Before: Judge Agnieszka Klonowiecka-Milart (Presiding)
Judge Joëlle Adda
Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Charles Adeogun-Phillips, Charles Anthony LLP
Sètondji Roland Adovi, *Études Vihodé*
Chukwudi Felix Unah

Counsel for the Respondent:
Yun Hwa Ko, UNFPA
Wambui Mwangi, UNFPA

Introduction

1. The Applicant is a former staff member of the United Nations Population Fund ("UNFPA"). He filed an application on 8 May 2020 to contest the decision by the UNFPA Executive Director to impose on him the disciplinary measure of dismissal pursuant to staff regulation 10.1(a) and staff rules 10.1(a) and 10.2(a)(ix).[1] On 11 May 2020, he filed a motion for interim measures pursuant to art.10.2 of the Tribunal's Statute. The motion was refused via Order No. 094 (NBI/2020).

2. The Respondent filed a reply on 11 June 2020.

3. The case was assigned to a judge on 24 May 2021 and on 9 June 2021, the President of the United Nations Appeals Tribunal ("UNAT") authorized the referral of the case to a panel of three judges for adjudication.

4. Between 13 August and 16 September 2021, the Tribunal ruled on motions relating to: (a) concealment of the Applicant's identity[2]; (b) anonymity for the Complainant[3]; (c) in-person attendance of the oral hearing by the Applicant and the witnesses[4]; (d) preservation of the confidentiality of evidence under art. 18.4 of the UNDT Rules of Procedure[5]; and (e) protective measures for the Complainant during the oral hearing[6].

5. The Tribunal held a case management discussion on 9 September 2021 and hearings on 9 and 22 to 24 September 2021. The Tribunal heard oral evidence from the Applicant; nd 22 0004628t2 T1 0 0 1 99.384 358.97 Tm0 g0 G[(witnesse)4(s)] TJETQ0.000018243 0 612 7

Procedural background and the dispute over validity of the sanctioning decision

11. On 13 April 2017, the Complainant reported to OAIS that she had been raped and sexually assaulted by the Applicant at the Hotel Laico in Ouagadougou, Burkina Faso, on 2 December 2016.[11] She was interviewed by two OAIS investigators on the same day.[12]

12. OAIS informed the Applicant on 16 May 2017 of its investigation into the Complainant's allegations against him.[13] On 23 May 2017, OAIS notified the Applicant that it required access to and would seize UNFPA information and communication technologies ("ICT") equipment assigned to him, including data files, word processing, e-mail messages, LAN records, intranet/internet access records, computer hardware and software, telephone services and any other data accessible to or generated by him.[14]

13. After conducting interviews with the Applicant and several other staff members, analysing the official email accounts of the Applicant and Complainant and accessing the Applicant's official cell phone, OAIS concluded in an investigation report dated 23 October 2017 that while the Applicant's credibility and conduct obstructing the investigation was questionable, the evidence was insufficient to support a finding of the alleged rape/sexual assault. OAIS recommended that the case be closed but noted that "the closing of the case at this stage does not preclude OAIS from re-opening the case and pursuing further investigation, if further details and/or information are subsequently disclosed."[15]

14. On 25 October 2017, OAIS informed the Applicant and the Complainant that the matter was closed and that "the closing of the case at that stage did not preclude OAIS from re-opening the case, if further details and/or information were subsequently

[11] Trial bundle, p. 77.
[12] Ibid., p. 21.
[13] Ibid., p. 149.
[14] Ibid., p. 152.
[15] Ibid., p. 17, paras. 78 & 79.

disclosed."[16]

15. By memorandum dated 31 January 2019, Mr. A. R, the Chief of the UNFPA Legal Unit requested that OAIS conduct a further investigation into the allegations, in particular, to secure three items of potentially material evidence which were not included in the Investigation Report, and which, according to Mr. A.R, could lend credibility to the Complainant. The three items comprised the Complainant's notes contemporaneous with the event, a record of conversation with the Ethics Advisor or an interview record of her as a witness and a conversation between the Complainant and Mr. A.P about her attempt to separate from service immediately after 2 December 2016.[17]

16. On 4 February 2019, Ms. F.L, the then Director of OAIS informed the Applicant and the Complainant of the re-opening of the investigation into the Complainant's allegations against him so that OAIS could "further pursue avenues of inquiry within the scope of the investigation and allegations raised".[18]

17. On 11 February 2019, OAIS interviewed the Complainant regarding her notes and her contact with the Ethics Advisor.[19] OAIS interviewed Mr. A. P on 13 February 2019[20] and the Ethics Advisor on 14 February 2019[21]. On 28 February 2019, the Complainant provided OAIS with a copy of her notes.[22]

18. On 7 May 2019, Ms. L.F. forwarded the additional evidence to Mr. A.R.[23]

19. On 10 January and 10 February 2020, the Director, Division of Human Resources ("Director DHR"), UNFPA, forwarded the additional evidence obtained by OAIS to the Applicant and requested his comments. The Applicant submitted

[16] Ibid., pp. 220-221 & p. 471 (application, p. 3, para. 6).
[17] Ibid., pp. 210-211.
[18] Ibid., pp. 220-221.
[19] Ibid., pp. 222-228.
[20] Ibid., pp. 276-303.
[21] Ibid., pp. 238-251.
[22] Application, annex 20.
[23] Trial bundle, p. 212.

incapable of corroborating the Complainant's account.

28. The Applicant further alleges that his dismissal had been motivated by discrimination against African UNFPA staff members at the D-1 and D-2 levels after the death of the previous Executive Director, Mr. B.O., in late 2017. The new Executive Director, Dr. N.K. , created a "new zero tolerance" wave that was based on extraneous factors, and directed against those who were perceived to have "benefitted" from Mr. O's leadership, which according to the Complainant and Mr. A. P., included the Applicant. His case and the cases of approximately six other senior-level African UNFPA staff members who had been forced out of UNFPA for fallacious reasons were brought to the attention of the African Group. In an effort to address the issues of unfair treatment and discrimination at UNFPA, the African Group took the following actions between May 2020 and January 2021: held meetings with Dr. N.K., the Secretary-

racism on the part of the Applicant against the decision makers is undermined by the fact that the Director DHR is African, and the Executive Director is of African descent.

Considerations

34. As to the contention of abuse of power through acting without the *locus standi*, it will be useful, primarily, to recall staff rule 10.3, which is applicable to UNFPA, and which provides in the relevant part:

> Rule 10.3
>
> Due process in the disciplinary process
>
> (a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. […]

This rule, in its generality, signals that an investigation is a mandatory segment in a process in which disciplinary responsibility is established.

35. As regards the delineation of competencies and tasks in the internal regulatory framework of UNFPA, they are divided between an investigative body (OAIS) and the disciplinary organs (Director DHR and the Executive Director). OAIS is responsible for internal audit and investigation services at UNFPA.[33] After receiving an allegation of misconduct, the Director, OAIS, determines whether an investigation is warranted; decides on the conduct of the investigation; and may decide at any time during the investigation that the matter does not warrant further investigation and close the case.[34] OAIS determines the scope of its interventions and the methodologies used to conduct its work as it deems necessary. At the conclusion of the investigation the Director, OAIS, submits the Investigative Dossier to the Legal Advisor for consideration.[35] The

36.

organ applying the disciplinary or administrative measure. While these organs, i.e., ASG/OHRM, USG for Management or persons with delegated authority, are not those who usually hear the evidence, they are nevertheless required, at minimum, to critically review the record and the findings of the invithose who 4 dg/Arti,m0 Tf1 0 0 1e ablis7(quh0 0 1wh 708[(r)-81(0 1 13

as well as the grounds and time-limits for re-opening it. In this regard, the Tribunal agrees that the regulatory framework on the junction of review of OAIS investigative dossier by the UNFPA disciplinary organ is not precise and does not confer sufficient procedural guarantees. This said, in the Applicant's case the legal certainty was not infringed through a violation of a technical norm because his case was never "closed" pursuant to section 15.3 of the Disciplinary Framework. Viewed, on the other hand, as the function of the passage of time, the principle of legal certainty was also sustained, as the time that elapsed from the recommendation for closure t 584.62 Tm0 g0 G 0.024 Tc[(time)] TJET Q 0

The Applicant's allegation that six other senior-level African UNFPA staff members "had been forced out of UNFPA for fallacious reasons" is not supported by any evidence. However, the Applicant's case is about liability for his individual acts and falls to be evaluated on the strength of the evidence gathered in his individual case. It is not alleged, let alone shown, that Caucasian, or non-African, men would avoid prosecution for misconduct in a similar situation. To the contrary, in this Tribunal's experience, prosecution for sexual misconduct follows consistently and without discrimination even in cases involving lesser allegations.[44]

Other due process issues

52. The Respondent applied the wrong standard of proof to the facts of this case. The instant case is not a simple administrative matter since rape is a crime derived from the application of criminal law principles. As such, the standard of proof required to charge one with rape is proof beyond reasonable doubt, in recognition of the potential risk of reputational damage to the defendant.

53. The Applicant also alleges irregularities concerning his dismissal, starting with the fact that he received a response to his management evaluation request the day after the UNDT quashed the decision on administrative leave pending management evaluation. He further described that upon his dismissal he was abruptly stripped of all his income and protections applicable to staff (even the generator was taken away from him) while in Madagascar, during the COVID-related closure, where he could not even

misconduct and fall under category I and notes that sexual harassment constitutes a serious concern to Member States; ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) (superseded by ST/SGB/2019/8 issued on 10 September 2019) providing that sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another.

leave the country. It took an intervention from his government to cause UNFPA to attend to his security and safety until he could return home.

54. To meet due process requirements, the Administration must inform staff members of the allegations of misconduct against them, and staff members must have a reasonable opportunity to make representations before the Administration acts against them. UNFPA fully complied with the Disciplinary Framework and the Organization's established practice. The Applicant was afforded: an opportunity to provide information during the investigation; two opportunities to provide written comments on the Investigation Dossier; proper notice of the charges of misconduct and an opportunity to respond to those charges through counsel as provided under staff rule 10.3(a). The Administration carefully considered the Applicant's submissions, as evidenced by the decisions and communications from the Administration.

55. The Applicant erroneously argues that Count 1 involving rape requires application of the criminal standard of beyond a reasonable doubt. The jurisprudence is clear that the appropriate standard of proof is "clear and convincing" evidence, required for a finding of misconduct at the end of the disciplinary process when termination is a possible outcome.[45] The Respondent applied the proper standard in the analysis of the totality of the facts and circumstances and in determining the ultimate disciplinary measure of summary dismissal.

Considerations

56. The standard of proof adopted by the Appeals Tribunal in similar cases is that of "clear and convincing evidence", which is defined to mean that "on the evidence presented by a party to the Dispute Tribunal during the trial, it must be highly and substantially probable that the factual contentions are true."[46] This standard is similar to, or more demanding than, those applied by other international administrative

[45] *Mobanga* 2017-UNAT-741.
[46] Ibid. and jurisprudence cited therein.

tribunals[47], except the International Labor Organization Administrative Tribunal ("ILOAT"), which indeed applies a beyond reasonable doubt standard. This Tribunal is not persuaded to depart from the practice established by the Appeals Tribunal. It stresses that, although the acts attributed to an applicant may be criminal in nature, administrative tribunals do not pronounce on criminal liability. To the extent it may be necessary to describe the misconduct in terms employed by criminal law (theft, fraud, forgery, rape), these terms do not enter the dispositive part of administrative decisions and judgments. Moreover, in respect of presumption of innocence in any potential criminal trial, as well as in avoidance of excessive reputational damage, applicants before UNDT may apply for anonymity. Such request was granted in the Applicant

hotel room, put down her hotel key and her phone and engaged in a conversation, during which they proceeded to the balcony. It is undisputed that shortly, while they both were standing on the balcony, the Applicant started stroking the Complainant's arms and shoulders, her hair, and kissing her on the mouth. The Complainant describes that these advances were unwanted and caused her embarrassment and that she avoided the kissing. The Applicant maintains that caresses were mutual and interspersed with conversation. The Applicant maintains they remained on the balcony around 30 minutes, which is consistent with a timeline resulting from the Complainant's overall account of events.

66. The Complainant described breaking the embrace, returning to the room, grabbing her key card and phone, and trying to leave the room after telling the Applicant that she had made a mistake. He would not physically let her leave the room. Somehow, he got her on the bed, and she told him that she did not want to have sex with him. She managed to get off the bed and tried to get to the door, but he pinned her against the wall. A struggle ensued, during which he unsuccessfully tried to perform oral sex on her. He then picked her up, put her over his shoulder and brought her back to the bed. She stopped struggling at that point and he raped her. Afterwards, he went into the bathroom. She still had on her dress and shoes and her phone and key card were in her hand. She grabbed her undergarments and walked out of the room. She went to her room and showered.

67. The Complainant explains that she did not scream or tell the Applicant to stop immediately when he started touching her, because she viewed him as a powerful man in the Organization and was afraid to upset him. Also, she did not want the Applicant to give additional negative information about her to the Regional Director when her job was already in a precarious situation. Even in the room, when he became more aggressive, she did not scream or fight him, but she told him that she did not want to have sex and resisted physically as long as she could. She was in shock and was ashamed, so she did not instantly report the incident to anyone. Instead, she went to her room and showered. The Applicant called her room and asked if she had showered and whether she was coming back to his room. She said no, hung up and tried to sleep. She

denies: staying on the bed and having a conversation with the Applicant after the rape; telling him that she wanted them to have a long-term relationship; the Applicant telling her that he was coming to Dakar in March 2017; and the Applicant kissing her goodbye as she was leaving his room.

68. The Applicant described kissing and caressing each other on the balcony for about 20-30 minutes, walking into the room while holding hands and falling on the bed together, with him on top of her. They continued kissing while he removed her panties and his trousers and underwear. They had consensual sex for approximately 10-12 minutes. He made some comments whilst they were having sex, but the Complainant had her eyes closed and did not talk. She was, however, relaxed and moving. Afterwards, he went to the bathroom to clean himself. Upon his return, they sat on the bed and talked about their future plans. The Complainant asked him to commit to a relationship but he declined because he was married. She was disappointed and annoyed by his refusal to commit. She dressed and left his room apparently unhappy. He called her later to check if she had arrived safely in her room. The Applicant denied: restraining the Complainant or trying to prevent her from leaving his room; the Complainant telling him to stop; picking

"*Merci. Mais tu sais que la nuit*

Advisor

OAIS.[86]

The Applicant s submissions

84. The Applicant's case is that evidence adduced by the Respondent in support of the charge of rape was neither clear nor convincing. The factual findings were not derived from the investigations conducted in the case, but rather, from empirical studies of the likely impact of such events on like victims. These were extraneous factors to the investigation and therefore, incapable of sustaining the charge of rape levelled against him.

85. The case was closed in 2017 because the Complainant's evidence was not credible. The Complainant was completely incoherent even with respect to the date when the alleged event occurred. Additionally, the Complainant was unable to provide the Tribunal with a clear and consistent statement explaining her seemingly friendly disposition towards the Applicant, which was clearly exculpatory of him having assaulted or raped her, as conveyed in their WhatsApp conversations subsequent to their alleged encounter on 2 December 2016.

86. The Respondent's conclusion that the Complainant's account of events was 'credible' in the face of the material inconsistencies contained therein is indicative of bias by the Respondent towards the Applicant. The same can be said of the Respondent's assessment in connection with the finding by OAIS that the Complainant fraudulently forged an electronic note to herself to create the false impression to OAIS investigators that the preparation of said document was, in fact, contemporaneous with the events of 2 December 2016.[87]

87. Further, the Complainant's evidence was also later contradicted in very material respects by witnesses upon whose "additional" statements, serious charges of misconduct were subsequently levelled against the Applicant. The Applicant, however, does not elaborate what the alleged contradictions were.

[86] Trial bundle, p. 77.
[87] Application, p. 15, para. 73.

88. That standard of clear and convincing evidence is met in the present case, namely: (i) the consistent, coherent and highly believable account of the assault provided by the Complainant on two occasions to OAIS; (ii) the Complainant's early report to her supervisor, Mr. A. P, about two weeks after the incident; her report to Ms. K. C, the UNFPA Ethics Adviser, after approximately two months; and her eventual report to the OAIS; (iii) her demeanour and genuine emotion and distress during her three reports as well as in the interview with OAIS; (iv) the corroborating evidence provided by Mr. A. P, Ms. K.

Further, the Complainant reported the matter to OAIS after she was reassigned to New York. If reassignment were her only purpose, then having achieved it, there would have been no need to further escalate the matter.

91. On the other hand, the Administration took into consideration the false and/or

when it became obvious that they were not going to the bar – after which the Applicant would not take "no" for an answer. The Complainant, nevertheless, described in a reasonable detail her repeated expressions of non-consent and attempts to leave the room in the face of the Applicant's increasingly intense advances.

93. The Majority consider that the Complainant's account is not undermined by the fact that she did not scream or beat the Applicant, and that astonishment, embarrassment, and reluctance toward any violent confrontation with the Applicant whom she perceived as a powerful person, are plausible explanations. The reaction described by the Complainant accords with what is reported as frequent experience of rape victims who find themselves mentally and/or physically "stunned" or "paralysed" during the assault.[88] The Majority, likewise, find entirely understandable that neither the ending conference in a strange country nor the unfriendly working environment in the Dakar office, where the Applicant, admittedly, was well-connected to the Regional Director, the then Executive Director and the governments, were conditions predisposing to reporting the rape instantly. The Complainant may have reasonably felt vulnerable and exposed to pressure when in Dakar and feared negative consequences in the event her complaint failed. Indeed, documents submitted to this Tribunal by the Applicant, two letters from the Permanent Representative of the Republic of Congo to

[88] In

that the Complainant's dress had been on and that he had pulled it up, corroborating the Complainant's account[97] and rendering his version about a paced foreplay leading to consensual intercourse[98] less credible.

101. Yet another inconsistency concerns the circumstances of obtaining the Complainant's cell phone number: The Complainant maintained that the Applicant had asked for her phone number the day after the rape, *i.e.*, 3 December 2016. She had given him a wrong number

facts were meaningless for the witnesses at the time, and they could have forgotten them entirely or remembered it differently. These details are of peripheral value for the case in any event.

Whether the established facts amount to misconduct

104. The evidence obtained from their investigations in the instant case, was incapable Case No.:

handing it over.[109]

submissions

113. The Respondent's case is that the

resources and attention.

submissions

117. The Applicant's case is that, due to the passage of time between the event and the Applicant's 23 May 2017 OAIS interview, he may have been mistaken as to whether he had sent the Complainant the 3 December 2016 email, the contents of which were anyway exculpatory of the allegations levelled against him**.** Similarly, due to the passage of time, he did not remember where the room had been located and the confusion also stemmed from the fact that he had travelled numerous times after the Burkina Faso meeting and stayed in a number of hotels.[111] The fact that the Applicant signed all the necessary waivers to enable the investigators contact Hotel Laico and gain access all his personal information proves that he was cooperating with the investigation.

118. The WhatsApp application which contained the correspondence between the parties were contained on the Applicant's personal iPhone, and therefore did not constitute official material. Thus, the Applicant was at liberty to exercise control over its contents at all material times. Although he did not tell the investigators beforehand about deleting the WhatsApp application, his intention was not to hide information. [112]

119. To hold these inconsistencies against the Applicant as constituting misconduct, would not only be contrary to the findings of the OAIS report, but would also be demonstrative of an application of double standards in the assessment of the evidence derived from the accounts of other persons interviewed during the investigation, who also sometimes gave inconsistent or mistaken statements.

Considerations

120. The Tribunal finds that Respondent correctly found that the Applicant had made to OAIS two false statements concerning, directly or indirectly, the placement of

[111] Applicant's oral evidence of 22 September 2021.
[112] Applicant's closing submission, para. 60.

124. As concerns the deletion of the 3 December 2016 email, the Tribunal recalls that the IT expert could not locate the deleted email in Google vault due to a technical problem.[116] As such, the date of the deletion is not known. The Tribunal considers that the Respondent had no grounds to infer that the message had been deleted after the commencement of the inquiry and with the goal of obstructing it. Personal messages between the Complainant and the Applicant, despite having been sent via his official email account, did not constitute official material. By its content, moreover, the message lost any purpose on the day after dispatch. The Applicant had the Complainant added as contact to his email directory two weeks later.[117] He had no reason whatsoever to keep the message; his explanation that he had deleted it as part of a routine email review is entirely plausible. The Respondent's argument that in the Applicant's 'sent' folder there remained two emails from him to his co-workers from the same period does not disprove the Applicant's version as there could have been myriads of reasons for deleting some emails while keeping other ones.

125. Moving on to the deletion of WhatsApp messages to the Complainant, the Tribunal wishes to note at the outset that, undisputedly, the WhatsApp messages had been deleted prior to the Applicant's interview and that communications in the Applicant's WhatsApp account were owned by him and he was at liberty to dispose of them as he pleased. The Respondent is prepared to admit as much, stating in the Sanctioning letter:

> OAIS did not establish during its investigation specifically when you had deleted the relevant, individual WhatsApp messages and whether you in fact did so before the investigation commenced. Therefore, you are afforded the benefit of the doubt on this point.[118]

126. The Tribunal wishes to remark that the matter is not as much about a doubt on this point, as about a lack of any proof that the Applicant had deleted the messages in order to obstruct investigation. Just as it is the case with the email, the Applicant had no reason to keep meaningless and potentially embarrassing correspondence on his

116

phone.

127. The Respondent, however,

588. **App:** The room phone, yeah.[121]

129. On this point, the Tribunal notes that the contemporaneous 3 December 2016 email confirms, instead, that the Applicant had tried to call the Complainant but unsuccessfully, and that the exchange about him wanting to spend another night with her had taken place on WhatsApp and not in a telephone conversation.

130. Subsequently, the Applicant volunteered that he and the Complainant had exchanged their phone/WhatsApp numbers (albeit he was not sure when) and that he had then called and sent messages on WhatsApp when he returned to Addis.[122] He was asked:

> "666. **LM:** So apart from the messages you sent back from when you were in [Addis], any other messages?
>
> 667. **App:** No."

131. The investigator subsequently confronted the Applicant:[123]

> "937: LM: You said the only time you attempted to contact [the Complainant] *post the meeting* [was] when you were in Addis for WhatsApp"[emphasis added].

which remark directed the interview toward the authorship of the email of 3 December 2016.

132. Of note is that when shown the WhatsApp messages by the investigator, the Applicant confirmed having sent them. He explained that in answering about his attempts to contact the Complainant, he was not focusing on communications during the meeting but on subsequent ones from Addis. He reiterated that he had deleted all WhatsApp messages.[124]

133. The Tribunal considers that, because of the way the theme of WhatsApp messages rambled throughout the interview, it did not come in focus until the moment

[121] Trial bundle, p.107.

when the Applicant was confronted with the actual messages. Earlier, he was not asked directly and specifically whether he had sent any WhatsApp messages *during* the conference. As demonstrated by the quote in para. 129 above, the Applicant signalled his lack of accurate recollection about the means of communication on 3 December 2016, while the investigator "cemented" him in an answer that was wrong, albeit not necessarily insincere.[125] Further, as demonstrated by the quote in para. 130 above, both the Applicant and the investigator understood the Applicant's earlier response as pertinent to the period *after* the conference. The Tribunal accordingly finds that, while the Applicant indeed did not volunteer information on WhatsApp messages, it does not result with a sufficient probability that he necessarily remembered what and when he had been writing to the Complainant, especially that

had been no messages between him and the Complainant. Obviously, however, the Applicant had an interest in not revealing the remaining ones, whatever the content, and thus deleted the application after the interview but prior to handing in his phone. The explanation furnished in his written submission, in turn, is unconvincing and concocted, possibly due to unfortunate miscommunication between the Applicant and his counsel, as the Applicant had no reason to free-up space and increase capacity of his mobile phone just before complying with

does not distinguish between a disciplinary charge of a "criminal nature" and a purely administrative one, which would favour a rapist, an embezzler or a thief whereas staff

The proportionality requirement

of the request for access to UNFPA email accounts[136], the Tribunal considers that respect for proportionality would speak against disciplining for a refusal to make a blanket disclosure of all communications on a private phone. In fact, the Investigation Report indicates that OAIS considered the Applicant's phone as UNFPA property[137], which it was not.

145. In summing up, the Tribunal agrees that the Applicant did commit misconduct in furnishing false statements to the investigators as to his room location and denying the email of 3 December 2016. In doing it, the Applicant demonstrated if not the outright intent to mislead and stall the investigation, then at least an impermissible nonchalance, which provoked the need for additional inquiry.

146. The Tribunal, on the other hand, does not find false statement or hampering of the investigation in supplying reasons for deletion of WhatsApp messages, for the reasons outlined at paras. 130-132 above. Further, the Tribunal does not find withholding of evidence in the Applicant's not volunteering information about his WhatsApp messages to the Complainant on 3 December 2016. This is primarily because there is no sufficient basis to assume that the Applicant had proper recollection of these messages at the time of the interview; moreover, investigators' questions on this point were unclear. Contrasting the Applicant's stance regarding these messages with the Complainant's, who admittedly started preparing her case already on the return flight from Ouagadougou, is, in any event, nonsensical. Finally, the Tribunal considers that, even though the Applicant formally speaking destroyed potential evidence through deletion of the WhatsApp application, the existence of any relevant evidence in that application was purely speculative; the Applicant may have had unrelated reasons to delete it; and the scope of the Applicant's obligations with respect to preservation of the content of the phone was unclear. As such, the Tribunal does not find misconduct on this point.

147. The misconduct determined in para. 144 should have been covered by the

[136] Trial bundle, p 155.
[137] Investigative Report, para. 77.

mitigating factors that would enable this Dispute Tribunal to conclude that the summary dismissal was disproportionate to the offence. An unblemished record does not automatically qualify for mitigating factors to be applied.[140] Both jurisprudence and practices of other United Nations organizations show that for cases involving rape and sexual exploitation and abuse, the imposed disciplinary measure is usually dismissal.[141] For sexual harassment, the disciplinary measure usually is separation from service or dismissal. In the present case, the evidence shows that Applicant committed a rape and sexual assault and then brazenly sought to undermine the investigation into his conduct with lies and obfuscation. Such misconduct merits dismissal from service in the Organization.

Considerations

151. In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.[142]

152. The Tribunal recalls that sexual abuse usually attracts disciplinary measures based in separation from service.[143] Particular gravity of the present case does not justify an exception. Long service and unblemished record are indeed treated as mitigating circumstances, in the present case, however, these are offset by the

[140] *Diakite* UNDT/2010/24.
[141] See *Diabagate* 2014-UNAT-403; *Oh* 2014-UNAT-480.
[142] *Sanwidi* 2010-UNAT-084, para. 39, also *Samandarov* 2018-UNAT-859.
[143] *Haidar* 2021-UNAT-1076; *Mbaigolmem* 2018-UNAT-819; *Mobanga* 2017-UNAT-741.

of closing, because the staff member cannot be exposed forever to a threat of a punitive measure for actions of the past.

7. In the case at hand, in its Investigation Report of 23 October 2017, OAIS, "considering the evidence collected insufficient to support a finding of misconduct", recommended that the case be closed. OAIS further noted that "the closing of the case at this stage does not preclude OAIS from reopening the case and pursuing further investigation, if further detail and/or information are subsequently disclosed". Both pieces of information were transmitted to the Applicant.

8. It is true that article 15.4.1. of the Disciplinary Framework allows the Administration to ask for further investigation, apparently with no statutory limitations. However, this rule cannot be open-ended; it cannot be an instrument to circumvent the six-month statutory limitation under art. 16.1 and the right to the person investigated towards the Administration to be informed of the closure of the case or to be accused within six months. Any other reading would cause a staff member to be exposed to the threat of punitive action *indefinitely*, which violates the minimum guarantees of due process that he/she is entitled to.

9. In other words, when the deadline elapses, the presence of extraordinary circumstances (requested by art. 16.1) are necessary to allow more time to the Administration for its evaluations of the facts. The Administration cannot simply ask to redo the investigation (for instance re-hearing witnesses already heard on the same facts). It can only ask for further investigations, essentially to establish facts which were not available at the time of the previous investigation. To meet the condition of reopening the OAIS investigation of 2017, such detail or information must have been materially new or in addition (or not available or not readily obtainable during the course of the initial investigation) to the information and/or details already established, and this should be reasonably be expected to be able to affect the established results and outcome of the previous investigation.

10. In this case, the closure of the investigation was communicated to the Applicant on 25 October 2017, and the Administration, after the passage of substantial time

it was the first time she experienced that a case was “reopened”), there are some flaws in the disciplinary proceedings, as above assessed.

20.

definitively the bed and the room, it remains undemonstrated how the Applicant in that situation could realize the Complainant was not consenting.

31. In other terms, the test required by this case is not only to assess if the Complainant wanted the sexual intercourse or not, but also the perception of her behaviour by a reasonable person within a multicultural environment.

32. From the Investigation Report it is worthwhile to recall some acknowledgements by the Complainant, which may be indicators of lack of a clear expression of dissent by the Complainant to the Applicant's heavier advances:

> line 1009: So for an amount of time you were on the bed, he's on top of you.
>
> …
>
> line 1198. HW: -- and then I think he removed my underwear at that point.
>
> …
>
> line 1200. HW: I think he removed his pants. I still wasn't -- I wasn't

Applicant by agreeing to stay in his room". I add that no evidence is on record about the impossibility for the Complainant to have left the room at any time.

35. In addition, there is also no evidence of physical coercion: the opposite is not even alleged by the Complainant and the only sign of physical strength is in the firemen's lift to fly her on the bed –para. 92-, which is an act that in itself (with no other signs of coercion) could be subjected to different interpretations.

36. Certainly the expectations that a youngnBT 1 99.384 614.02 Tm0 g0 G[8049004C0055004800480

though the charisma of the Applicant's position and his insistence had a role in the fact that the Complainant remained in the room and did not leave immediately when the situation was clarified with the first sexual advances ("*tu n'a me pas permet de partir*", that is "*you didn't let me go*"), no abuse or threat or violence occurred ("*je ne pense pas que tu voudrais m'abuser*", that is "*I don't think you wanted to abuse me*"; in another exchange the Applicant referred to the intercourse as based on "*Complicity and respect*" and the Complainant replied "*Hier on a eu complicité*?", that is "*did we have complicity yesterday*?", with no reference to possible lack of respect). In addition, it is to be noted that in all other messages there is no accusation of rape nor any, even veiled, reference to any supposed violence.

40. Instead, from the messages it results only the stubborn persistence of a man in his advances for sex ("*you didn't let me go*"), without deeper implications ("*Je pense que tu as vu les femmes comment une conquete*", that is "*I think you see women as a conquest*"; see also the message "*hier il n'était pas normal pour moi*", that is "*yesterday it was not normal to me*", expression of embarrassment for a same day sex with a colleague, with no reference to a possible rape).

41. In sum, there is no clue that could suggest the Complainant was not in control at any moment. In a situation which was clear since the very beginning as having sexual connotations, it is difficult to believe that the Complainant did not want the intercourse or at least there is no clear and convincing evidence that she showed her dissent without ambiguity, so as to make the Applicant aware that she did not want (the reference to the sentence "*we are colleagues, I don't want to have sex*", is referred to a preliminary moment of the meeting, overcome by the following situation of the two persons, laying on the bed for a not irrelevant time, when the Complainant perfectly knew the intentions of the man, did not leave nor express clearly her opposition, and the Applicant therefore did not realize she did not want or he misinterpreted – may be for a cultural clash or because he was caught unawares by the unexpected new situation - weak opposite signals received.

42. Finally on this point, it has to be noted, on one hand, that I am aware that the Applicant's right to remain silent cannot prevent his behaviour – in situations which clearly call for an explanation from him – from being taken into account in assessing the persuasiveness of the evidence adduced against him; however, I am of the view that the Applicant's behaviour after the meeting in the – sometimes clumsy - attempt to defend himself, cannot constitute – even in a circumstantial trial - a surrogate of the evidence of rape, which in this case was not proven to the requisite standard.

43. On the other hand, I think that, when the charge of rape is deemed to be not founded, the Applicant cannot be disciplined for sexual harassment or sexual abuse or other minor offences, which are not the subject of the disciplinary proceedings (which focused only on the alleged rape).

44. In conclusion, the Administration, which bears the burden of proof given the presumption of innocence, failed to provide clear and convincing evidence that a rape occurred.

45. As to Count 2 of the charges, instead, I agree with the majority that facts were established by clear and convincing evidence. For these facts, however, the main legal issue is to assess whether the facts amount (or not) to misconduct.

Whether the facts (under Count 2) amount to misconduct.

46. In my view, when charges are criminal in nature the principle "*nemo tenetur se detegere*" must come into play, which makes inapplicable the obligation to cooperate with investigators: this is because the interest of self-defense must prevail on competing interests, unless specific prohibitions are set.

47. In this matter, one could say that the specific prohibition of these behaviours is contained in section 11.1 of the UNFPA Disciplinary framework (transcript at para. 136 of the Judgment), complemented by section 12.3.4.(f).

48. The Majority already underlined (at para. 139 and following) on the one hand that "the above provisions do not determine the extent of non-cooperation that may

constitute misconduct" and, on the other hand, "that whereas the above-cited provisions do not discriminate between staff members subject to investigation and the staff appearing in another capacity, it is nevertheless obvious that it is necessary to sometime construe impunity for the subject, either on the ground of the procedural law, or the substantive one, or both, to avoid absurd results."

49. In my view, when the facts relevant for imposing disciplinary rules is also a crime under national laws (and rape is a worldwide recognized crime, prohibited in many international covenants too) the right against self-implication in the disciplinary procedure must be recognized as a projection of the right against self-incrimination in the criminal procedure.

50. As to the kind of behaviour that can be relevant for the issue at stake, we can consider three different levels: the right to silence and the lack of cooperation (even though it could hamper the investigation by a behaviour which is purely passive or consists only in generic oral communication, such as false statements to the investigators), the subjection to the imposition of limitations to privacy (this category includes the disclosure of private communication on private devices), and the active misleading of the investigation.

51. In criminal matters, in democratic countries the right to silence and the right not to contribute to incriminating oneself is generally recognized. The European Court of Human Rights ("ECHR"), for instance, affirmed that anyone accused of a criminal offence has the right to remain silent and not to contribute to incriminating himself[147] and that the privilege against self-incrimination is a generally recognised international standard which lies at the heart of the notion of a fair procedure under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[148]

[147] *O'Halloran and Francis v. the United Kingdom*, ECHR, 29 June 2007, [GC], § 45; *Funke v. France*, ECHR, 25 February 1993, § 44.
[148] As amended by Protocols Nos. 11 and 14. Council of Europe Treaty Series, No. 5.

52. The protection can be extended to the right not to be prosecuted for not confessing or for denying own misconduct and, in general, for any form of lack of cooperation (including one that, in a passive way only or with a generic verbal conduct only, has the effect of obstructing the investigation). In my view the same protection must be recognized in general for a person accused of misconduct, at least when the misconduct is related to facts that contain sufficient grounds of a crime. As the Majority recalled, it derives from the presumption of protection principle, a principle which has been firmly confirmed by the Appeals Tribunal's jurisprudence (quoted under footnote no. 126 of the Majority's Judgment).

53. It follows that as of the two different provisions contained in the UNFPA Disciplinary Framework, section 11.1, the obligations under letter (a), (to cooperate with any Investigation, answer questions, provide documentary evidence in their possession or which should reasonably be expected to be in their possession, and to assist the Director, OAIS, as required) cannot be applied at all to the subject of the investigation (at least when charged of an allegation equating to a crime), being applicable only to other staff members. Instead, the obligation under letter (b), (not to interfere with any investigation, and, in particular, not to withhold, destroy or tamper with evidence, and not to influence or intimidate the complainant and/or potential witnesses) is applicable to all staff members, including the subject of an investigation. The article, which unduly shares the two situations in violation of the principle of silence, must be interpreted in a restrictive way, as above mentioned.

54. It follows that lack of cooperation cannot be considered as fact relevant autonomously for disciplinary purposes; therefore, the "impermissible nonchalance" by the Applicant which provoked the need for additional inquiry, referred to in para. 145 of the Majority's judgment, is totally irrelevant from a disciplinary point of view.

55. It follows also that lack of cooperation cannot be relevant as an aggravating factor; indeed, it is clearly improper to penalize a staff member (considering lack of cooperation and passive hampering of the investigation as a form of misconduct or an aggravating circumstance) for exerting his/her right to self-defence.

56. I disagree with the conclusion by the Majority (expressed at para. 147), according to which lack of cooperation may be considered as aggravating circumstance only if it is not relevant as misconduct too; indeed, a detrimental treatment (a kind of "*double peine*") will be in any case referred to an act that implies the exercise of the right to self-defence.

57. I also disagree with the Majority (see para. 143, footnote 133) because I think there is no room for any balancing of the interest not to cooperate with the seriousness of the crime, nor for any proportionality assessment of the refusal to cooperate.

58. As to protection of privacy, specific rules apply, as the legal system can provide different means of intrusion in the private sphere to gather evidence: for instance, inspection of private premises, strip-searches, seizure of personal items could be allowed by law under certain conditions in order to discover crimes or to find evidence about them or their author; the privilege against self-incrimination does not extend to

Majority's Judgment). It follows that also the imposition to disclosure of private communication on private devices cannot be allowed, because it would be a way to circumvent the prohibition of interference in the private sphere.

61. As to the third level for the considered behaviour, related to active hampering and misleading of the investigation, in criminal matters specific prohibitions are required: for instance, it is an autonomous crime to hide the corpse after a murder, suborn witnesses after a crime in general, favouring the author of a crime (not the author him/herself), or specifically accuse to the Authority someone else of the committed crime, and this is because in most of the national legislations there are specific rules which prohibit that, as behaviour which is prohibited in addition to other considered crimes. Out of these specific provisions, however, an active obstruction to justice or even a misleading of the investigations cannot be relevant. As the Majority recalled, for the author of an offense the principle of inclusion impedes that "*post facta*" be relevant and punishable.

62. For facts that are not criminal, instead, the active hampering and misleading of justice cannot be derived from the right to silence and it can be specifically prohibited to protect the loyalty of the staff member (even one who committed disciplinary infractions) to the Organization. This is precisely the content of the UNFPA Disciplinary Framework, section 11.1(b), applicable to all staff members, included those subjected to investigation.

63. In this framework, I find that in the case at hand the guarantees provided for criminal acts must be respected and the Applicant's lack of cooperation cannot be disciplined by the Administration; therefore the disciplinary framework cannot be applied to the Applicant, accused in substance of a crime and he was entitled not to cooperate in order to defend himself. On the other hand, the Administration cannot discipline the violation of the (alleged) obligation to disclose private communications on private devices, as this obligation cannot be envisaged, being control of private life and on private devices of its staff members outside of the powers of the Administration.

64. On the contrary, in general the behaviour of the staff member can be relevant for active hampering and misleading the investigation. However, this is not the case of the Applicant. Indeed, while erroneous or false statements to investigators entail lack of cooperation only and does not overcome the limit of the right against self-implication in the disciplinary procedure, similarly the deletion of WhatsApp messages by the Applicant on his iPhone (which without dispute occurred and that could have depended also on many legitimate reasons) have to be included in the same right above mentioned. No specific acts by the Applicant of active misleading of the investigation occurred instead. Therefore, charge under Count 2 completely falls too.

65. In the light of the above, the application should be granted, with all legal consequences, also related to damages.

(Signed)

Judge Francesco Buffa

Dated this 28th day of March 2022

Entered in the Register on this 28th day of March 2022

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi