Case No.: UNDT/NBI/2023/066
Judgment No.: UNDT/2024/064
Date: 25 September 2024

Introduction and procedural history

1. On 22 August 2023, the Applicant, a former staff member of the United Nations Mission in South Sudan ("UNMISS"), filed an application before the Dispute Tribunal challenging the 30 June 2023 decision to impose upon him the disciplinary measure of separation from service with compensation in lieu of notice for serious misconduct ("the contested decision").

2. The disciplinary sanction was imposed based on a finding that it had been established by clear and convincing evidence that:

a. On at least 105 different times, between 8 October 2019 and 11 April 2020, he permitted his wife to reside in his UNMISS-provided accommodation without permission and without paying due accommodation fees;

b. On 10 December 2019, during a session with a Staff Counsellor, he threatened to kill his wife and threatened to kill anyone in the Organization to protect their marriage and their need to live together; and

c. On 114 nights, between 25 January 2021 and 19 May 2021, he permitted his wife to reside in his UNMISS-provided accommodation ir need to live togu.I

him: “ok, just remove your things cause otherwise I am going to drag you behind the car”.

4. Consequently, the Organization concluded that the Applicant’s conduct violated staff regulations 1.2(a), 1.2(b), 1.2(f) and 1.2(q), staff rule 1.2(f), section 2.1 of Administrative Instruction No. 005/2011 (Camp Regulations for UNMISS-provided accommodation), and sections 2.3, 5.3, and 5.4 of the Mission Directive

Parties' submissions

10. The Applicant's principal contentions are:

a. The case against him consists entirely of hearsay collected in a flawed Office of Internal Oversight Services ("OIOS") report which nevertheless dismissed two of the four allegations raised against him.

b. The Respondent further confuses matters by claiming that some allegations are proven with clear and convincing evidence while others only with a preponderance of evidence. Thereafter, the Respondent decided to construct a case out of other issues, including the allegations surrounding his wife's presence in the compound.

c. The charge of continuing to have a South Sudanese national stay with him in his accommodation, after being advised against it, ignored the changed context in that AT was both an UNMISS staff member and became the Applicant's wife in October 2019. This was a unique situation not provided for in any rule and not the objective of the Directive excluding local Sudanese from residing in the compound.

d. The Applicant, his spouse and GM testified about advice and encouragement received from other senior officials to continue to pursue the matter officially. In the interim, COVID-19 restrictions in 2021 further complicated working and living arrangements. The Applicant's wife testified that they asked for and were later given permission through the same established channels for her to remain in the compound over the holidays as a paying guest, thus sending mixed messages.

e. From the correspondence at the time, he disclosed his relationship and offered to pay the cost involved in having his wife stay there.

f. Regarding the allegations that he threatened his wife as well as other United Nations colleagues, neither his wife nor any United Nations staff confirmed these accusations, which OIOS noted were the product of gossip

l. Neither UNMISS, Mission Support nor the Staff Counsellor provided any real assistance to him. Instead, the Respondent embarked on a determined effort to separate him despite his long service in several difficult and dangerous missions.

m. The Respondent applied a disproportionate and harsh sanction long after the fact. In justifying his decision to impose the harshest of penalties, the Respondent has taken the conclusions of the OIOS report further than what was warranted by the limited findings.

11. The Applicant requests the Tribunal to rescind the contested decision and award him compensation for harm to his career and *dignitas* in the amount of two years' net base pay.

12. The Respondent's principal contentions are:

a. The record contains clear and convincing evidence establishing the facts underlying the contested decision.

b. The Applicant has not contested that AT stayed in his UNMISS-provided accommodation on the dates in question, nor claimed that he received permission or paid the due fees for those stays.

c. The sworn statement of JM, the Staff Counsellor who witnessed the Applicant issuing the threats, and her contemporaneous report of the threats to the Applicant's supervisors support the allegation. The Applicant has not offered any reason why JM's evidence should be ignored

j. The threats to harm FB amounted to serious misconduct and were considered as evidence of a pattern of conduct that supports the other allegations of threats of violence.

k. The sanction imposed on the Applicant is consistent with the Organization's past practice in comparable cases, involving issuing threats to kill without proceeding to use physical violence, which have resulted in the sanction of separation from service with compensation in lieu of notice with or without termination indemnity. Issuing threats to harm have attracted sanctions ranging from demotion to written censure.

l. The Applicant's misconduct was compounded and repeated. He persisted in permitting AT to stay in his UNMISS accommodation even

> proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. (*Sanwidi* 2010-UNAT-084, para. 40).

16. However, UNAT also held that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General". In this regard, "the Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (*Sanwidi*, *op. cit.).*

Whether the facts on which the disciplinary measure was based were established by clear and convincing evidence

17. In disciplinary cases "when termination is a possible outcome", UNAT has held that the evidentiary standard is that the Administration must establish the alleged misconduct by "clear and convincing evidence", which "means that the truth of the facts asserted is highly probable" (*Negussie* 2020-UNAT-1033, para. 45). UNAT clarified that clear and convincing evidence can either be "direct evidence of events" or may "be of evidential inferences that can be properly drawn from other direct evidence".

18. In examining the sufficiency of the evidence in this case, there are two major allegations: (1) that the Applicant allowed his wife to live in his quarters when she was not permitted: and (2) that he threatened to physically harm others. The Applicant presented testimony from three witnesses: himself, his wife, and his former supervisor. The Respondent did not call any witnesses to testify live at the hearing, instead relying on the record assembled by the Organization and cross-examination of the Applicant's witnesses.

A. Housing his wife at a non-family duty station

19. It is important to clarify the context in which the alleged violation of permitting his wife to live in his quarters took place. It is undisputed that the

26. The Applicant was quite aware of these rules against having unauthorized guests stay in his UNMISS accommodation, having been reprimanded previously for violating those same rules.[1] He also testified that he knew the rules and regulations regarding accommodation in the United Nations compound "which were built especially for international staff and, with some exception for security reasons, for national staff and their dependents."[2]

27. The Applicant also stated that he knew "the camp rules say national staff are not allowed to ask for residence inside the camp because they have houses outside."

28. Nonetheless, he had AT spend the night in his accommodation, without permission, several times prior to their marriage. After the marriage, he requested authorization for her to stay in the accommodation and continued having her stay while his request was pending.

29. The decision denying the Applicant's request was communicated to him on 5 December 2019, and he repeatedly sought "clarification" or reconsideration of that decision. Finally on 16 December 2019, the Director of Mission Support ("DMS") wrote that "[t]he matter was settled from our perspective and the SM [staff member] has been referred to the PSA [Principal Security Adviser,], in copy, for options to live outside with his wife."

30. When the Applicant persisted in arguing his case to the DMS, she responded "I trust you do understand the importance of complying with existing rules and regulations and will recognize the efforts by the Mission to address your new

he and his wife reside in a 'DSS approved' residential site in the city." According to PSA, the Applicant felt that neither option was acceptable to him, and he continued to have his wife spend nights in his UNMISS accommodation.

32. By early 2020, the PSA continued hearing rumours that the Applicant's wife was still staying in his accommodation and again told him that she was not to stay there. In response the Applicant nodded, and the PSA understood this to mean that she was no longer staying there. In fact, UNMISS gate records showed that AT was still spending the night on the compound during this time.

33. On 23 March 2020, the Applicant was interviewed by the Special Investigations Unit ("SIU") at UNMISS about allegations that he allowed AT to stay overnight without authorization[3]

appeared to be an innocent misunderstanding of a relatively obscure UN staff rule for Missions."

37. This statement conflicts with the facts as set forth above. By his own admission, the Applicant was fully aware of the rules. They were not "obscure" to him, and he did not misunderstand them. The DMS's "intervention" was at the request of the Applicant.

38. The PSA's recent statement also conflicts with his own previous statements at the time in question. Contrary to the sympathetic tone of his newest statement, on 3 December 2019 the PSA wrote that the Applicant's plan to move his wife into the UNMISS compound "is not acceptable to us as it will cause a number of other staff to start compiling similar actions, but perhaps more importantly is what does the UN do if the new wife becomes pregnant? Do we protect the new baby also?"

39. After he communicated to the Applicant the decision denying his request, the

2019 saying that he felt too stressed out to work and would like to be replaced on duty. The supervisor promised to replace him as soon as possible, told the Applicant to contact the UNDSS Stress Counsellor to discuss his issues, and gave him the counsellor's contact information.

43. A few days later the Applicant again called his supervisor to say that he was too stressed to work. The supervisor arranged a replacement and reiterated the need for the Applicant to see a stress counsellor. The Applicant affirmed that he had an appointment with the Stress Counsellor scheduled for that day.

44. Following the session, the Stress Counsellor ("JM") reported to the PSA that, during a joint session with the Applicant and his wife, the Applicant "verbally threatened his wife of (1) killing her should he find out that she is cheating on him and (2) he will kill anyone to protect their marriage and the need to live together."

45. The report recounted that, at the beginning of the counselling session, JM explained the protocol whereby their discussions would remain confidential, except if there were a threat to life or safety. This protocol was repeated to the Applicant when he made the threats. "In reaction, he even became suspicious about me that I may be recording his conversation. He showed me his gun and insisted that killing someone would not be a problem for him." JM also wrote that the wife separately confirmed to her that the Applicant had in the past expressed anger outbursts, been overly jealous and suspicious that she was unfaithful, and had threatened her with aggressive behaviour.

46. JM said that she discussed these threats with her supervisor and they "agreed that due to the paranoid ideas that [the Applicant] is frankly expressing and his access to a firearm, the issue is very serious and needs to be escalated to [the PSA], in order to get a specialist assessment and care for [the Applicant], ensure the safety of his wife, and protect the organization."

47. The PSA responded by email stating that he understood and was taking action. The Regional Senior Stress Counsellor followed up confirming that,

> As stress counsellors, client confidentiality is critical for our work …
>
> a. The only exception is when there is a threat to life or safety of a client, or of another person due to the actions of the client. In such situations, we are ethically bound to breach confidentiality in the interest of protection a life.
>
> b. Even in these situations, we have a strict protocol that we follow for the disclosure. [JM] followed that step by step process excellently, and I just want to document it for transparency and accountability …
>
> [JM] carried out these steps in consultation with me and the Chief of CISMU (Moussa Ba).
>
> We hope his disclosure as an exceptional measure will help to get specialist assessment and care for [the Applicant], ensure the safety of his wife, and protect the organization.

48. As a result of JM's report, the PSA had the Applicant's firearm withdrawn and sent him for a psychiatric evaluation.

49. During the investigation leading to these charges, JM was interviewed by OIOS. She described being contacted by the Applicant's supervisor who said the Applicant needed some counselling service. JM advised that she does the counselling and then called the Applicant. He told her that he was not ready to have a session, so she said she was always available should he be ready.

50. A few days later the Applicant called her to say he wanted to have a session and that he wanted to come with his wife "who was by his words 'suicider'." Since this sounded urgent, JM left her location and met the Applicant and his wife at the UNMISS compound.

51. In her interview, JM reiterated that she had begun the session by discussing the protocol on confidentiality described above. Then the Applicant produced a folder with wedding photos, explaining how devastating it was for them not to be allowed to live together in the UNMISS compound, and said this was the reason for the stress.

52. JM said that she asked about the suicide issue because this seemed like an emergency matter. The Applicant's wife said that she did not want to commit suicide; she was just sad, extremely sad. She was also angry at her husband as he was overreacting.

53. As the discussion focused on the issue of them living together, JM told the couple that she could not be a mediator between the staff and the Organization and that should be done through the Office of the Ombudsman. The Applicant became suspicious that JM was recording the conversation and demanded to see her phone. She showed him her phone, reassured him about confidentiality unless there was a threat to life and tried to calm him down.

54. The Applicant got up and began moving around, chain smoking, while his wife continued crying. His wife then told the Applicant "please, lets give her some time to do her work, let's not be suspicious." The Applicant then said to his wife "I know you don't want to live with me, should I know that you are cheating on me, I will slaughter/kill you like a chicken."

55. At that point, JM reminded him again about the limits of confidentiality when there is a threat to life. The wife then moved closer to JM "just to be a bit more safe" as the Applicant was hitting her on her side.

56. JM said she could see that the Applicant was very agitated and very angry so she used some relaxation techniques to calm him down in order to learn what the anger and frustration was all about.

57. Immediately after engaging in the relaxation techniques, the Applicant said "tell me what I can do for us to maintain the marriage. Even if it takes like killing anyone in the Organization for us to have the marriage, I will do it for you. Just let me know what and I will do it for you."

58. Once again, JM reminded him that threatening to kill someone would negate the confidentiality of the counselling session. As the Applicant started pulling out copies of emails he had written requesting permission to live together, his anger

erupted again. JM then told him "let's concentrate on your psychological health, … on having ourselves to calm down and maybe see how I can best support you two."

59. At that point, the Applicant stood up and started cursing. He looked at his wife and again repeated "Should I suspect that you are cheating on me, I will

65. The Tribunal finds JM's statements to be credible. She had no motive to lie about the Applicant making threats, having never met the Applicant before. Indeed, reporting those threats entailed professional risks to her for breaching the general confidentiality of counselling discussions. In addition, JM consulted her technical supervisor half-way around the world to discuss the threats and the appropriate way to handle them. Once it was agreed that she should disclose these threats to protect the life of those threatened, JM met with the PSA to make sure that he understood

with a number of people on the Mission, why was the Applicant singled out for this treatment?

70. Curiously, the PSA told the OIOS investigator that "[t]here was a discussion, I asked [the Applicant] to see [a] Stress Counsellor which he did. The Stress Counsellor told me that he was quite aggressive in his interview and he actually said 'I will kill, I will kill'. He did not actually say whom, his wife or whom, and he put his hand where his holster would be. And he did have a holster."

71. The PSA also testified that, after he met with JM, he spoke with the Applicant about her allegations. According to the PSA, the Applicant "swore black and blue and said absolutely he did not have any weapon with him whatsoever, and I believe that." Yet, the PSA relieved the Applicant from duty and withdrew his weapons. If the actual presence of a weapon at the counselling session was dispositive, as his testimony implies, and he believed that the Applicant was truthful in denying that he had a weapon, then why did the PSA implement JD's recommendation?

72. The answer to these rhetorical questions is that, contrary to his recent testimony before the Tribunal, the PSA believed the Applicant was capable of making threats and carrying out at that time. He never told the OIOS investigator that he believed the Applicant's denial. Instead, the PSA said that "the fact that he put his hands [where he had a holster] and said that will kill him it was a final point where I said 'I am taking your weapon from you.'"

73. Indeed, in his hearing testimony, the PSA conceded that the Applicant at this point in time "was not quite the guy that I could remember … He was quite tense." When the Applicant and his wife came to his office during this period, the Applicant

81. In her statement to OIOS, AT was more definite saying "he was having just holster, it was empty there." The reason she was so clear that his holster was empty is that she recalls the Applicant telling her that his weapons were taken before the counselling session. However, the record clearly shows that is not the proper chronology of events. The Applicant's weapons were taken after, and as a result of, the counselling session and not earlier.

82. However, it is noteworthy that the testimony of both the Applicant and his wife confirm JM's statements that the Applicant was angry during the counselling session, also nervous, walking around and repeatedly smoking cigarettes. And interestingly, they both contradict the PSA's testimony that the Applicant pushed his wife "quite hard in the back".

83. As a result, the Tribunal concludes that neither the Applicant nor his wife are credible and reliable witnesses. Further, the Tribunal finds that the evidence is both clear and convincing that the Applicant did make threats to kill his wife and others during the course of his counselling session with JM.

84. The Applicant also challenges the Organization's finding that, in 2017, he threatened a co-worker ("FB"). Specifically, the Under Secretary-General found, by a preponderance of the evidence, that:

that he ever threatened to shoot or stab anyone in UNMISS. Thus, determining whether there was evidence to support the finding must be found primarily in the administrative record.

86. The USG's finding was based on FB's "credible statement", as corroborated by AC, VB, JD, and the Applicant's admission that he had argued with FB one night at AC's house.

87. On 6 August 2020, FB was interviewed under oath by OIOS. FB said he was a Close Protection Officer in UNMISS and at the time he was working on the Applicant's team. There was a lot of tension between them, with the Applicant accusing FB of trying to have sex with his wife, and other things. This occurred especially when the Applicant was drunk. According to FB, the Applicant "had something with everyone, like everyone wants to make him a fool or something like that."

88. There was a point when the Applicant told FB "my brother, if you would have come at that time in the shadow, it was nighttime, I would have stabbed you." FB said that he did not see a knife. "He just told me that he would stab me."

89. After that FB avoided the Applicant "because if somebody […] threaten[s] you, you must be careful. Th[ese] guys, when they are drunk, you never know, [carrying] weapons [is] not for everyone." FB said he told the Applicant they should only talk about their job and avoid each other. "I was just trying to take care for myself and not be exposed for the threat. It was not realistic, but it was what [the Applicant] told me. When someone is telling you this, it definitely puts you on guard. I took it serious."

90. FB said that another time, when they had to exchange cars in preparation for the next day, the Applicant said, "just remove your thi[n]gs cause otherwise I will drag you behind the car." Eventually, FB asked JD to transfer him from the Applicant's team, and that was done.

91. When asked about any other incidents when someone faced trouble with the Applicant, FB said "he is well known in CDT [Conduct and Discipline Team], has

problem with him. FB said that he had an encounter with the Applicant, but he did not go into any detail about it. So, JD moved FB to another team.

96. In his interview with OIOS, the Applicant said that he could not recall an incident with FB and never threatened him. However, he did recall that, one night in the home of "[AC], one of my other colleague, our other colleagues, also Romanian … but I remember we have argued, but long, long ago." The Applicant went on to say that he and FB are "like brothers…. [FB] speak[s] with me every day … We are even close, sir, this is issue of … even brothers, blood brothers." He said they had general arguments "but it doesn't mean I hate you."

97. Based on the record, the Tribunal agrees that it is more likely than not that the Applicant threatened FB. FB, AC, and the Applicant all agree that there was an incident at AC's accommodation where the Applicant argued with FB. The Applicant has no other recollection of that night, but AC remembers the Applicant having a lot to drink and threatening to beat FB. He also recalls that the Applicant threw something, then left for awhile before returning and calling FB to come into the dark where he was.

98. FB says that, a few days later, the Applicant told him that he would have stabbed FB if he had come into the shadows when beckoned. AC and VB both said FB reported this statement to them soon thereafter. In addition, JD corroborates FB's story that he asked to be removed from the Applicant's team because of an unspecified incident.

99. Thus, the Tribunal is persuaded by the preponderance of the evidence that the Applicant threatened FB, as was found by the Organization.

Whether the facts amount to misconduct

100. The Applicant argues that "stories about isolated arguments or becoming depressed and angry over family matter or having private arguments outside work can [not] legitimately be considered serious misconduct in the absence of any official record, complaint or reprimand."

101. First, this argument mischaracterizes the conduct in this case. This is not a situation of mere arguments or becoming depressed and angry. To the contrary, the Applicant made serious threats against coworkers and his wife. He also repeatedly and knowingly violated the rules by having his wife stay overnight in a non-family duty station.

102. Second, there is no legal requirement that misconduct be committed by means of an official record. Indeed, most misconduct is not done in writing. Nor is there any requirement for a specific written complaint in order for misconduct to have occurred. And, of course, a reprimand or other disciplinary sanction is penalty for misconduct, not a required element to prove serious misconduct.

103. To be clear, the Tribunal finds that the Applicant's threats and repeated violation of the housing rules amounts to serious misconduct.

Proportionality

104. According to the sanction letter in this case,

> a. In determining the appropriate sanction, the [Organization] has considered the nature and gravity of your misconduct, the past practice of the Organization in matters of comparable misconduct, as well as any mitigating or aggravating factors. The [Organization] has considered that the following are aggravating factors in your case: (a) your compound misconduct; (b) your repeated misconduct; (c) your role as a close protection officer; and (d) the fact that you issued a threat to kill your wife in relation to potential infidelity given the violence against women context. The [Organization] has

close protection officer with access to firearms should not have been considered as an aggravating factor.

106. The claim that the Organization ignored the Applicant's long record of service itself ignores the case record. As noted above, the [Organization] expressly considered his service record as a mitigating factor.

107. In addition, the claim that the Organization ignored his full cooperation with the investigation is factually unsupported. Staff rule 1.2(c) obligates staff members to cooperate with duly authorized audits and investigations. Full cooperation involves more than merely submitting to an interview since that is required. The Tribunal views full cooperation as answering questions truthfully and completely. The record is clear that the Applicant was less than truthful and forthcoming in responding to the allegations. Thus, he was not entitled to any mitigation for full cooperation

108. The argument that his statements were not actual threats is also belied by the record. On each occasion where a threat was made, the Applicant was in an agitated state - angry, nervous, and sometimes intoxicated. In this context, it is unreasonable to argue that the threats were merely conditional. Saying "I would have stabbed you if you had come when I called" is a statement of one's past intention to kill. On the other hand, when the Applicant was angry about not being able to keep his wife in the compound, threatening to kill anyone that interferes with his marriage (as he sees the decision not to let his wife live in the non-family duty station) is a real threat to kill in the future. The "condition" was already met in the Applicant's mind by the decision not to let AT live at UNMISS. As FB succinctly put it, "if somebody threatens you, you must be careful."

109. These repeated threats, to various people under various circumstances, do seem to exhibit a pattern of behavior by the Applicant. And it is appropriate to consider this pattern of behavior since the Applicant's job involves him carrying firearms and being authorized to use deadly force. Again, as FB pointed out, "carrying weapons is not for everyone."

110. Indeed, the severity of the threats in inextricably linked with the Applicant's role as a close protection officer with access to firearms. The threat of "I will kill you" coming from an armed close protection officer is much more serious that coming from an office clerk whose access to weapons may be limited to a letter opener or stapler.

111. Similarly, the Applicant's pattern of knowingly and continuously violating the rules on restricted access to housing on the compound should be considered. The jurisprudence is clear that the sanction should be no more than necessary to deter the misconduct. (See *Mubashara Iram* 2023-UNAT-1340, paras. 86 and 87; *Kenneth Conteh* 2021-UNAT-1171, para. 50; *Samandarov* 2018-UNAT-859, para. 23).

112. However, the record is clear that the Applicant was not deterred by the rules, a prior reprimand, and clear direction of the DMS on this subject. He simply was determined to have his wife live with him in the non-family compound. In the face of such wilful refusal, along with the serious nature of threats by a staff member whose job entailed access to weapons, the sanction of termination was appropriate and proportionate.

Due Process

113. The Applicant argues that "charging him again at this stage with the same allegation of misconduct for a different time period when it could have laid those charges in the First Allegations of Misconduct is improper and in violation of the fundamental legal principle of *ne bis in idem*." Latin for "not twice for the same," *ne bis in idem* is generally a criminal law principle. In common law jurisdictions it is commonly referred to as the double jeopardy doctrine; in civil law jurisdiction is may be referred to as *autrefois acquit/autrefois convict.* The Applicant has cited no authority for applying this doctrine in the present context, nor is the Tribunal aware of any case in which it was applied in the modern United Nations Internal Justice System.

114. Indeed, it appears that the only time that the *ne bis in idem* principle was examined in the modern United Nations system, the Dispute Tribunal found it did

Conclusion

119. In view of the foregoing, the Tribunal DECIDES to deny the application in its entirety.

(Signed)
Judge Sean Wallace
Dated this 25th day of September 2024

Entered in the Register on this 25th day of September 2024

(Signed)
Wanda L. Carter, Registrar, Nairobi