

UNITED NATIONS DISPUTE TRIBUNAL

Introduction

1. The Applicant, a Team Assistant at the GL-4 level with the United Nations Mission in South Sudan (“UNMISS”) on a fixed-term appointment, in the Aweil Field Office, is challenging the decision by the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) to impose on him the disciplinary measure of separation from service with compensation *in lieu* of notice and without termination indemnity in accordance with staff rule 10.2(a)(viii).
2. The disciplinary measure was imposed on grounds that the Applicant engaged in serious misconduct, in violation of the regulations and rules prohibiting sexual exploitations and sexual abuse.

Procedural background

3. On 29 July 2022, the Applicant filed an incomplete application to the United Nations Dispute Tribunal sitting in Nairobi *via email* requesting urgent relief under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend the decision mentioned in para. 1.
4. The disciplinary measure was imposed on grounds that the Applicant violated staff regulations 1.2(a) and 1.2(b), staff rule 1.2(e), and sections 1, 3.1, 3.2(a), (c), and (f), and 3.3 of ST/SGB/2003/13 (Special measures for protection from sexual exploitations and sexual abuse).
5. The Applicant completed his application on 10 August 2022.
6. On 11 August 2022, the Tribunal issued Order No. 112 (NBI/2022) dismissing the Applicant’s motion for suspension of the impugned decision. As the Applicant had already been separated at the time of filing, the Tribunal determined that it had no jurisdiction to suspend a decision that had already been implemented.
7. The Respondent filed his reply on 23 September 2022.

8. The Tribunal has carefully reviewed the parties' submissions and determined that this matter is suitable for adjudication on the basis of the written record available to it.

9. On 29 June 2023, the Tribunal issued Order N.082Q q BT /F1 12.0 Tf 0.0 0.0 0.0 rg 0.999

18. Nevertheless, the Applicant and V's family arrived at an out-of-court settlement which included marriage and payment of cattle.

19. The Applicant was placed on Administrative Leave with pay on 11 May 2021. He was interviewed by the Office of Internal Oversight Services ("OIOS") on 2 June 2021.

20. On 30 June 2021, the High Court in Aweil dismissed the criminal matter on the basis of the settlement agreement between the parties. The Court made no findings on the facts and merits of the complaint.

21. OIOS issued its initial report on 19 August 2021. The matter was referred to Office of Human Resources ("OHR") for appropriate action on the same day.

22. On 11 October 2021, the Applicant confirmed receipt of the Memorandum of Allegations that was sent to him by OHR on 30 September 2021.

23. On 29 October 2021, the Applicant submitted his response to the allegations.

24. V delivered a baby boy on 12 December 2021, whom the Applicant acknowledges as his own.

25. The Applicant submitted further responses to the allegations on 3 December 2021, 6 January 2022, and 7 March 2022. All his responses were consistent in his denial of the allegations against him.

26. On 6-8 April 2022, OIOS conducted an additional investigation into the Applicant's case as requested by OHR. This investigation entailed further witness interviews, including that of the Applicant, as well as collection and verification of evidence.

27. OIOS submitted its findings to OHR on 13 April 2022.

28. On 19 April 2022, the Applicant was asked to comment on these findings. The Applicant submitted his comments on 29 April 2022.

29. On 21 July 2022, the Assistant Secretary-General (“ASG”) for Human Resources wrote to the Applicant to inform him of the sanction. The ASG said:

I dropped the aspect of the allegations against you regarding [V] being under 18 years of age. However, the USG/DMSPC concluded that the remaining allegations against you, that you engaged in sexual relations with [V], who was a member of the local population without independent financial means and who occasionally provided unpaid domestic help to you, that you impregnated [V] and that you agreed to marry [V] and pay a dowry to her family only after your arrest and in the hope that you would not face a possible trial concerning

agreed to marry her, this was only after charges of rape were made against him before the local courts. He paid her family dowry to avoid criminal responsibility. In other words, the Respondent argues, the Applicant

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in South Sudan (about three days' travel from Aweil) to her uncle's house after the death of her father and about 10 years before the facts at issue, when she was approximately seven years old (and V's uncles and other witnesses heard by the investigators, stated V was 17 years old at the time of the facts). She completed primary school only recently (she was recorded as 16 years old in 2018, with a date of birth of 31 March 2022: (para 84 of the Report)).

45. In any case, the certificate by the Aweil Town Public Prosecution Attorney on 1 July 2021 certifies that the case against the Applicant (there is no issue between the parties that the certificate refers to the Applicant, although the name indicated does not fully correspond to the Applicant's effective name) was dismissed "because there is no **Rape** and **no under Age**" (bold characters in the original).

46. Finally, it has to be noted that para. 129 of the investigation report stressed clearly that:

OIOS cannot definitively state V's age, given the inconsistencies in the accounts and the lack of birth certificate or any other contemporary documentation OIOS notes that there are credible grounds to consider that V is a juvenile and that [the Applicant] could not have been certain of her being an adult when [he] had sex with her. OIOS could not confirm that V changed her account at the request of [the Applicant] but notes that she did so after his arrest and when discussions between the families to reach a settlement were ongoing.

and that in the disciplinary sanction letter from the ASG for Human Resources, the aspect of the allegations against [the Applicant] regarding [V] being under 18 years of age (see para. 30 above) was dropped.

47. Also, the age of the Applicant is not certain (see para. 130 of the investigation report), although he is recorded in the United Nations system as 53 years old. While the Applicant was a United Nations staff member, enjoying all the benefits related to his status for years, V had no job, came from an impoverished background in a remote village and was living in "austere" conditions in Aweil. The report therefore assessed a power differential between the Applicant and V (see page. 25 of the report):

there was a notable power and status differential between [the Applicant] and V, emanating from their comparative ages, maturity, wealth and status, as well as [the Applicant's] United Nations position.

48. The Applicant and V had sexual intercourse on four different days and occasions, which were fully consensual (para. 27 and 69 of the report).

49. Following the said intercourse with the Applicant, V became pregnant.

50. It is undisputed that, after becoming pregnant, V had to either marry the Applicant or be taken back to their paternal village, in rural South Sudan, where she would have lived in even greater poverty, compared to her living conditions in Aweil.

51. It results from the records that, following a claim by V's uncle, the Applicant was arrested on suspicion of rape (accusation connected to the complainant's affirmation that V was 17 years old, therefore incapable of expressing a valid consent under the national laws).

52. The Applicant was released on bail, then again arrested and, after 21 days, released once more.

53. It also results from the records that (after some initial hesitations) the Applicant acknowledged the baby as his and named him Kofi, allegedly after the former United Nations Secretary-General Kofi Annan (annex 1 to the reply; see also para. 64 and 79 of the investigation report).

54. The Applicant and V married following the national rules, and the Applicant paid to V's family 31 cattle and five bulls as dowry.

55. At the end the Applicant was discharged, and the criminal case was dismissed (see para. 27 of the report; see decree on 30.6.2021 by the High Court Northern Bahr El Ghazal State Aweil), in consideration of the matter being settled by agreement between the complainant and the Applicant, and also because there was no rape and V was not underage (see certificate by the Aweil Town Public Prosecution Attorney on 1 July 2021, above quoted).

Whether the facts amount to misconduct.

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intercourse in the private life (with no connection with the working position of the person and his/her functions) with a poorer or less important person would entail sexual exploitation in itself (with no other benefit, given or promised, out of the sexual act).

68. The Tribunal notes indeed that neither the Applicant had a benefit from the sexual intercourse, nor V was offered or promised any advantage from her sexual activity, so we cannot see any exploitation, which requires undue advantages (even only the sexual act in itself).

69. In theory it would have been different (and staff rule 1.2(e) would have been applicable) if the victim was a minor, legally and naturally incapable of expressing a valid consent to the sexual intercourse: but this is not the case, and, apart what is said above about V's age, the Respondent himself said (at para. 37 of the reply) that the sanction imposed on the Applicant is not premised on V's age (and also the sanction letter dropped the correspondent accusations).

70. In the case at hand, the sexual intercourse was fully consensual, and the different social conditions of the persons would not entail any coercive condition, remaining the social and economic inequality out of the performed act. From what it results from the file, there are no elements which can support the allegation that the Applicant abused V in having the sexual intercourse or exploited the situation having undue advantages.

71. As already mentioned, in the Tribunal's view the case shows simply some consensual sexual intercourse, the fortuity of a pregnancy, the birth of a child, a marriage, all facts of private life with no connection with the status of the staff member concerned.

72. The Respondent in his closing submissions recalls *Erefa*, UNDT/2021/109, (paras. 53, 85, 93, 94, 96, Judgment not appealed before the UNAT and, thus, final). In that case, the UNDT found that striking an agreement to pay money to a victim

77. But even this assessment will not change the conclusion that the Applicant's behaviour was not a misconduct. Indeed, the quality of a United Nations staff member as the Applicant had no influence on the events and changed in no way what can happen to anybody else.

78. Moreover, in this case it has to be noted that the sexual intercourse was later tied to a son born by the couple and by a legal marriage, so, considering the whole picture and having in mind that we are dealing only with facts of private life with no connection with the position of the Applicant at the United Nations, we cannot say that there was a violation of the duty of integrity of the staff member.

79. In sum, the facts the Applicant is blamed of do not constitute sexual exploitation or abuse and do not amount to misconduct.

80. The contested decision must therefore be rescinded.

81. The Applicant is to be reinstated, with all his benefits and entitlement, from the date of separation.

82. In accordance with art. 10.5(a) of its Statute, the Tribunal shall also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission as the contested decision concerns termination.

83. It is clear from art. 10.5(a) of the Dispute Tribunal's Statute, as consistently interpreted by the Appeals Tribunal, that compensation *in lieu* is not compensatory damages based on economic loss, but only the amount the Administration may decide to pay as an alternative to rescinding the challenged decision or execution of the ordered specific performance (see, for instance, *Eissa* 2014-UNAT-469).

84. As to the amount of the compensation *in lieu*, the above recalled article of the Dispute Tribunal's Statute sets a general framework for its determination, stating that, apart from exceptional circumstances, it "shall normally not exceed the equivalent of two years' net base salary of the applicant" (see *Mushema* 2012-UNAT-247; *Liyanarachchige* 2010-UNAT-087; *Cohen* 2011-UNAT-131; *Harding* 2011-UNAT-188). The Appeals Tribunal found that the amount of *in lieu*

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