UNITED NATIONS DISPUTE TRIBUNAL

(xi) [The Applicant] did not learn about [DD's] extended absences from the office or his flexible working arrangements until [she] noticed that he was not copied on several important matters relevant to his duties;

(xii) [DD's] extended absences and flexible working arrangements affected the work of the section; and

(xiii) On 25 May 2018, [the Applicant] held a telephone meeting with [DD] and [CC] after learning of his flexible working arrangements and absences from the office during which [the Applicant] admittedly "lost [her] cool" and "spoke sharply" to him.

6.

Consideration

The issues of the case

9. The Appeals Tribunal has consistently held that the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member,

12. In response, the Applicant submits that the relevant decision "made up part of the investigative process, which was only concluded with the transmission of the disciplinary sanction, and as such is receivable". The Applicant further contends that she "did, in fact, request a management review of the administrative leave and noted explicitly the damage the administrative leave was doing to her career viability and reputation" in an email exchange on 21 October 2018.

13. The Tribunal notes that under staff rule 11.2(a) a staff member who wishes to "formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment … shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision". This requirement, however, does not apply to "a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process".

14. In the present case, it(,)-2799Bd to

the procedures utilized during the course of the investigation by the Administration". In this context, [the Dispute Tribunal] is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". See, for instance, para. 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT-1024.

17. The Appeals Tribunal has, however, underlined 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" (see *Sanwidi* 2010-UNAT-084, para. 40). In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a ju]Ú ex^

rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

Whether the facts on which the sanction was based have been established?

20. The Applicant, in essence, submits that the OIAI did not properly establish as a matter of fact that she had told AA not to "talk to anyone" and that she had shouted at him, which she denies. Similarly, the Applicant submits that she never shouted at DD.

21. The Respondent submits that it "has been established by clear and convincing evidence that: (1) on 13 March 2018, the Applicant shouted at [AA], for whom she acted in a supervisory capacity; (2) on 12 April 2018, the Applicant again shouted at [AA]; and (3) on 25 May 2018, the Applicant shouted at [DD], for whom she also acted in a supervisory capacity". In specific, the Respondent contends that:

a. On 13 March 2018, "the Applicant shouted at [AA] at such a volume 'that [it] could be heard in the corridor…'" and that "the Applicant conceded that it was 'very possible that [she] expressed irritation during this interaction'".

b. On 12 April 2018, AA "met with the Applicant in the presence of [BB and CC], and according to AA, the Applicant "intrusively questioned him about his conversations with other colleagues asking, at one point, 'why is this girl even talking to you?!'. BB and CC "provided similar accounts" as: (i) BB "stated, *inter alia*, that the Applicant 'openly accused [AA] of negatively effecting the work of the section by talking to people outside the section and … objected to his networking with some friends he had made…", and (ii) CC "described the Applicant's conduct as 'very rude, humiliating and disrespectful' and stated that it was apparent that 'it was extremely humiliating for [AA]'". The Applicant herself "conceded that the meeting 'became contentious' and that 'it was not good to making this a group conversation'".

24. Concerning the meeting on 13 March 2018, the Tribunal notes that AA, who was one of three staff members to file a complaint of misconduct against the Applicant, was the only witness who stated that the Applicant had shouted at him. The Applicant has consistently denied that she did so and has only admitted that she may have "expressed irritation" toward him. According to the Deputy ED's account of the facts, AA even stated that the Applicant's shouting was so loud that it could be heard by others in the corridor. However, it does not follow from the sanction letter that any other witnesses had confirmed this statement.

25. With regard to the 12 April 2018 meeting, according to the Deputy ED's account of the facts, no one present at this meeting—AA, BB, CC or the Applicant—stated to the OIAI investigation that the Applicant had shouted at anyone during the meeting. Rather, CC had reported that the Applicant had spoken to AA "in a manner

difference as these occasions are not under review in the present case. Also, the Tribunal notes that according to the Deputy ED, four other witnesses, on the other hand, countered this allegation and denied ever having experienced such behavior on the part of the Applicant.

28. Consequently, the Tribunal finds that according to the Deputy ED's own account of the facts, the Applicant allegedly only shouted at colleagues/supervisees at two, and not three, occasions, namely at the 13 March 2018 and 25 May 2018 meetings, and that the two testimonies to this effect were both given by staff members who had already filed misconduct complaints against the Applicant, namely AA and CC. These two witnesses therefore had a vested interest in the outcome of the disciplinary process, and the evidentiary weight of their testimonies is therefore to be assessed in this light. Also, it is telling that according to the Deputy ED's own account, no other witnesses—even though they were present at both occasions—stated that the Applicant had actually shouted at either AA or DD.

29. Also, the Deputy ED based her decision on the fact that "it was reasonable *to assume* that such conduct would cause embarrassment and/or humiliation, particularly in view of the fact that others were able to hear and/or otherwise witness [the Applicant's] conduct" (emphasis added). Rather than a fact, this is—in the Deputy ED's own words—an assumption, and therefore holds no evidentiary value, which means that it has not been established that either AA or DD were embarrassed and/or humiliated by the Applicant's actions at the relevant meetings.

30. On the preponderance of the evidence, the Tribunal therefore finds that by the Deputy ED's own account of the facts in the sanction letter, the Deputy ED had failed to demonstrate that the Applicant shouted at AA and DD as otherwise stated by the Deputy ED in her decision, as well as in the manner which the Respondent describes in his submissions. Accordingly, the facts on which the sanction was based have not been lawfully established (see *Turkey*, *Ladu* and *Gisage* above).

Whether the established facts amounted misconduct and the disciplinary measure applied was proportionate to the offence

31. The Applicant submits that "the facts established by OIAI did not amount to misconduct, and even if they did, the sanctions were disproportionate to the alleged misconduct".

32. The Respondent contends that "[t]he established conduct constituted humiliating, embarrassing, and otherwise demeaning words and actions that reasonably caused offence and humiliation to both [AA and DD] and, therefore, constituted misconduct". The disciplinary measure imposed, a written censure, is further "the lightest available to the Respondent under the Staff Rules and was proportionate to the Applicant's established misconduct".

33. The Tribunal notes that under the applicable UNICEF executive directive in force at the time of the contested decisions, CF/EXD/2012-005 (Disciplinary process and measures), a precondition for imposition of a disciplinary sanction against a staff member is that s/he had been found culpable of misconduct following a disciplinary process (see sec. 4.3). Although sec. 1.4 of CF/EXD/2012-005 states that the stipulated list of misconduct offences is not exhaustive, if a UNICEF staff member is then found guilty of misconduct without reference to any of the listed offences, the definition of the offence must be so specific and precise that—as a matter of access to justice—it would allow the relevant staff member to prepare an application to the Dispute Tribunal in accordance with sec. 5 of CF/EXD/2012-005.

34. The Tribunal notes that in the Deputy ED's sanction letter, the only qualification that she makes of the Applicant's sanctionable behavior is that the Applicant's "conduct [had been] unacceptable". The Deputy ED does not qualify whether the Applicant's actions amounted to misconduct or indicate what category of misconduct the Applicant had allegedly committed as per art. 1.4 of CF/EXD/2012-005. Similarly, in the Respondent's submissions, he also simply contends that "[t]he established conduct constituted humiliating, embarrassing, and otherwise demeaning

words and actions that reasonably caused offence and humiliation to both [AA and DD]" without stating what category of misconduct to which this amounts, although he does, at least, reach the conclusion that this alleged behavior "constituted misconduct". Also, the Tribunal notes that in the Deputy ED's sanction letter, it was not stated that AA and DD were actually humiliated or embarrassed by the Applicant's conduct but only that this was the assumption.

35. The Deputy ED's decision is therefore flawed as the basic reason and legal foundation for imposing the disciplinary sanction of written censure placed in the Applicant's official status file for five years is missing.

36. The OIAI investigation report dated 24 May 2019 was, however, titled, "Investigation report on harassment and abuse of authority by a staff member at the programme division", and the Tribunal will therefore examine the case as a case on harassment and abuse of authority, which are actions that are considered misconduct under art. 1.4 of CF/EXD/2012-005.

37. The applicable definitions of harassment and abuse of authority are found in UNIC ά 1 >˚

> Abuse of authority is the improper use of a position of influence, power, or authority against another person. This is particularly serious when a person uses, or threatens to use, his/her influence, power, or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment, and such conduct can include (but is not limited to) the use of intimidation, threats, blackmail or coercion.

50. In this regard, the Tribunal notes that concerning the three specific incidents,

59. With reference to the above, the Tribunal has found that the disciplinary sanction and the administrative measure were unlawful, and considering the seriousness of both decisions, the Tribunal finds that it is only appropriate to rescind them under art. 10.5(a) of its Statute. As neither decision concern "appointment, promotion or termination", no elective compensation *in lieu* is to be set by the Tribunal.

60. Regarding granting the Applicant a new two-year appointment, the Tribunal notes that as part of the present case, the Applicant has not appealed any administrative decision not to renew her fixed-term appointment or any non-selection decisions. The Tribunal therefore cannot rescind any non-renewal decision or order a renewal as specific performance.

Compensation for harm

61. The Tribunal notes that in *Kebede* 2018-UNAT-874, the Appeals Tribunal outlines the three basic prerequisites for compensation, namely, harm, illegality and nexus between the both, as follows (see para. 20):

> … It is universally accepted that compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both. It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien.11 If one of these three elements is not established, compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question.

62. The Applicant submits that her reputation and career were harmed, "leaving her unable to find a D-level job either within or outside of UNICEF as no one wants to hire a staff member with a censure who cannot supervise staff". She "unsuccessfully applied for 27 jobs internally and externally" and the "[t]here are rumours she is in trouble or was kicked out of UNICEF", and [her] "performance reviews were handled negligently and unprofessionally, and she was openly treated as someone being ushered out the door", which all "had a detrimental effect on her mental and physical health, which required her to seek professional medical care".

67. The Appeals Tribunal set out some evidentiary standards for a claim for reputational harm in *Kallon* 2017-UNAT-742 (para. 68) as follows:

> … The evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence [reference to footnote omitted]; or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of

therebetween in order to award her compensation for reputational damages. Also, with reference to *Kallon*, the Tribunal finds that it has, at least presumptively, been established that the unlawful impugned decisions had a significant adversarial impact on her reputation and therefore also on her other job applications, in particular those with the United Nations.

70. Taking into account the severity of the illegality combined with the Applicant's reputational damages and her distressed efforts to find new employment, the Tribunal finds the compensation award therefor should be set according to the highest levels and awards the Applicant three-months net-base salary in compensation. In line herewith the Tribunal refers to *Kallon*, para. 82 in which the Appeals Tribunal affirmed the Dispute Tribunal's award of USD50,000 that had primarily focused on "the impact of the treatment on [the applicant's] career" and the "state of [his] well-being".

Damage to mental and physical health

71. The Respondent contends that "she has produced no evidence to support this claim" and that "it was incumbent for the Applicant to provide such evidence without further prompting from the Tribunal".

72. The Tribunal notes that compensation for harm under art. 10.5(b) of its Statute is subject to evidence and that the Applicant has indeed not provided any evidence for her mental or physical harm resulting from the impugned decisions.

73. In the Applicant's submission dated 14 October 2020—without any further explanation and appending abundant evidence for her request for reputational damages—she "[r]eserve[d] her right to request (1) additional production of documents strictly as they relate to the issue of damages and (2) an oral hearing on damages, should the case proceed to on da729 Tm0 G[( )] TJETQ0.00000912 0 612 792 re>BD12 792BT/F1 12 Tf1 0ida729

74. The Tribunal therefore sees no reason to instruct the Applicant—once more—to provide evidence for her damages under art. 10.5(b) of the Statute. In addition, the Tribunal refers to the Appeals Tribunal in *Robinson* 2020-UNAT-1040 in which it held that (see paras. 36 to 37):

> … There is no obligation on the Dispute Tribunal to request evidence from the parties, particularly when both are represented by counsel who are presumed to be aware of the relevant evidence from the parties, …

c. The Applicant is awarded three months of net-base salary in compensation under art. 10.5(b) of the Dispute Tribunal's Statute;

d. The compensation amount shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Joelle Adda

Dated this 17th day of November 2020

Entered in the Register on this 17th day of November 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York