



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/038

Introduction

1. The Applicant is a former staff member of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) based in the Central African Republic (CAR).
2. On 23 May 2016, he filed an application contesting a decision dated 29 March 2016 to impose on him the disciplinary penalty of separation from service with compensation in lieu of notice and without termination indemnity in accordance with staff rule 10.2(a)(viii).
3. The Respondent filed a reply to the application on 24 June 2016.

Facts and Procedure

4. The Applicant served with OCHA in Haiti since 2010 as an Information Management Officer at the P-3 level and subsequently was reassigned to OCHA in CAR in 2014.
5. On 15 September 2013, the Applicant was arrested by the Haitian local police on accusations of associating with local Haitian minors. He was kept in detention for three weeks and was subsequently released on 8 October 2013.
6. On 13 August 2015, the Office of Human Resources Management (OHRM) informed the Applicant of allegations of misconduct, namely, that he had used his United Nations Laptop to access pornographic materials and had recourse to one or more prostitutes in 2012 or 2013.
7. On 15 September 2015, the Applicant provided comments denying the charges.
8. On 29 March 2016, the Officer-in-Charge, OHRM, informed the Applicant that the Secretary-General had decided to separate him from service with compensation in lieu of notice and without termination indemnity.
9. On 20 to 21 June and on 19 September 2017, the Tribunal held hearings during which it took the testimony of the Applicant, witnesses Mr. Marc Etienney and Ms. Maria Komiati, the neighbour from the same residential compound in Port-au-Prince, Haiti. The parties did not require any further live evidence. On the motion, the Tribunal accepted

written statements from Mr. Herve Kokue, a former colleague and roommate of the Applicant, Ms. Marly Clervin and Mr. Emile Djaka, a former Common Services Manager at the United Nations Development Programme who was present at

10. The Applicant denies accessing, storing or distributing pornographic materials on his United Nations computer.

a. He asserts that because of cracked software, pop-ups occurred over which he had no control. He provided confirmation of this fact from a noted computer risk management specialist citing numerous web sources confirming that using cracked software generates collateral damage pop-ups of unwanted images such as pornography.

b. Because of the lengthy waiting period for receiving legal software for the operational needs, most OCHA field offices use cracked software to be able to perform their duties. It is in this context that he used cracked software. The Acting Chief Information and Technology Section Communications and Information Services Branch stated to the Office of Internal Oversight Services (OIOS) that the use of cracked software is systemic in almost every OCHA field office he visited. Given the general awareness of the widespread problem there is no reason the Applicant would have felt the need to report on this phenomenon.

c. He did not have exclusive access to the laptop. The laptop was often left in the office known to other staff members, it could have been accessed by numerous other persons. Samples indicate that

rather than with the presence of automatically accessed content does not address the issue of who might be responsible. There was no verification undertaken of who was present at the time the images were allegedly created. Some appear to have pre-dated and/or postdated the

whether similar patterns occurred on other computers or into the security of user passwords in the mission.

e. Once his criminal charges were dismissed and it was clear that no minors had ever been involved, it is unclear on what authority OIOS impounded the computer. Moreover, e contrary to the provisions of ST/SGB/2004/15 (Use of information and communication technology resources and data).

f. It is a known fact that search terms in a general search engine can be triggered by automatically generating a Universal Resource Locat and, if cracked software can trigger one web page opening, and the software remains loaded, it can trigger multiple openings at different times. The OCHA Program Officer for Information Management, Information Services was reported in the OIOS report as having stated that he was aware of a similar occurrence while working in UNDP.0 612 792 reW*inQ.00000912 0 612 792 r

Article 25.1 of the Haitian Constitution provides that no one may be interrogated without his attorney or a witness of his choice being present.

b. Contrary to the statement made in the termination memorandum that relevant steps were taken to comply with the terms of the administrative instruction, ST/AI/299 (Reporting of arrest or detention of staff members, other agents of the United Nations and other members of their families), there is no indication that the Mission undertook the required steps throughout his incarceration to visit him, review the charges, assist in ensuring counsel or reporting the arrest to the United Nations Headquarters before waiving immunity. Annex I, 2(d) of ST/AI/299 makes it mandatory for the Organization to assist a staff member or agent in arranging for legal counsel for his/her defence, something that MINUSTAH failed to do since its officials were the ones pushing for his incarceration. Friends outside the United Nations helped with finding legal counsel for him once they realized that the United Nations was not interested in assisting him in any way.

ii. The statement provides details relating to the use of prostitutes including how one of the prostitutes, V01, came and went to and from his residence including the fact that he had suspected her of having taken his personal laptop computer from his residence. The Applicant accounted for how he could tell that the prostitutes were not minors because of their shape.

iii. The contention that V01 must have been a prostitute that came to his residence on two occasions is consistent with his later admissions that V01 did come to his residence on two occasions. This consistency could not have simply been fortuitous and would be uncharacteristic of a fabrication.

iv. The Applicant printed his name on each page of the *procès-verbal* thereby acknowledging its contents.

f. The contentions that he did not tell the Judiciary Police that he had recourse to the services of prostitutes and that the *procès-verbal* is a fabrication are not plausible. The Judiciary Police would have no interest in fabricating allegations that he had recourse to the services of prostitutes since the allegations against him were related to non-consensual sexual relationships with a minor not to the use of prostitutes.

g. The fact that charges against the Applicant were dropped by local authorities is not relevant as they did not relate to his use of prostitutes. No judicial finding was made that called into question the validity of the *procès-verbal* in which the Applicant admitted to having had recourse to the services of prostitutes while in Haiti.

17. The facts amount to misconduct.

a. The Organization has consistently held that the use of Information and Communication Technology Resources in relation to pornography amounts to misconduct. In this regard the conduct violated staff regulation 1.2(q) in that he used the property and assets of the Organization, namely its Information and Communications Technology (ICT) resources for the viewing of pornography. The

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ii. On 16 September 2013, the Mission contacted the Haitian prosecutor in charge of the case who informed the Mission of the nature of the allegations against the Applicant.

iii. The Applicant retained an attorney to represent him in the case

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eliminate dispute on whether a confession was freely given in criminal cases. The exclusionary rule is usually express. It is not absolute, as there are systems that allow the use of such statements in favor of the defendant

autonomous and independent. When asked by the Tribunal about the reason why he had told the
because the police were
t logically explain providing information about using prostitution. It also
confirms that apart from the mere presence of armed officers no inducement to supplying this
information is alleged. The Tribunal concludes that the circumstance of using prostitutes was
volunteered for the *procès-verbal* by the Applicant.

29. On 15 September 2013,
in relation to allegations that he had engaged in non-consensual sexual relations with a minor.¹⁰
The relevant parts of the interview are reproduced below:

La première fois que la prostituée était venue chez moi, je suis allé la déplacer vers Pétion-Ville. (The first time that the prostitute came to my home, I brought her to Pétion-Ville).

Je ne connais pas exact des prostitués avec lesquelles je couche, mais je me
(I do not know the exact age of the

31. The witness further described that on one weekend she decided to monitor the activity and she witnessed him shuttle three different women: he parked his United Nations car close to the entrance, took a woman to his apartment for approximately 1,5 hours, then drove her away and brought another one. The witness corrected her statement from the investigation, per which there had been nine women; she explained that this had been extrapolation from the frequency that she had observed herself and from what she had been told by another inhabitant of the compound.

content of previously deleted files. Based on the url of that webpage, this is typically a webpage that would come from manual browsing and not from pop-ups. Pages that appear from pop-ups usually point to a generic homepage of the website or a page designed to advertise a website. Based on the structure of the url, the address of the webpage, this particular webpage was

This is not typically the functioning of pop-ups but show that someone went to the website, typed in those keywords in a search box and accessed that page.

36. Further, entries 6350 6461 starting at page 685 of the trial bundle, are the browsing trails with a keyword search conducted on the website google.com. The fact that it is a search

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results of the google search. There is no reason for software allowing pop-ups to track users to google. The reason for a website with cracked software is to direct a user to specific pages because that is how income is derived from the use of cracked software. There is no point for cracked software to randomly direct a user to search results for google, as this would be both complicated and inefficient.

37. Entries 7196 7287 starting on page 699 of the agreed bundle, once again show the browsing of a website using a keyword search. This was not a pornographic website but a generic one that hosts videos usually uploaded by users. In this particular case, the keywords

dication that the keywords were entered manually. At the

search.

38. Entry 9683 on page 708 shows an attempt to register with a website e
email used to register on the website was kramojl@yahoo.fr. Citysex is an online dating website

39.

webpage that is hosted on the hard drive of the computer and gives access to different items.

pornographic images found on the hard drive by the initial OIOS investigator. Mr. Etienney split the items in this bookmark into three to better explain how or if those particular files could be attributed to the Applicant. Page 786 and below show files found in the area of the hard drive

Mozilla browser. There is a very high probability that those files were created as a result of the actions of that particular user. Page 732 and below display all the pornographic files found on the

a time when the Applicant was in possession of the computer.

40. Altogether, Mr. Etienney found over 1000 traces of access to different pornographic websites, over a period of more than 40 different days. Most of this access could be technically

Mr. Etienney acknowledged that part of the records could have been the result of the pop-ups appearing on the cracked software, notably where a large number of pornographic links had been accessed in a quick succession. The pattern, however, that was found in 70-80% of the browsing history, loaded for of the use of the search functions on both pornographic and non-pornographic websites, allowed him to conclude that the user browsed manually/deliberately and the websites were not generated by pop-ups as a result of cracked software. This included that many pages were accessed in succession, each corresponding to a new category of pornography and the fact that each page appeared to have been used for several minutes.

41. Last, Mr. Etienney explained, in reference to page 451 of the agreed bundle, that the computer was assigned to the Applicant in the period from at minimum July 2012 until September 2013, with the majority of the pornographic browsing dating May-July 2013. Records post-

created by the investigators pr

the pornography was accessed after wom0 ma2494(r.Nre)7()-77 wd, -997es y G[(r)-6(e), -997eb97entrol-148aov

unfounded. It, however, agrees with the Respondent (para. 20 above) that the matters of the United Nations response are not properly before the Tribunal for review.

CONCLUSION

45. The Tribunal finds that the relevant facts were established by clear and convincing evidence, that the Respondent properly found that the conduct amounted to misconduct and that