measures (...).<sup>11</sup>

Preliminaries to the UNDT's Substantive Consideration of the Case

12. The Appellant submitted an application to the UNDT, appealing his separation from service and the other sanctions imposed on him by the Respondent. In early 2020 the parties filed their initial pleadings with the UNDT. On 11 November 2020, there was a case management conference with a UNDT Judge, in which both parties agreed not to call any witnesses to give *viva voce* evidence (oral evidence of witnesses in the presence of each other and the Judge) but in which they requested a hearing "on the merits", in reality consideration and a decision of his appeal on the papers filed. As agreed by the parties and directed by the UNDT, the parties filed a joint bundle of documents on 13 November 2020.

13. On 29 July 2021, the Appellant filed a motion with the UNDT, seeking to introduce additional evidence. The Secretary-General opposed the admission of these materials, contesting their relevance and submitting that they were neither authenticated nor officially translated. The Appellant says that his 29 July 2021 motion for additional evidence was filed in order, among other reasons, to make the UNDT aware that the United Nations Office of Legal Affairs had mistakenly reported the case to his home country's authorities, causing, he said, serious damage to his reputation.

14. By an order made on 8 September 2021 (Order No. 140 (GBA/2021)), the UNDT confirmed its preliminary proposal to decide the case on the parties' submissions without an oral hearing; requested the Secretary-General to clarify some specific issues; and recorded its decision to defer its decision on the admissibility of the additional documents that the Appellant had proffered as evidence.

15. In his written submissions, the Appellant contended that the misconduct alleged against him had never occurred and that the facts alleged against him had not been proven to the required "clear and convincing evidence" standard. He contended that his relationship with the Complainant was a purely platonic employer-employee relationship. Further, the Appellant contended that OIOS had not observed the presumption of his innocence during the investigation and disciplinary procedure. The Appellant contended that the investigators had

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<sup>11</sup> *Ibid.*, para. 13.



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23. Turning to the first of the foregoing tests, the UNDT held that in cases of disciplinary sanction resulting in separation from service, the alleged misconduct had to be established by clear and convincing evidence. It said its role was to “critically assess the evidence, to review how it was collected and under which circumstances and to determine whether it rationally supports the allegations made against the [ Appellant] ”.<sup>13</sup> The Dispute Tribunal added, in this regard, that United Nations “disciplinary proceedings are of an administrative nature and the Organisation has limited means to investigate because it does not have law -enforcement powers and bases its investigations on co-operation from staff members and other entities ”.<sup>14</sup> It said, therefore, that “the main legal principles that are applicable in a criminal law setting cannot be ‘automatically ’ transposed to the internal legal framework ”, which was why, it said, the standard of proof applicable to misconduct in disciplinary proceedings resulting in termination of employment is not beyond reasonable doubt.<sup>15</sup> These rationale were also said to justify “the lower protective status of defence rights in comparison to national jurisdictions in criminal law proceedings ”.<sup>16</sup>

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26. The Dispute Tribunal concluded that the investigation report's transcripts of interviews held with the Complainant coincided with her statement made to the National Judiciary Police of Guinea-Bissau. Further, the audio recording of the conversation between the Appellant and the Complainant was held by the UNDT to indicate that they had an intimate relationship of a sexual nature, and that the Appellant was "extremely concerned" about the complaint that had been made against him which might cost him his job and affect other people's employment as well. In addition, the UNDT held that the audio recording showed that the Appellant offered money to the Complainant in exchange for withdrawal of her charges against him.

27. The UNDT considered the importance of the OIOS investigation report setting out the content of an interview with the Complainant's mother. Despite the fact that her mother was not present when the relevant events of 29/30 December 2018 took place, the Dispute Tribunal concluded that the mother's evidence confirmed her complainant daughter's account of those

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33. The UNDT was also influenced by what it said were two logical inconsistencies. The first was between the Appellant's insis

38. In particular, the Tribunal concluded that the established actions of the Appellant constituted sexual exploitation of the Complainant and of other Guinea-Bissau females. It held that it was irrelevant whether the intimate sexual relations were consensual because “the underlying rationale of the [United Nations] policy is to prevent staff members and officials to make use of their professional status to engage in these sorts of exchanges with local populations the [United Nations] assists”.

39. In addition to the Appellant’s behaviour having been in violation of a number of

42. The Dispute Tribunal stated that it had “carefully scrutinised the OIOS investigation report as well as the evidence collected by the OIOS investigators and [was] satisfied that they [complied] with the requirements of the internal legal framework”. The Appellant’s allegations of bias or other wrongdoing failed.

43. The UNDT noted that there being no error on the part of the Secretary-General in reaching the decisions he did, it was not appropriate for the UNDT to consider the remedies claimed by the Appellant. It dismissed all of the Appellant’s claims.

44. We address the points in support of the appeal in the order in which they are made in submissions rather than as issues in logical forensic sequence. As will be noted subsequently, we have refined and categorised these points on appeal as well as considering some issues that emerge from them.

45. The Appellant requests the Appeals Tribunal to reverse the impugned Judgment and order the United Nations Office of Legal Affairs to rectify the information it had provided to his home country’s government.

46. The Appellant complains that the UNDT failed to consider the psychological tests provided as evidence of harm caused to him, we assume, from the sanctions imposed on him.

47. Turning to due process issues, the Appellant’s appeal focuses significantly, however, on audio recordings, the

49. As regards the audio recording of his 2 January 2019 conversation with the Complainant, the Appellant maintains that its transcript omitted, maliciously, parts of that recording. He says that he was entrapped by the investigators into having this recorded conversation with the Complainant after she had made her complaints. The veracity and authenticity of its transcript was not forensically tested. The Organisation should have translated and transcribed the recordings and interviews by certified means, instead of by OIOS investigators: that the OIOS investigator's first language was Portuguese which was the language of the conversation, was insufficient reason for doing so.

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or administrative issuances) or by the Tribunals (Rules of Procedure, Practice Directions)  
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the Secretary-General's decision on the merits of the particular case is correct in law. If, for example, the UNDT concludes that an administrative decision of the Secretary-General is non-compliant with the terms or contract of employment of a staff member, or that a staff member has been unlawfully subjected to a disciplinary sanction, the UNDT may grant certain remedies in accordance with its Statute. Even then, however, there are boundaries that the Tribunals will not cross. These include not substituting its decision for that of the Secretary-General in making an appointment to a role where the latter is best placed to make that decision. There are other well-established areas of similar deference to the Secretary-General.4 (o)-1.4 (n)7 ( 2 (e)7..6 (r)1 (e a)1010.9 (e)-10161 ( b)1.7 a (u)-5.1 (u)-5.10.7 (r)3.9 (i)16.4 1d





(c) On the night of 29/30 December 2018 and at other times, the Appellant attempted to engage in transactional sexual acts (as defined above) with several local unidentified females.

(d) On the night of 29 /30 December 2018, the Appellant assaulted the Complainant.

(e) On the same occasion, the Appellant treated the Complainant with contempt by removing her possessions from, and putting them outside, his residence.

(f) The Appellant interfered (either directly or through intermediary third parties) with the Respondent's investigation of the foregoing allegations by negotiating with the Complainant to persuade her to withdraw her allegations.

(g) The Appellant breached the Organisation's standard operating procedures for UNIOGBI's vehicles by providing his driver's license to a former colleague, enabling the latter, who was not authorised to drive such vehicles, to do so.

(h) The Appellant breached those standard operating procedures for vehicles by transporting the Complainant in a United Nations vehicle.

92. In view of the Appellant's denial of all of these charges and of the information constituting them, it was incumbent on the UNDT to make findings, to the clear and convincing

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97. To evaluate the Appellant's allegations that the UNDT erred in fact and in law, we have examined each of the issues identified by the Appellant on appeal. Considering whether the UNDT erred either in fact or in law in its decisions about each, we conclude (using the same lettering references as above) as follows.<sup>25</sup>

(a) Applying the evidential test stated, the UNDT was entitled to conclude on the Complainant's evidence alone that the Appellant had engaged in a sexual relationship with her. Even ignoring the hearsay evidence from the Complainant's mother (which was in part of dubious probative value), there was direct and some other proper inferential evidence of this sexual relationship, including in particular the audio recording the admissibility of which the Appellant challenged, but not the veracity of its content. This recorded conversation with the Complainant also tends to confirm that the sexual nature of that relationship was employment-related and thereby transactional. While the photographs of the Appellant and the Complainant at social events may perhaps be consistent with a platonic relationship, in combination with the recorded conversation and other evidence, they tend to corroborate the Complainant's account of their relationship. Further, the UNDT assessed the Appellant's denials of that aspect of their relationship as being unconvincing. We need to emphasise, however, that the existence of a sexual relationship alone did not necessarily lead thereby also to the proof of the allegations about the particular features of that relationship, i.e. whether sex was transactional and whether it was exploitative of the Complainant. The Appellant denied these elements too. Simply because the Appellant was not believed about one aspect of their relationship does not necessarily mean that he lied or was unreliable about other elements of it.

(b) From the material before it, it was open to the UNDT to have found the Complainant completely credible and to have rejected the Appellant's denials completely. It was open to have done so on the basis of the evidence.



(d) The UNDT was entitled to conclude from the evidence and to the appropriate high standard of probability, that the Appellant had been intending to engage in transactional sexual relations with several young local women on the specified December night, although there was no finding by the UNDT of sufficient certainty or even any evidence that these young women were minors (“girls”) or that the Appellant did indeed engage in transactional sexual relations with them on that occasion. Nevertheless, the reported conversations between the Appellant and these females, irrespective of whether they were girls or young adult women, were of a transactional sexual nature. The UNDT was entitled to conclude to the clear and convincing evidence standard on the Complainant’s account of these conversations that he attempted to engage in transactional sex with them.

(e) The most serious conclusion that the UNDT may reasonably have drawn from the evidence before it and about an assault, was that there was an argument between the Appellant and the Complainant, in the course of which the Appellant assaulted her but without causing serious injury. In that sense, it was established that the Appellant assaulted the Complainant but the degree of seriousness of this breach would not alone have warranted the sanctions that were imposed.

(f) Although there was evidence that, in her absence from his house later that night or on the following day, the Complainant’s possessions were put outside it (within the gated compound in which the Appellant lived, we assume from the photographs and other evidence), the UNDT made no findings about this and, significantly, did not reach

expected standards of conduct which had to be, and was, proven to the high standard of clear and convincing evidence.

(h) As to the allegation of instances of misuse of vehicle operating procedures by the Appellant, he admitted them. They, too, would probably not alone have warranted  
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105. For these reasons, the Appellant's appeal is dismissed.