UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1332

AAE[1]

(Appellant and Respondent on Cross-Appeal)

v.

Secretary-General of the United Nations

(Respondent and Appellant on Cross-Appeal)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Graeme Colgan Judge Dimitrios Raikos Judge Sabine Knierim Judge Martha Halfeld Judge Gao Xiaoli
Case No.:	2022-1695
Date of Decision:	24 March 2023
Date of Publication:	28 April 2023
Registrar:	Juliet Johnson

Counsel for AAE:	Charles Adeogun-Phillips, Sètondji Roland Adjovi, Chukwudi F. Unah, Motunrayo R. Akande and Ishaq Obashola Apalando
Counsel for Secretary-General:	Noam Wiener and Patricia C. Aragonés

[1] This unique three-letter substitute for the party's name is used to anonymize the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. The Appellant is a former staff member of the United Nations Population Fund (UNFPA) who contested the decision by the UNFPA Executive Director to impose on him the disciplinary sanction of dismissal based on two counts of misconduct (the contested decision). The two counts are that he: 1) raped, sexually assaulted and harassed another staff member (the Complainant) (Count 1), and 2) failed to cooperate with the Office of Audit and Investigation Services (OAIS) by withholding and/or failing to disclose facts material to the investigation and/or providing false information during the investigation (Count 2). OAIS had initially investigated the allegations and concluded that there was insufficient evidence to "conclusively determine" misconduct and closed their investigation. Subsequently, the Executive Director requested clarification and further information from OAIS, which ultimately led to misconduct charges and the contested decision.

2. The Appellant applied to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) to challenge the contested decision. In addition to contesting the misconduct findings, the Appellant challenged the authority or *locus standi* of the UNFPA to reopen the OAIS investigation and to impose a disciplinary sanction in the absence of a conclusion by OAIS that the Appellant had engaged in misconduct.

3. On 17 August 2021, the Dispute Tribunal issued Order No. 166 (NBI/2021) that granted the Appellant's Motion to Conceal [the Appellant's] Identity in the proceedings (Order No. 166 or Order).

4. On 28 March 2022, a panel of three Judges of the Dispute Tribunal issued their Judgment with the Appellant's name redacted pursuant to Order No. 166. In a divided opinion, the Dispute Tribunal dismissed the Appellant's application. Two judges on the panel (the Majority) held that there was no abuse of process or violation of legitimate expectations or legal certainty in the Executive Director seeking clarification and further information from OAIS because the disciplinary case was not "closed". The Majority upheld the finding of misconduct on Count 1, including finding the Complainant's testimony credible, and confirmed the proportionality of the disciplinary sanction of dismissal (the impugned Judgment).[2] The third

[2] *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/030.

Judge (the Dissenting Judge) disagreed with the Majority's reasoning and would have allowed the Appellant's application.

5. The Appellant appeals and requests that the Appeals Tribunal set aside the impugned Judgment in respect of Count 1 on the basis that it was unlawful to "reopen" the investigation after its closure by OAIS and that there was not clear and convincing evidence of the alleged misconduct. The Appellant considers that the Dispute Tribunal acquitted him of misconduct with respect to Count 2.[3]

6. The Secretary-General cross-appeals the impugned Judgment on the sole issue of the lawfulness of the Dispute Tribunal's decision to redact and anonymize the Appellant's name from all decisions in the case that were published on the UNDT website, including the impugned Judgment.

7. Therefore, the issues in the appeal before us are:

i) Was the UNFPA Administration's "reopening" of the investigation unlawful and did this action violate the Appellant's due process rights?

ii) Is there clear and convincing evidence of misconduct on one or both counts? If so, is the disciplinary sanction of dismissal proportionate to the misconduct?

iii) Was the anonymization of the Appellant's name in the impugned Judgment (pursuant to Order No. 166) and all other decisions in the underlying case that are published on the UNDT website lawful?

8. The appeal was paneled for a full bench of the Appeals Tribunal because a three-member panel of the Dispute Tribunal issued the impugned Judgment. For the reasons discussed herein, the Appeals Tribunal dismisses the appeal and partially accepts the Secretary-General's cross-appeal with respect to the procedural error underlying Order No. 166; however, we deny the cross-appeal's request to disclose the Appellant's name. Three

[3] The Appeals Tribunal notes, however, that the impugned Judgment states (at paragraph 153): "The [Dispute] Tribunal considers that the misconduct, *such as found established under Count 2*, did not require meting out a separate sanction, given that the sanction for Count 1 takes the facts of hampering the investigation into account as aggravating circumstances." (Emphasis added.)

members of the Appeals Tribunal would have granted the Secretary-General's cross-appeal with respect to disclosing the Appellant's name, as outlined in the dissenting opinion.

Facts and Procedure

9. The Complainant was recruited by the UNFPA to be the Human Resources Strategic Partner at the P-5 level for the West and Central Africa region in 2014. Although based in Dakar, Senegal, her reporting line was to UNFPA Headquarters in New York, and her immediate manager was the Deputy Director and Chief, HR Strategic Partner Branch (DD/HR).

10. At the time of the events in question, the Appellant was the UNFPA Representative to the African Union and United Nations Economic Commission for Africa at the D-1 level in Addis Ababa, Ethiopia. Since joining the United Nations in 1992, the Appellant had served in seven different United Nations organizations.

11. Between 29 November and 2 December 2016, the Appellant and the Complainant attended a West and Central Africa Regional Office (WCARO) Regional Management Team meeting in Ouagadougou, Burkina Faso, and stayed, with other meeting participants, at the Hotel Laico in Ouagadougou.

Events relevant to Count 1 misconduct:

12. On 2 December 2016, the Appellant, the Complainant, and other meeting participants attended a dinner that was organized by the Burkina Faso Country Office. The Complainant and the Appellant were seated at the same table and conversed.[4]

13. After their return to the hotel around 9:00 p.m., the Complainant went to her room which was on the fourth floor. The Appellant called her on the hotel phone shortly thereafter, with a proposal to continue their conversation.

14. The Appellant's and the Complainant's versions of events that followed differ greatly.

[4] Hearing Transcript, 23 September 2021 (Complainant), p. 7:9-21; Hearing Transcript, 22 September 2021 (Appellant), p. 98:2-4. References to the Hearing Transcript are to the UNAT Registry's transcription of the hearings before the UNDT.

Night of 2 December 2016

15. It is undisputed that the Complainant agreed to come to the Appellant's room that evening, having been provided with the room number by the Appellant. However, they gave divergent accounts regarding this visit:

(a) The Complainant testified that the Appellant asked to come to her room, which she refused. However, she stated that she agreed to come to his room to pick him up on the way down to the bar.[5] The Appellant disputes that there was a plan to go to the bar, testifying that he does not drink alcohol, and that "as a lady" why would the Complainant come to pick him up rather than just meet in the lobby.[6]

(b) The Complainant says that the Appellant's door was open when she arrived and that she found him standing at the far end of the room, by the balcony. The Appellant says that his door was closed when the Complainant arrived, and that he escorted her to the balcony after opening the door for her.[7]

16. It is undisputed that the Complainant entered the Appellant's hotel room and engaged in a conversation, during which they proceeded to the balcony. It is undisputed that shortly after, while on the balcony, the Appellant started stroking the Complainant's arms, shoulders, and hair, and kissing her on the mouth.

17. However, the Complainant describes these advances as unwanted which caused her embarrassment. She says she avoided the kissing. The Appellant maintains it was mutual and interspersed with conversation.[8]

18. As recounted in the impugned Judgment,[9] 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 Appellant that she had made a "mistake". She says he would not physically let her leave the room and somehow, got her on the bed, at which point she told him that she did not want to have sex with him. She says that she managed to get off the bed and tried to get to the door, but he pinned her against the wall. A struggle ensued after which he picked

[5] Impugned Judgment, para. 64.
[6] Hearing Transcript, 22 September 2021 (Appellant), pp. 71:17 – 72:3.
[7] Impugned Judgment, para. 64.
[8] *Ibid.*, para. 65.
[9] *Ibid.*, para. 66.

her up, put her over his shoulder, and brought her back to the bed. She says that she stopped struggling at that point and he raped her. No condom was used.[10] Afterward, he went into the bathroom. She says that she still had on her dress and shoes and her phone and key card were in her hand. She testified that she was "stunned" and "grabbed [her] undergarments and walked out of the room".[11]

19. The Complainant testified that she did not scream or tell the Appellant to stop, because she viewed him as a powerful man in the Organization and was afraid to upset him. She explained that she was in a precarious situation with her Regional Director, and she did not want the Appellant to give additional negative information about her to the Regional Director that would further compromise her job.[12] Even in the room, when he became more aggressive, she says that she did not scream or fight him, but she did tell him expressly "we're colleagues (…) I don't want to have sex with you".[13] She resisted physically as long as she could. She says that she was in shock and ashamed, so she did not instantly report the incident to anyone. Instead, she went to her room and showered. She says that the Appellant 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.[14]

20. The Appellant described mutual kissing and caressing on the balcony, after which they walked into the room while holding hands and fell on the bed together. He says that they continued kissing and had consensual sex. He made some comments, but the Complainant had her eyes closed and did not talk but was relaxed and moving. Afterwards, he went to the bathroom to clean up. Upon his return, he says that they sat on the bed and talked about their future. He testified that "she want[ed] a long-time commitment, and [he] said no. 'I'm married.'"[15] He says that 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.[16]

[10] OAIS Witness Interview Transcript, 13 April 2017 (Complainant), para. 40.
[11] Impugned Judgment, para. 66; Hearing Transcript, 23 September 2021 (Complainant), p. 13:5-6.
[12] Hearing Transcript, 23 September 2021 (Complainant), p. 12:14-22.
[13] *Ibid.*, p. 12:9-10.
[14] Impugned Judgment, para. 67.
[15] Hearing Transcript, 22 September 2021 (Appellant), p. 86:22-23.
[16] Impugned Judgment, para. 68.

21. The Complainant denies that she a) stayed on the bed and had a conversation with the Appellant after sex, b) told him that she wanted a long-term relationship, c) was advised by the Appellant that he was coming to Dakar in March 2017, and d) had any conversation with him after he came out of the bathroom or that he kissed her goodbye as she left his room.[17]

22. The Appellant denies a) restraining the Complainant or trying to prevent her from leaving his room, b) the Complainant telling him to stop (although he does not entirely deny her saying that she made a "mistake" at the start of the encounter), c) picking the Complainant up in a fireman's lift, d) raping her, and e) asking her if she had showered and was coming back to his room.[18]

Events after 2 December 2016:

23. The next day, on 3 December 2016, the Complainant says that the Appellant asked for her phone number, but she initially gave him the wrong number. Later in the day, he asked for it again and the Complainant testified that she felt compelled to give him the correct one as he was putting her number in his phone in front of her.[19]

24. That evening, at 5:07 pm, the Appellant sent the Complainant a WhatsApp message saying "Hi darling .. what are you doing…". The Complainant did not respond. At 5:10 pm, the Appellant sent the Complainant an e-mail "trying to reach [her]" and asked her to call him in Room 314.[20]

25. Ultimately, the Complainant responded to his initial WhatsApp message at 5:24 pm. The complete exchange is reproduced here.[21]

Appellant:	Hi darling.. what are you doing..
Complainant:	Chatting with colleagues in the lobby.
Appellant:	Ok, take your time. Waiting for you to chat and watch a nice movie.

[17] Hearing Transcript, 23 September 2021 (Complainant), p. 13:9-25.
[18] Impugned Judgment, para. 68.
[19] Hearing Transcript, 23 September 2021 (Complainant), p. 14:17-25.
[20] Hearing Transcript, 22 September 2021 (Appellant), p. 41:3-16. The Appellant would later deny ever sending this e-mail, and when he was shown the e-mail by OAIS investigators, he continued to insist that he had not sent it. *See* OAIS Investigation Report, 23 October 2017, p. 12.
[21] Respondent's Answer, Annex 3 ("WhatsApp" conversation). To the extent that the impugned Judgment included translated portions of the exchange, the UNDT translation is adopted here. Additional translation was performed by UNAT Registry staff.

Appellant: Miss you terribly.

Complainant: Merci! Je suis en train de dormir 😴 Dors bien!
[*Thank you! I am sleeping. Sleep well!*]

Appellant : Miss you really. Gnite

Complainant: Merci! Fait les beaux rêves
[*Thank you ! Sweet dreams*]

Appellant : I can't lie … want really to have you in my hands

Complainant: Dors bien mon ami!
[*Sleep well my friend*!]

Appellant: 😘
Appellant: Let's me come and nurture that love baby
Appellant: You are too tough with me
Appellant: I am in my way … leave the door open

Complainant: Non. Merci. Bonne unit
[*No. Thanks. Good night]*

Complainant: Nuit
[*Night*]

Appellant: 😢
Appellant: 😫 😭

Complainant: Desolee
[*Sorry]*

Appellant: I can see you from here laughing at me

Complainant: I'm not laughing

Complainant: I'm actually trying to understand you.

Complainant: Is it a game for you?

Complainant: A power thing?

Appellant: [Complainant's name], I am not a player.. do not think that I am trying to play with you

Appellant: I am feeling very comfortable with you and I need some trust from you..

Appellant: I want you to be more relax..

Appellant: I am sad that you are thinking I just want to abuse you

Appellant: Miss u

Complainant:	Je ne pense pas que tu voudrais m'abuser. Je pense que tu as vu les femmes comme un conquest. *[I don't think you would want to abuse me. I think you see women as a conquest.]*
Complainant:	Oui? [Yes?]
Appellant:	Can I call you and explain briefly
Complainant:	Tu aimes obtenir ce que tu voulais *[You like to get what you want]*
Appellant:	Love is between 2 people. Those who see women as a conquest always make sure that other people noticed..
Appellant:	Oui Cherie, tout le monde aime obtenir ce qu'ils veulent. *[Yes darling, everyone likes to get what they want.]*
Appellant:	Mais avec toi je veux que tu sois à l'aise car ca va nous permettre de faire les grandes choses *[But with you I want you to be comfortable because it will allow us to do big things]*
Appellant:	
Appellant:	Je veux dormir avec toi cherie stp [*I want to sleep with you darling, please*]
Complainant :	Merci. Mais tu sais que la nuit dernière ne m'a pas fait sentir a l'aise. Tu ne m'a pas permet de partir [*But you know that the last night did not make me feel at ease. You did not let me go.*]
Appellant:	L'amour est compliquée chérie… [*Love is complicated my dear*]
Appellant:	Let's invest in joy, complicity and happiness
Complainant:	Sounds good
Appellant:	Please me come baby
Appellant:	Trust me
Complainant:	Bonne nuit!! [*Good night !!]*
Appellant:	What to do to convince you?
Appellant:	That I am a good person.. I am not comfortable speaking about myself..
Appellant:	J'ai envie de toi [*I want you*]

Complainant:	Pour moi. Je voudrais que tu parle le veritie. [*For me. I would like that you tell the truth*]
Appellant:	Je te jure chérie [*I swear darling*]
Appellant:	Darling, listen if I was not sincere why to bother as yesterday we had good time..
Appellant:	It is because you are so special for me that I am trying to find your company. You mean a lot for me.
Complainant:	Hmmm. Tu aimes d'avoir le pouvoir sur les femmes? [*Hmm. You like having power over women?*]
Complainant:	Hier. Ce n'est pas normale pour moi. [*Yesterday. It's not normal for me.*]
Appellant:	No complicity and respect..
Complainant:	Ah. Hier nous avons complicitie? [*Ah. Yesterday we had complicity?*]
Appellant:	Je sais [*I know*], forget about yesterday and be more constructive
Appellant:	Yes, some complicity .. only difference you were rationale and me not..
Complainant:	Ok. Bonne nuit!! [Ok. Good night!!]
Appellant:	I was just fascinating by your intellect

26. The Complainant returned to Dakar on 4 December 2016. She testified at the hearing that once in Dakar, she searched the internet for advice for rape victims. The next day she requested contact information for a Stress Counsellor from the Regional Security Advisor. She did not pursue this contact because "he asked [her] what was wrong".[22] She also called the SOS medical referral program to see if she could find an English-speaking female counselor to talk to but was unsuccessful. She then tried unsuccessfully to find a counselor in the United States.[23]

[22] Hearing Transcript, 23 September 2021 (Complainant), p. 16:20-21.
[23] *Ibid.*, p. 16: 22-25.

27. On 5 December 2016, she claims that she asked her manager for a mutually agreed termination and/or relocation from Dakar, but he refused the request. In his testimony, however, the DD/HR could not confirm this.[24]

28. According to the Complainant, sometime during the week of 5 December 2016, she created a note to file regarding the 2 December 2016 incident. In the contested decision, the note was ultimately not relied upon because the file had become corrupted prior to sending it to investigators.[25]

29. Between 6 and 11 December 2016, the Appellant called and sent messages to the Complainant on WhatsApp. In January 2017, he sent her a greeting card, and at some point, he sent her a Facebook friend request, which she did not accept.[26] In March 2017, the Appellant stopped by the Complainant's office when he was in Dakar as he had brought her a present. But she was absent, and he slipped his business card through her door.[27] She did not respond to any of these advances.

30. On 16 December 2016, the Complainant met with her supervisor, DD/HR, in New York. DD/HR testified that the Complainant reported that she had been raped by the Appellant.[28] He also testified that the Complainant said that the Appellant had "overpowered" her.[29] He further testified that she broke down in describing the incident, which was not normal for her as he considered her "a strong person".[30] The Complainant asked him not to tell anyone. DD/HR testified that she was concerned about filing a complaint while she was still based in the regional office in Dakar, where she did not have a support network. He also noted that he had an obligation to report the incident, but that he wanted to wait for the Complainant to become more comfortable.[31]

[24] Impugned Judgment, paras. 70-71; Hearing Transcript, 9 September 2021 (DD/HR), p. 66:3.
[25] The Legal Advisor testified that the internal IT team concluded that the document properties were unreliable, and that perhaps this was due to the fact that the Complainant switched computers between the time of creation and the time of providing the document to OAIS. *See* Hearing Transcript, 24 September 2021 (Legal Advisor), p. 54:11-19. The Dispute Tribunal rejected the Appellant's argument that the notes were a "forgery", *see* impugned Judgment, para. 94.
[26] Hearing Transcript, 23 September 2021 (Complainant), p. 17:6;
[27] Hearing Transcript, 22 September 2021 (Appellant), p. 48:5-15.
[28] Hearing Transcript, 9 September 2021 (DD/HR), p. 43:20.
[29] *Ibid*., p. 17:24-25; *see also* OAIS Witness Interview Transcript, 26 April 2017, (DD/HR), paras. 29, 53, and 92-93.
[30] Hearing Transcript, 9 September 2021 (DD/HR), p. 13:11-17; *see also* OAIS Witness Interview Transcript, 26 April 2017 (DD/HR), para. 29.
[31] Hearing Transcript, 9 September 2021 (DD/HR), p. 37:7-18.

31. DD/HR consulted with the Ethics Advisor, who advised him to encourage the Complainant to file a formal complaint. He checked with the Complainant about filing a complaint several times.[32]

32. Also, while she was in New York in December, the Complainant testified that she went for HIV testing and a pregnancy test. On the recommendation of DD/HR, she also met in-person with the Critical Staff Counselor's office in the Secretariat.

33. On 30 January 2017, the Complainant contacted the Ethics Advisor to request a meeting, which occurred via Skype on 1 February 2017, during which the Complainant reported the incident in detail. The Ethics Advisor took notes of this conversation and documented the meeting by e-mail with: "SM [Complainant] stated that in December she was raped by a male colleague working in East Africa, during a meeting in Burkina Faso".[33]

34. The Ethics Advisor advised her to report the matter to OAIS.[34] The Complainant responded that she "[didn't] feel safe" and that once she was "out of Dakar" and "found another job" then she would "most likely file a complaint".[35]

35. On 13 February 2017, the Complainant requested Special Leave Without Pay. On 23 February 2017 she had the first of five Skype sessions with a psychotherapist regarding the rape.[36]

36. At the end of March 2017, the Complainant relocated to New York.[37]

37. On 13 April 2017, the Complainant reported to OAIS that she had been raped and sexually assaulted by the Appellant.

The Investigation:

38. The Complainant was interviewed by two OAIS investigators on the same day as her reporting the alleged misconduct.[38]

[32] Impugned Judgment, paras. 75 and 77.
[33] E-mail of Ethics Advisor, 1 February 2017.
[34] Impugned Judgment, para. 79.
[35] E-mail from Complainant to Ethics Advisor, 14 February 2017.
[36] Impugned Judgment, paras. 80-81; 24 May 2020 Letter from [Therapy Provider].
[37] Hearing Transcript, 9 September 2021 (DD/HR), p. 15:24-25.
[38] Impugned Judgment, para. 11.

39. OAIS informed the Appellant on 16 May 2017 of its investigation into the Complainant's allegations against him.

40. On 23 May 2017, OAIS notified the Appellant 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.

41. After conducting interviews with the Appellant and several other staff members, analyzing the official e-mail accounts of the Appellant and the Complainant, and accessing the Appellant's official cell phone, OAIS concluded in Investigation Report No. 2017-124, dated 23 October 2017 (Investigation Report) that "there [was] insufficient evidence to conclusively determine that [the Appellant] had raped and sexually assaulted [the Complainant] on 02 December 2016".[39] The Investigation Report further noted that "[a]lthough the evidence strongly suggests that [the Appellant] made false statements during the investigation, OAIS considers it to be insufficient to support a finding of misconduct". Accordingly, "OAIS consider[ed] the allegation unsubstantiated and (…) closed the matter".[40] However, OAIS also stated that "[t]he 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".[41]

42. On 25 October 2017, OAIS informed the Appellant and the Complainant of the outcome of the investigation. A copy of this communication has not been provided and is not in the record.[42]

43. By memorandum dated 31 January 2019, the Chief of the UNFPA Legal Unit (Legal Advisor) requested that OAIS conduct further investigative steps, in particular, to secure three items of potential material evidence which were not included in the Investigation Report, and which, according to the Legal Advisor, could "lend significant credibility to [the

[39] OAIS Investigation Report, 23 October 2017, p. 1.
[40] *Ibid.*
[41] *Ibid.*
[42] We note, however, that in the OAIS Director's subsequent letters of 4 February 2019 to the Appellant and the Complainant, she stated: "On 25 October 2017, (…) you were further informed by OAIS that the matter was closed and that the closing of the case at that stage did not preclude OAIS from re-opening the case (…)"

Complainant's] account and [could] be of important corroborative value in the chain of evidence".[43] He testified that these items were what investigators would typically look at but were omitted from follow up. The three items comprised the Complainant's notes contemporaneous with the event, a record of the Complainant's conversation with the Ethics Advisor, and any questioning of DD/HR to corroborate the Complainant's stated attempt to separate from service immediately after 2 December 2016.[44]

44. On 4 February 2019, the new Director, OAIS, informed the Appellant and the Complainant of the "reopening" 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".[45]

45. On 11 February 2019, OAIS interviewed the Complainant regarding her notes and her contact with the Ethics Advisor. OAIS interviewed DD/HR on 13 February 2019 and the Ethics Advisor on 14 February 2019. On 28 February 2019, the Complainant provided OAIS with a copy of her notes.

46. On 7 May 2019, OAIS forwarded the additional evidence to the Legal Advisor.

47. On 10 February 2020, the Director, Division of Human Resources (Director, DHR), UNFPA, forwarded a copy of the original Investigation Report, as well as the additional evidence obtained by OAIS, to the Appellant and requested his comments.

48. The Appellant submitted comments on 24 February 2020. His view was that the report showed "that there was nothing to suggest that the liaison between [the Complainant] and [himself], was nothing short of a consensual relationship between two consenting adults, initiated by [the Complainant] herself".[46] The Appellant further commented that the Complainant had made "false and malicious allegations" against him and that her "motive" in doing so was "to enable her justifying an application to change her duty station from Dakar".[47]

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[43] 31 January 2019 Memorandum from Chief, Legal Unit, OED to Director, OAIS, re: UNFPA Investigation Report No. 2017-0024; Request to Seek Additional Evidence.
[44] *Ibid.*; *see also* Hearing Transcript, September 24, 2021 (Legal Advisor), p. 58:9-25.
[45] OAIS Director letter of 4 February 2019, re: Re-opening of investigation by the UNFPA Office of Audit and Investigation Services.
[46] Closure of OAIS Investigative Report 2017-24: final comments, submitted by the Appellant to the Director of Human Resources, 24 February 2020.
[47] *Ibid.*

49. On 4 March 2020, the Director, DHR, charged the Appellant with misconduct on the grounds that the OAIS investigation had established that he had: (a) raped, sexually assaulted, and sexually harassed the Complainant when they attended a WCARO meeting in Ouagadougou, Burkina Faso (Count 1); and (b) obstructed and/or failed to cooperate with OAIS by withholding and/or failing to disclose facts material to the investigation, and/or providing false information during the investigation (Count 2).[48]

50. The Appellant was also placed on administrative leave with full pay (ALWP) on 4 March 2020 for the duration of the disciplinary process.

51. The Appellant submitted his response to the charges on 20 March 2020.

52. By memorandum dated 4 May 2020, the Executive Director decided that the available evidence met the legal standard of clear and convincing evidence regarding both charges and that, pursuant to Staff Regulation 10.1(a) and Staff Rules 10.1(a) and 10.2(a)(ix),[49] the disciplinary measure of dismissal was being imposed on the Appellant.[50]

The impugned Judgment:

53. On 8 May 2020, the Appellant filed an application with the Dispute Tribunal, challenging the contested decision. In addition to contesting the misconduct findings, the Appellant challenged the authority or *locus standi* of the UNFPA to "reopen" the OAIS investigation and to impose a disciplinary sanction in the absence of a conclusion by OAIS that the Appellant had engaged in misconduct.

54. The Dispute Tribunal heard oral evidence from the Appellant, the Complainant, and other witnesses over four days in September 2021. In the impugned Judgment, the Dispute Tribunal dismissed his application and held that the argument of the lack of *locus standi* to issue the misconduct charges or the sanctions was fallacious because the UNFPA Disciplinary Framework (the Framework) and Staff Rule 10.3 are the guarantors of due process and prevention of abuse of power in two ways: investigation is a necessary prerequisite for any disciplinary process and investigative bodies are vested with operational

[48] Impugned Judgment, para. 20; 4 March 2020 Letter from Director, DHR, to the Appellant.
[49] Secretary-General's Bulletin, ST/SGB/2018/1/Rev. 2 (Staff Regulations and Rules of the United Nations).
[50] Impugned Judgment, para. 23; 4 May 2020 Letter from Executive Director, UNFPA to the Appellant.

independence and exclusivity as to the conduct of the investigation.[51] Moreover, relying on *Mbaigolmem*,[52] the Dispute Tribunal concluded that although the organs of the disciplinary process do not collect evidence, they are responsible for analyzing the material put before them in the legal aspects and evaluating the evidence to assess which facts have been established and whether they suffice for attribution of misconduct. In the divided opinion, the Dispute Tribunal also held that the Administration had established misconduct on Count 1 and partially on Count 2, and that the disciplinary sanction of dismissal from service in the Organization was proportionate.

Submissions

AAE's Appeal

55. The Appellant requests that the Appeals Tribunal set aside the impugned Judgment as to Count One.[53] Pursuant to Article 2(1) of the Statute of the United Nations Appeals Tribunal, the Appellant seeks to set aside the impugned Judgment on the grounds that the Dispute Tribunal erred on questions of law, committed errors of procedure, and erred on factual questions, resulting in a manifestly unreasonable decision.

Secretary-General's Answer

56. The Secretary-General requests that the Appeals Tribunal affirm the impugned Judgment and dismiss the appeal. In addition, the Secretary-General requests that if the Appeals Tribunal upholds the impugned Judgment, the name of the Appellant be included in the Dispute Tribunal and Appeals Tribunal Judgments in the interests of transparency and accountability.

Secretary-General's Cross-Appeal

57. The Secretary-General appeals the result of Order No. 166, wherein the Dispute Tribunal granted the Appellant's Motion to Conceal his Identity, which is reflected in the anonymization of the Appellant in the impugned Judgment. The Secretary-General argues that the Dispute Tribunal exceeded its competence and erred on a question of law when it

[51] Impugned Judgment, paras. 44, 48.
[52] *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. UNDT/2017/051, *aff'd*, Judgment No. 2018-UNAT-819.
[53] As noted *supra* at para. 5, the Appellant contends he was "acquitted" of Count Two.

issued this Order on 17 August 2021, without providing the Secretary-General an opportunity to respond, and without giving any reasons for anonymity, which is contrary to General Assembly resolutions and UNAT jurisprudence on the importance of transparency and accountability in the internal justice system.

AAE's Answer to the Cross-Appeal

58. The Appellant submits that the issue raised by the Cross-Appeal was not one of the issues submitted at trial and was not adjudicated in the impugned Judgment. He says that because the purported cross-appeal emanates from Order No. 166, according to Article 7(1)(b) of the Appeals Tribunal Rules of Procedure (Rules), the Secretary-General had thirty days to file an interlocutory appeal of this Order but failed to do so. Accordingly, the Appellant argues that the cross-appeal is time-barred.

59. In the alternative, the Appellant submits that the Dispute Tribunal was correct to redact his name from all public records. The Dispute Tribunal had the competence to redact his name in this case in accordance with Article 36 of the Dispute Tribunal Rules of Procedure (UNDT Rules), which gives it the authority to address any matters in a case not expressly provided for in the UNDT Rules, and Article 19 of the UNDT Rules which gives the Dispute Tribunal the authority to issue any order that it considers to be fair and expeditious and to do justice in a case.

Considerations

I. Was the UNFPA's "reopening" of the investigation unlawful and did the UNFPA violate the Appellant's due process rights?

60. In the impugned Judgment, the Dispute Tribunal assessed whether the "reopening" of the case was a "breach of a competence norm that would formally invalidate the sanctioning decision without the need to show a prejudice to the Applicant's rights"[54] and whether it caused prejudice to the Appellant's due process rights. The Dispute Tribunal's conclusion that there was no such breach or violation, respectively, is contested by the Appellant.

[54] Impugned Judgment, para. 42.

61. The Appellant says that the "reopening" of the investigation in January 2019 and the resulting imposition of disciplinary sanctions was contrary to the recommendation of OAIS, was *ultra vires*, an abuse of authority, and occasioned by bad faith. We examine these contentions in turn.

1. Did the Administration abuse its authority and act in a manner ultra vires given the regulatory framework?

62. The Appellant submits that the Majority erred in its interpretation of Staff Rule 10.3(a) when it found that there was no abuse of power in relation to the "reopening" of the investigation.

63. Staff Rule 10.3(a) outlines the authority of the Secretary-General, and therefore, the UNFPA, in the disciplinary process. It provides that "[t]he Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred."

64. The Appellant says that this Staff Rule sets out a legislated condition precedent before the commencement of a disciplinary process, namely that there must first exist a finding of misconduct by OAIS (the finder of fact). Therefore, based on his interpretation of *Ular*,[55] he argues that the commencement of the disciplinary process, absent a prior finding by OAIS of the existence of misconduct, is a clear violation of Staff Rule 10.3(a). He contends that the Administration lacks *locus standi* to evaluate the evidence obtained through the OAIS investigation and, similar to the prosecutor who must rely on the results of a police report to bring charges against the suspect before a court, the Administration must rely only on the investigation findings of the OAIS. The Appellant argues that to allow otherwise is tantamount to permitting the Secretary-General to "act as a judge in his own cause" in violation of the *nemo judex in causa sua* principle. In addition, the "reopening" of the investigation was conditional upon "further details and/or information" being subsequently disclosed to OAIS investigators and he argues that such detail/information must have been materially "new" or "in addition" to the information and/or detail already established. He contends that the

[55] *Ular v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/221, *aff'd,* Judgment No. 2022-UNAT-1212.

evidence of the three witnesses interviewed in the reopened investigation did not add any value to the investigation.

65. In the impugned Judgment, the Dispute Tribunal recognized that under the Framework, there is a delineation of competencies between OAIS and the disciplinary organs of the Organization (Director, DHR and the Executive Director). The testimony from both the Director, OAIS, and the Legal Advisor was that there had been no violation of a competence norm when the Legal Advisor requested additional information. The Dispute Tribunal held that the determination of whether misconduct occurred was not the exclusive province of OAIS, and the Administration also has the competence to make this assessment as part of the disciplinary procedure. The Dispute Tribunal thus rejected the Appellant's argument that the Administration did not have the authority to issue a misconduct charge or a sanctioning decision in the absence of a finding of misconduct from OAIS.[56]

66. We find that the Dispute Tribunal did not err in its interpretation of Staff Rule 10.3(a). A plain, ordinary, and literal reading of this provision is that it is permissive. It provides that the Secretary-General "may" initiate the disciplinary process, giving the Secretary-General discretion to decide whether to commence a disciplinary process against a staff member "where the findings of an investigation indicate that misconduct **may** have occurred".[57] It does not provide that the Secretary-General can only commence disciplinary proceedings where the investigation finds that misconduct **has** occurred. The language of the provision does not make a finding of misconduct of an investigation mandatory or a condition precedent for the Secretary-General to commence a disciplinary process. Rather, the Secretary-General receives the investigation's findings for review and assessment. Afterward, he can judiciously and lawfully exercise his discretion to adopt the findings or not and to proceed with or halt the disciplinary process.

67. A similar allocation of functions is also reflected in Section 9 of the Framework (Summary of Overall Responsibilities) where OAIS is the investigative body and solely responsible for the conduct of all investigations, while the Director, DHR, and the Executive Director are the disciplinary bodies.

[56] Impugned Judgment, paras. 42-44, and 48; and dissenting opinion, para. 3.
[57] Emphasis added.

68. The independence of OAIS is enshrined in paragraph 47 of the Charter of the Office of Audit and Investigation Services, UNFPA (OAIS Charter) by ensuring it is "free to determine the scope of its interventions and the methodologies used to conduct its work as it deems necessary". After receiving an allegation of misconduct, the Director, OAIS, determines whether an investigation is warranted and if so, decides on the conduct of the investigation, the scope of the interventions, and methodologies used to conduct its work, and may decide at any time to close the investigation.[58] At the conclusion of the investigation, the Director, OAIS, must submit, as soon as possible, its investigation report to the Executive Director for "consideration of disciplinary and administrative actions".[59]

69. After receiving the investigation dossier and any further evidence, and obtaining the Legal Advisor's advice, the Director, DHR, can request clarification or additional evidence from the Director, OAIS,[60] and can either issue the misconduct charges or close the case where there are no or insufficient grounds warranting disciplinary action.[61]

70. As with Staff Rule 10.3(a), the OAIS Charter confirms that OAIS is an independent entity that provides its investigation report "for consideration"[62] to the Executive Director, and that the conclusions or findings in the report are not legally binding on the Executive Director. To interpret otherwise would be contrary to the Framework as it is the Director, DHR, that is authorized to either issue the charges of misconduct or close the disciplinary case where there are no or insufficient grounds warranting disciplinary action. The Director, DHR, determines whether the staff member's reply to the charges of misconduct and/or any evidence submitted by the staff member merits further investigative activity. If so, they may refer the matter to the Director, OAIS, requesting clarifications or further inquiries. The Director, OAIS, will accommodate such a request as they deem appropriate.[63]

71. Therefore, the responsibility for the findings of misconduct of a staff member is in the ultimate competence of the administrative organ applying the disciplinary or administrative measure. In the present case, this is the Director, DHR, who is required, at a minimum, to critically

[58] UNFPA Disciplinary Framework, Section 9.2.
[59] OAIS Charter, para. 28. *See also* UNFPA Disciplinary Framework, Section 12.4.1 ("If the Director, OAIS, issues an Investigation Dossier, he or she will transmit it to the Legal Advisor and will provide a copy to the Executive Director.")
[60] UNFPA Disciplinary Framework, Section 13.2.
[61] *Ibid.*, Sections 9.3 and 15.1.
[62] OAIS Charter, para. 28.
[63] UNFPA Disciplinary Framework, Section 15.4.1.

review the record and findings of the investigation, and to determine whether the required threshold of proof has been met and whether the acts, as established, amounted to misconduct.[64]

72. Thus, the Dispute Tribunal correctly reasoned that, under the Framework, assessing the facts of misconduct is not exclusive to OAIS, but that the Director, DHR, must also analyze the evidence, which analysis could lead to a different conclusion than that of OAIS. In *Ular*,[65] both the Dispute and Appeals Tribunals confirmed that the Administration had discretion with regard to taking action in cases of allegations of sexual harassment contrary to investigation findings but held that the discretion must be exercised lawfully and judiciously, including ensuring the staff member is properly informed of the advancement of the case and is able to comment; it is this failure to do so that was held to be an abuse of authority. This is not the circumstance here where the Appellant was informed and given the ability to comment on the misconduct charges.

73. Further, at the hearing, the Dispute Tribunal heard evidence from the former Director, OAIS, and the Legal Advisor. The Director, OAIS, testified that the OAIS recommendation is not binding on UNFPA management who can independently make their own determination.[66] She advised that there have been situations where OAIS "concluded one way, [but] the organization decided to go another way."[67] Similarly, the Legal Advisor testified that "it falls within the authority of the Administration to determine whether the facts as established by the factfinder are sufficient or insufficient to merit a charge of misconduct and a disciplinary measure".[68]

74. Therefore, we find that the Administration and the Secretary-General had the authority or *locus standi* to proceed with a disciplinary process even in the absence of a finding of misconduct by OAIS. This is supported by Article 97 of the United Nations Charter and the Appeals Tribunal jurisprudence confirming that the decision-maker has the authority to accept or reject in whole or in part the recommendations of an investigative body.[69] Contrary to the

[64] *Elobaid v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-822, para. 36 ("the delegated manager (…) has the responsibility to consider what action, if any, is to be taken after receipt of the [investigative] report").
[65] *Ular v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/221, paras. 23 and 25, *aff'd*, Judgment No. 2022-UNAT-1212, paras. 47 and 55.
[66] Hearing Transcript, 24 September 2021 (Director, OAIS), p. 33:20-22.
[67] *Ibid.*, p. 43:10-15.
[68] Hearing Transcript, 24 September 2021 (Legal Advisor), p. 66:16-21.
[69] *See, e.g., Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, paras. 30-32.

Appellant's argument, the Majority did not hold that the Secretary-General had "unrestrained power", but rather that, within the applicable legal framework, the Secretary-General had the competence and discretion to assess whether the findings of fact warranted the initiation of disciplinary proceedings as long as that discretion is exercised judiciously and lawfully.

75. Similarly, the Appellant argues that the courses of action available to the Secretary-General when it is in receipt of an investigatory report is constrained as outlined in Section 5.18 of the Secretary-General's Bulletin, ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) (the Bulletin), which was erroneously ignored by the Dispute Tribunal. However, we find that the formal complaint procedures in the Bulletin apply to staff members of the Secretariat while the Framework and the OAIS Charter are the regulatory framework for the UNFPA and therefore take precedence in reviewing whether there was an abuse of authority or violation of due process in misconduct investigations involving UNFPA staff. UNFPA is a separately administered fund of the Organization and has its own legal framework and is not regulated by the general administrative issuances unless otherwise stated or unless it has expressly accepted their applicability.[70] In the present case, there is no evidence that UNFPA adopted the procedures in the Bulletin.

2. Were the Appellant's due process rights violated by the "reopening" of the investigation?

76. With regards to the Appellant's claim that his due process rights were violated by the "reopening" of the case 15 months after OAIS notified him of its findings, the Dispute Tribunal had diverging views. The Majority considered the regulatory framework ambiguous as to how long the Administration could review the Investigation Report before taking action but did not think that the time elapsed in this case was excessive.[71]

77. The Appellant argues that Section 16.1 of the Framework provides a timeframe for case closure and is mandatory. The latter section provides that the period between when the staff member is informed that s/he was a subject of an investigation and when s/he is informed

[70] Secretary-General's Bulletin, ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances), Section 2.3 ("Administrative issuances shall not apply to the separately administered funds, organs and programmes of the United Nations (…) unless the separately administered funds, organs and programmes have expressly accepted their applicability."). *See also Weerasooriya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-571, para. 20 (internal citation omitted).
[71] Impugned Judgment, para. 49.

of the charges of misconduct or case closure "should not under normal circumstances exceed six months".[72] The Appellant contends that six months should be the limit.

78. It is undisputed that a staff member being investigated for misconduct is entitled to reasonably prompt closure. This is done by establishing time limits for the conclusion of the disciplinary case as well as the grounds and time limits for re-commencing the investigation, while ensuring due process. However, while Section 16.1 indicates that "normal circumstances" should not exceed six months, it also stipulates that this time period should be observed "[t]o the extent possible" and "depending on the complexity of the matter". Therefore, the six-month deadline is not mandatory.

79. This is consistent with prior jurisprudence that only "inordinate delays" in process or "substantial procedural irregularities" will render delays to be fatal and the resulting separation unlawful.[73] Whether the delay is inordinate, or the procedural irregularity is substantial will depend on the circumstances of each case and the nature and complexity of the allegations against the staff member. As stated by the Appeals Tribunal in *Sall,* "[e]ven a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of grave misconduct, especially if the misconduct consists of a physical or sexual assault".[74]

80. Therefore, the six-month timeline outlined in Section 16.1 cannot be a strict deadline or a statutory requirement in every case and circumstance. What is appropriate will depend on the circumstances, including any practical challenges encountered in the investigation, the nature and gravity of the allegations, the complexity of the issues and evidence in the investigation, and the need to observe due process.

81. Further, the Majority held that in this case, the Appellant's legal certainty or legitimate expectation was not infringed through a violation of a "technical norm" because his case was never "closed" by the Director, DHR, pursuant to Section 15.3 of the Framework and that the time elapsed from the recommendation to close this case to the reactivation of the case was not "excessive". We agree that the time elapsed from the time the investigation was initially closed by OAIS to the subsequent gathering of additional information at the request of the

[72] Appellant's Brief, paras. 15 and 19.
[73] *See Sall v. Secretary-General of the United Nations*, 2018-UNAT-889, para. 34; *Masylkanova v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-662, paras. 23-24.
[74] *Sall* Judgment, *op. cit.*, para. 33.

Legal Advisor (acting on behalf of the Executive Director) was not excessive because of the complexity of the matter, the grave nature of the allegations, the operational issues regarding the change in the Executive Director, and the lack of demonstrable prejudice to the Appellant or the process.

82. As to the "closure" of the "case", Section 12.5.1 of the Framework governs the closure of investigations by OAIS. It provides that "If, in the view of the Director, OAIS, the information obtained during Investigation (i) does not give rise to a reasonable conclusion that Misconduct occurred or (ii) would not otherwise merit the continuation of an ongoing Investigation, the Director, OAIS, may close the case, recording the reasons in writing, and inform the complainant accordingly". Although the provision speaks of closing the "case", the closure must be within the parameters of the Director, OAIS' competence, which is to close the investigation case file, not the overall misconduct or disciplinary case. The latter is in the competence of the Director, DHR, as set forth in subsequent provisions of the Framework (e.g., Section 13 (Interlocutory Stage) and Section 15 (Procedures following Investigation and Interlocutory Stage)), which confirms that the disciplinary process continues after the investigation.

83. In the present case, on 25 October 2017, OAIS informed the Appellant and the Complainant of the outcome of the OAIS investigation that there was "insufficient evidence to conclusively determine that [the Appellant] had raped and sexually assaulted [the Complainant] on 02 December 2016", and that OASIS "closed the matter". However, OAIS also advised that the "closing of the case at this stage does not preclude the OAIS from re-opening the case and pursuing further investigation, if further details and/or information are subsequently disclosed".[75] This confirmed the closure of the investigation but not the end of the disciplinary process pursuant to the regulatory framework.

84. As required, the Director, OAIS, submitted its Investigation Report to the Legal Advisor for consideration.[76] The Legal Advisor provided legal support and advice and made recommendations to the Administration to request further information and clarification.[77]

[75] OAIS Investigation Report, 23 October 2017, p. 1.
[76] UNFPA Disciplinary Framework, Section 12.4.1.
[77] *Ibid.*, Section 9.4.

85. The Legal Advisor further testified that there were UNFPA operational reasons, unrelated to the case, which caused the report to be analyzed late, including a change in the Executive Director of UNFPA in October 2017, at the time the Investigation Report was sent over.[78] Once in hand, the Legal Unit "reviewed [the report] very carefully," and they briefed the Executive Director about "concerns and questions" that they had about the report.[79] As part of this review, the Legal Unit also sought advice from a clinical psychologist about the behavior of rape victims.[80] The Executive Director and the Legal Advisor decided that UNFPA could not implement the recommendation to close the case and that it required further fact-finding from OAIS.[81] The Legal Advisor then requested follow-up on the Complainant's note and her conversations with DD/HR and the Ethics Advisor because OAIS had not included these in the initial investigation.

86. The Appellant argues that "using the same set of facts", the Administration essentially arrived at different conclusions, namely that the evidence met the clear and convincing standard required for a case of serious misconduct. He asserts that the reopening was an instrument to simply overcome the time limit set in Section 16.1 of the Framework and to remedy any inaccuracies or negligence by the first investigation.

87. However, although Section 12.5.1 of the Framework gives authority for OAIS to close the investigation which it did on 25 October 2017, Section 15.1 governs the process following investigation. It gives authority to the Director, DHR, to review the investigation dossier and request further information and take action. There is no evidence that, subsequent to receiving the Investigation Report, the Director, DHR, expressly or implicitly communicated that s/he was "satisfied" that there were "no or insufficient evidence grounds warranting disciplinary action" as required by Section 15.3.1 of the Framework. Therefore, although the OAIS investigation had been "closed" as of 25 October 2017, the misconduct case and the disciplinary process were not "closed" as the Director, DHR, had not yet acted on the Investigation Report.

88. The Director, OAIS, testified that the request from the Legal Advisor was not a request to "reopen" the investigation, but rather a request for additional evidence, and she, as the Director, OAIS, had the authority to accept or reject the request.[82] This decision was her sole

[78] Hearing Transcript, 24 September 2021 (Legal Advisor), p. 51:10-25.
[79] *Ibid.*, p. 49:13-19.
[80] *Ibid.*, p. 84:8-9.
[81] Hearing Transcript, 24 September 2021 (Legal Advisor), p. 49:20-21.
[82] Hearing Transcript, 24 September 2021 (Director, OAIS), p. 22:8-14.

prerogative in accordance with Section 15.4.1 of the Framework. She went ahead and collected and forwarded the additional evidence to the Legal Advisor as requested because, as she further testified,[83] it was common procedure for the Legal Unit to ask for additional information or clarification, which the Legal Advisor also confirmed.[84]

89. Contrary to the Appellant's argument, there is no requirement or condition precedent in the Framework that the Administration's request for clarification or further inquiries must be materially "new" or "in addition" to the information and/or detail already established. It was within the competence of the Director, DHR, and the Legal Advisor to request whatever clarifications they saw fit, and it was likewise within the competence of the Director, OAIS, to accept or reject the request.

90. In conclusion, the OAIS investigation was closed by OAIS, but the overall disciplinary case was not, because the Director, DHR, had not yet formally acted on the Investigation Report. The disciplinary case remained open until the Director, DHR, analyzed the additional evidence requested, issued the misconduct charges, received the Appellant's comments, and ultimately, communicated the decision on the disciplinary sanction in April 2020.

91. Further, there was no violation of the Appellant's due process rights. The Appellant was advised on February 2019 by the Director, OAIS, of the continuation of the investigation and on 10 January 2020 was given the opportunity to comment on the Investigation Dossier (to include both the Investigation Report and the additional follow-up evidence that the Legal Advisor requested from OAIS). After the Director, DHR, received the full Investigation Dossier from OAIS and the Appellant's comments on this evidence, the Director, DHR, concluded that there were grounds for disciplinary action, and issued the formal charge letter under Section 15.2 of the Framework.

92. The Appellant submits that the "reopening" of the investigation coincided with the death of the previous male Executive Director who was Nigerian and was generally viewed in UNFPA circles as being favourable to Africans, and the appointment in his place of a new Executive Director who was a woman and whom the Appellant characterizes as being "hell bent on perpetrating her zero-tolerance policy towards sexual misconduct at the UNFPA, by making an

[83] *Ibid.*, p. 38:12-14.
[84] Hearing Transcript, 24 September 2021 (Legal Advisor), p. 64-65 (Administration disagreeing with OAIS findings and requesting follow-up information from OAIS in other cases).

example of the Appellant."[85] The Appellant also claims that the new Executive Director had a "desire and/or penchant for redressing what she and others at the UNFPA wrongly perceived as members of an 'African boys club' at the UNFPA, closing ranks to protect one of their own".[86] Also, the Complainant testified that she had no faith in the former Executive Director's ability to provide her with a just outcome.[87]

93. The Appellant further submits that the wording of the 31 January 2019 memorandum from the Legal Advisor requesting clarification illustrates bias as it was aimed at gathering evidence to bolster the Complainant's allegations. For support, he relies on the memorandum's statement that the pursuit of additional evidence "may lend significant credibility to [the Complainant's] account and may be of important corroborative value in the chain of event[s]".[88]

94. We find that the Dispute Tribunal correctly determined that, contrary to the Appellant's arguments, the continuation of the case was not a result of discrimination against African men or of another improper motive.[89] There is no evidence to substantiate this allegation of discrimination. We accept the Dispute Tribunal's finding that the continuation of the disciplinary case was a result of the seriousness of the charge and consistent with the Organization's zero-tolerance policy against sexual misconduct.[90]

II. Was there clear and convincing evidence of misconduct on one or both counts? If so, was the disciplinary sanction of dismissal proportionate to the misconduct?

95. It is well-settled in Appeals Tribunal jurisprudence that in disciplinary cases,[91] the Dispute Tribunal must establish:

(a) whether the facts on which the sanction is based have been established by clear and convincing evidence when termination is a possible outcome,

(b) whether the established facts qualify as misconduct under the Staff Regulations and Rules,

[85] Appellant's Brief, para. 17.
[86] *Ibid.*
[87] Hearing Transcript, 23 September 2021 (Complainant), p. 18:17-22.
[88] 31 January 2019 Memorandum from Chief, Legal Unit, OED to Director, OAIS, re: UNFPA Investigation Report No. 2017-0024; Request to Seek Additional Evidence.
[89] Impugned Judgment, para. 51; dissenting opinion, para. 20.
[90] *Ibid.*
[91] *Maguy Bamba v. Secretary-General of the United Nations*, 2022-UNAT-1259, para. 37.

(c) whether the sanction is proportionate to the offence and the circumstances, and

(d) whether the staff member's due process rights were observed in the investigation and disciplinary process (which we have dealt with above).

Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt; it means that the truth of the facts asserted is highly probable.[92]

96. The Appellant requests that the Appeals Tribunal set aside the impugned Judgment as to Count One[93] because he asserts that there was no sexual assault and that he and the Complainant engaged in consensual sex.

Count 1: Was Sexual Assault Established by Clear and Convincing Evidence?

97. The essential question for determination here is whether the Dispute Tribunal made an error of fact that led to a manifestly unreasonable decision when it held that the alleged misconduct of sexual assault and rape was proven by a standard of clear and convincing evidence.

98. Section 6.1.1 of the Framework provides examples of misconduct and includes "(c) assault, harassment, sexual harassment, abuse of authority, or threats to other staff members or third parties" and "(s) sexual exploitation and sexual abuse, which, in accordance with Staff Regulation 10.1(b), constitute Serious Misconduct".

99. Section 3.1 of the Bulletin provides that "All staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations." Prohibited conduct under the Bulletin[94] includes sexual harassment, which is defined in Section 1.3 as:

> 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, when such conduct interferes with work, is made a condition of employment or creates an

[92] *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 30.
[93] Appellant's Appeal Form, Box IV.
[94] ST/SGB/2008/5, Section 1.5.

> intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident.

100. There is no dispute that sexual assault and rape constitute prohibited conduct and serious misconduct. The question is whether the evidence established that the Appellant committed the alleged misconduct to a high degree of probability.

101. We note that the Majority opinion did not make an express finding or statement that the evidence was "clear and convincing" or that it was "highly probable" that the Appellant raped and sexually assaulted the Complainant. Rather, the Majority held that the Complainant was "credible" and "agreed" with the Respondent's reasons and closing submissions (which had argued that the clear and convincing evidence standard was satisfied).[95] The Dissenting Judge considered that the evidence did not meet the standard of "clear and convincing".[96]

102. The Appeals Tribunal has previously held that a finding of sexual misconduct against a staff member of the Organization is a serious matter with grave implications for the staff member's reputation, standing, and future employment prospects. For that reason, the Dispute Tribunal must base its finding of sexual misconduct on sufficient, cogent, relevant, and admissible evidence permitting appropriate factual inferences and a legal conclusion that all the elements of sexual misconduct have been established by clear and convincing evidence. In other words, sexual misconduct must be shown by the evidence to have been highly probable. This normally occurs after an oral hearing of the involved parties and witnesses with the opportunity for cross-examination. In the present case, due to the factual disputes, particularly on the question of consent, the Dispute Tribunal appropriately conducted an oral hearing and heard evidence from the Appellant, the Complainant, and other witnesses, both in direct and cross-examination.[97]

103. The Appellant and the Complainant provided divergent versions of events that occurred in the Appellant's hotel room on the night of 2 December 2016. As with many instances of allegations of sexual assault and rape, there were no direct witnesses to the

[95] Impugned Judgment, para. 92. Although for clarity it would have been preferrable for the Majority opinion to make an express finding, the parties and the Dissenting Judge do not dispute that the Majority concluded that the clear and convincing evidence standard was met.
[96] Dissenting opinion, para. 45.
[97] *Gonzalo Ramos v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1256, para. 36; *Appellant v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1210, paras. 37-38.

incident in question. This type of misconduct typically occurs in private, often with little or no direct, independent evidence.[98] Therefore, in most sexual assault cases and by necessity, credibility findings with respect to the two parties involved are central to the judge's determination.

104. We recognize, therefore, that sexual assault cases are typically difficult to adjudicate. Judges must make findings of fact often with two conflicting versions of events and with contradictory testimonial evidence. Therefore, in order to come to a reasoned conclusion on the disputed facts, judges must satisfy themselves on the credibility and reliability of the persons concerned and provide cogent reasons for those findings.

Credibility of the Appellant and the Complainant

105. As we have held in prior cases, the assessment of the credibility and reliability of witnesses will depend on a variety of factors including: i) the witness' candour and demeanour; ii) the witness' latent and blatant biases; iii) internal and external inconsistencies in the evidence; iv) the probability or improbability of particular aspects of the witness' version; v) the calibre and cogency of the witness' testimony when compared to that of other witnesses testifying in relation to the same incident; vi) the opportunities the witness had to experience or observe the events in question; and vii) the quality, integrity and independence of the witness' recall of the events.[99]

106. We must consider whether the Dispute Tribunal judges turned their mind to the relevant factors affecting the truthfulness of the evidence, including the believability or credibility of the witnesses, and the accuracy or reliability of their testimony.

107. In the present case, we find that the Dispute Tribunal appropriately considered these factors. The Majority found that the evidence established that the Appellant had committed a sexual assault against the Complainant, largely based on their finding that the Complainant was "credible" in her testimony.[100] In doing so, they reviewed considerations that supported this finding including the quality, integrity, and candor with respect to her recall of the events. They specifically considered that she "showed good recollection and observation of detail",

[98] *Al Hussein Haidar v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1076, para. 43.
[99] *AAC v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1264, para. 36.
[100] Impugned Judgment, para. 92.

"displayed honesty and emotion" in her account, and "maintained coherence and consistency on material details, some of which [were] unique".[101] In addition, the Majority considered evidence from the Complainant that implicated her in the events but supported her overall credibility. For example, the Complainant expressed "self-blame" for her lapse of judgment in going to and staying in the Appellant's room especially when it became obvious that they were not going to the bar. Conversely, the Majority credited her expressions of non-consent.[102] These expressions include her testimony that, after the Appellant started kissing her, she told the Appellant that she had made a "mistake" and tried to leave the room, but he physically would not let her leave, leading to a struggle, after which she expressly stated to him that she did not want to have sex.[103]

108. Further, the Majority considered internal and external inconsistencies in the witnesses' evidence including other contemporaneous indicia of the rape, such as the Complainant's report to her supervisor that same month and her reaching out for psychotherapy and other treatment.[104] In addition, the DD/HR, the Complainant's direct supervisor, corroborated the Complainant's testimony regarding her lack of consent. He testified that the Complainant advised him in December 2016 (shortly after the incident) that the Appellant had physically overpowered her the night of 2 December 2016 and prevented her physically from leaving the hotel room.[105] In addition, he confirmed that the Complainant did not report the rape immediately as she did not feel "safe" until she had been transferred from West Africa to New York.[106] Finally, DD/HR also testified that the Complainant broke down in tears and had difficulty speaking about the incident, which shocked him as it was in stark contrast to her usual demeanour.[107]

109. Although this is hearsay evidence as it pertains to the truthfulness of the encounter in question, it is a reliable first report made within a reasonable time of the incident and is therefore admissible. Further, the Complainant provided a plausible explanation as to why she did not immediately file her formal report to OAIS but waited until she was transferred to New York.

[101] *Ibid.*
[102] *Ibid.*
[103] Hearing Transcript, 23 September 2021 (Complainant), p. 10:24 – 11:11; and p. 12: 7-10.
[104] Impugned Judgment, para. 94.
[105] Hearing Transcript, 9 September 2021 (DD/HR), p. 18:12-20.
[106] *Ibid.*, p. 38:5.
[107] *Ibid.*, p. 13:11-17.

110. The other corroboration of the Complainant's evidence of non-consensual sexual activity on 2 December 2016 is the WhatsApp exchange the following day. The Majority placed weight on the WhatsApp exchanges between the Appellant and the Complainant the day following the incident, which text messages were deleted from the Appellant's phone and which messages he failed to mention to the OAIS investigators in 2017.[108] In the Majority's view, these messages "convey[ed] in a sufficiently clear manner that the Complainant had experienced compulsion the night before".[109]

111. At the hearing, both the Appellant and the Complainant testified about the WhatsApp exchange and their intentions in the exchange. Both the Appellant and the Complainant were questioned (or had the opportunity to be questioned) by their own and opposing parties' counsel and by the Dispute Tribunal itself.

112. During the hearing, the Complainant was asked about messages she had sent in the conversation. For example, she was asked for her explanation for a possible exculpatory message she sent to the Appellant: "*Je ne pense pas que tu voudrais m'abuser. Je pense que tu as vu les femmes comme un conquest*". The President of the Dispute Tribunal pressed her on what she meant by this message and she testified that "I felt it was a power differential", "I don't think he was intending to beat me up", and "he was basically intending to get what he wanted from me".[110]

113. As for the Appellant, he was also questioned about the WhatsApp exchange. He was asked about each of the statements in the exchange and was given the opportunity to provide responses and explanations for his statements, including his explanation for possible incriminating statements. For example, when asked about why he stated "I'm sad that you are thinking I just want to abuse you", he responded in the hearing that this was "her interpretation" and what was important was her response of "*Je ne pense pas que tu voudrais m'abuser*".[111] He explained that this was two adults "exchanging messages" in the French language and that he "always respected her".[112] Also, he was asked about his interpretation of

[108] Hearing Transcript, 22 September 2021 (Appellant), p. 39:6-10.
[109] Impugned Judgment, para. 95.
[110] Hearing Transcript, 23 September 2021 (Complainant), p. 27:11 – 28:3.
[111] Hearing Transcript, 22 September 2021 (Appellant), p. 57:4-12.
[112] *Ibid.*, p. 61:23.

the Complainant's message "*Tu ne m'as pas permis de partir*", and he responded that it was a consensual relationship and "how can I stop her of leaving. She leave. She left."[113]

114. The Appellant argues that the WhatsApp messages were indicative of the fact that the Complainant was neither raped nor sexually assaulted and were in fact exculpatory of him.

115. Although there is no express mention of rape in the WhatsApp exchange, we find no error in the Majority's finding that there are clear references to non-consensual activity by the Appellant. For example, the Appellant states "*Je veux dormir avec toi cherie stp [I want to sleep with you darling, please]*", and the Complainant replies, "*Merci. Mais tu sais que la nuit dernière ne m'a pas fait sentir à l'aise. Tu ne m'a pas permet de partir*. [*But you know that the last night did not make me feel at ease. You did not let me go*.]". Again, after persistent pleas from the Appellant with continued denials from the Complainant, the Complainant states "*Hmmm. Tu aimes d'avoir le pouvoir sur les femmes?* [*Hmm. You like having power over women?*]" and later when the Appellant mentions "complicity", she replies "*Ah. Hier nous avons complicitie?* [*Ah. Yesterday we had complicity?*]". After which, the Appellant's response is "Je sais [*I know*], forget about yesterday and be more constructive. Yes, some complicity… only difference you were rationale and me not…"

116. We also agree with the Majority's finding that these messages corroborate the Complainant's evidence and version of events and portray, in a sufficiently clear manner, that the Complainant had "experienced compulsion the night before".[114] The exchange reflects the nature of the Appellant's conduct towards the Complainant, namely his persistent compulsion of the Complainant into activity which she expressly and continues to reject; in other words, the Appellant refusing to take "no" for an answer to his advances.

117. Consistent with the nature of the Appellant's persistent conduct towards the Complainant, it is notable that the Complainant ceased all communication with the Appellant after 3 December 2016, although he continued to try to contact and pursue her with attempts to call, e-mail and text her, and even purchasing a gift and bringing it to her office in Senegal in March 2017.

[113] *Ibid*., p. 59:25.
[114] Impugned Judgment, para. 95.

118. In determining that the WhatsApp exchange corroborated the Complainant's version of events, the Majority reviewed the totality of the exchange and did not err in finding that the "overall tenor of the messages, including the absence of outright accusation of rape, is illustrative of the Complainant's effort to process and understand what had happened" while trying "not to antagonize the [Appellant]".[115] The Majority found the Complainant credible and therefore, accepted as plausible her interpretation of the exchange, while the Appellant was found to be generally lacking in credibility due to his account which was "replete with statements that are internally inconsistent and/or implausible".[116]

119. The Majority's finding of inconsistency between the Appellant's description of consensual sexual activity and his post-event response in the WhatsApp messages is grounded in the evidence and supports the finding that the Complainant's version of the events of non-consensual sexual activity and assault is highly probable. In the hearing, the Appellant provided contradictory explanations for the messages and his statements, for example in one moment stating the Complainant was upset because he rejected the Complainant's request for a long-term relationship[117] but then speculating that she was not feeling comfortable in having sex the first day of meeting him.[118] He then testified that despite his rejection of a long term relationship and only having just met her for one day, he felt "deep love and affection" for her.[119]

120. The Appellant disputes the Majority's view of the inconsistencies in the Appellant's account, particularly his inability to recall the location of his hotel room and his deletion of their WhatsApp messages from his phone which he says may have been occasioned by the passage of time. He further submits that the Majority erred in law and in fact by failing to provide a reasoned opinion as to why the Appellant was not afforded leeway about his inability to recall certain facts, whereas the Complainant's inconsistencies were allowed.

121. We disagree. The Majority did provide adequate reasons for their findings. In particular, the Majority found the Appellant's account to be "generally lacking in credibility" on the basis of "clearly false statements" on material facts.[120]

[115] *Ibid.*
[116] Impugned Judgment, para. 98.
[117] Hearing Transcript, 22 September 2021 (Appellant), p. 87:12-16.
[118] *Ibid.*, p. 58:21-23.
[119] *Ibid.*, p. 63:15-16.
[120] Impugned Judgment, para. 98.

122. One example is the Appellant's contradictory and self-serving evidence of the location of his hotel room in Hotel Laico. The Complainant's room was on the fourth floor of the hotel. In the investigation, the Appellant insisted that his hotel room was located above the Complainant's room (either the seventh or eighth floor) and therefore her statement that she was coming down to pick him up to go to the hotel bar was not credible.[121] This was not a question of lack of recollection, rather he was adamant even when presented with evidence otherwise (i.e., his own 3 December 2016 e-mail to the Complainant asking her to contact him in his hotel room 314, on the third floor). He denied to the investigators that the e-mail was his or sent from his e-mail account.[122] However, in the hearing, he ultimately accepted the location of his hotel room was 314.[123]

123. The Appellant also provided contradictory and inconsistent evidence on other material facts, such as whether he sent the 3 December 206 e-mail, how he obtained the Complainant's hotel room number (initially stating that the Complainant gave her room number to him but later stating he may have obtained it from hotel reception),[124] whether she was clothed during the alleged assault,[125] and when and how the Complainant gave him her cell phone number.[126] The Majority appropriately reasoned that the discrepancies in the Appellant's account appeared designed to "support his story that [the Complainant] was a willing participant in a consensual relationship", and that she was "the party actively seeking further interactions", which was not the case.[127]

124. The Appellant testified that the Complainant "fabricated a forgery" with respect to the allegation of rape and misconduct against him, because she was frustrated by his refusing to have a long-term relationship with her or may have entertained some regret "because it was a

[121] OAIS Witness Interview Transcript (Appellant), 23 May 2017, para. 725.
[122] *Ibid*., 23 May 2017, para. 962 (contesting whether it was "a genuine email").
[123] Hearing Transcript, 22 September 2021 (Appellant), pp. 33-34.
[124] In his OAIS Witness Interview of 23 May 2017, the Appellant repeatedly stated that the Complainant voluntarily, and "smiling[ly]" gave him her hotel room number after the group returned from dinner (paras. 188, 202, 235), but at the hearing conceded that possibly he reached her through hotel reception (Hearing Transcript, 22 September 2021 (Appellant), pp. 73-74).
[125] The Majority noted that the Appellant changed his account with respect to whether the Complainant's clothes were on during intercourse, ultimately corroborating the Complainant's account that her dress remained on but pulled up, "rendering his version about paced foreplay leading to consensual intercourse less credible". *See* impugned Judgment, para. 100.
[126] The Appellant stated in his OAIS Witness Interview that the Complainant gave him her personal phone number on the first day they met (at para. 914); but the evidence showed this was false, and that he pressed her twice the day after the incident to obtain it.
[127] Impugned Judgment, paras. 98-102.

one-night stand".[128] However, the Complainant had no evident motive to fabricate a rape allegation, and the Appellant's theory that she did so to effect a transfer from her duty station in Senegal was held to be "implausible" and unsubstantiated. Indeed, if this were the case, it would have been more logical for the Complainant to fabricate allegations against a man in her workplace (WCARO) in Dakar. Further, there was no guarantee that she would be transferred, and ultimately, she had to take a short-term assignment when she returned to New York, and finally landed in a lower-grade role.[129]

125. The Appellant claims that the Majority erroneously based its conclusion on "whose version it considered more believable" which does not meet the clear and convincing evidence standard. He asserts that this standard is also not met by examining "which party's account purportedly contains more gaps and/or untruths". This is not what the Majority did. Rather, the Majority heard the testimony of witnesses, including the Appellant and the Complainant, and reviewed other supporting evidence (such as her request to re-locate and her report of the rape to her supervisor shortly after the incident, as well as the WhatsApp messages) and made considered and reasoned findings of credibility. It reviewed the Complainant's and Appellant's testimony for internal and external consistencies.

126. Finally, it is well-established in our jurisprudence that the Appeals Tribunal recognizes the unique position of the Dispute Tribunal judge to see and hear the witnesses give evidence and be tested during the hearing, and thus the Dispute Tribunal's credibility findings deserve particular deference on appeal,[130] which we accept here.

Consent to the Sexual Activity

127. Ultimately, the Appellant contends that the Complainant consented to the sexual intercourse based on a number of facts including the Complainant "deliberately" going to the Appellant's hotel room, the length of time she spent in the room, her comments to the investigators about the Appellant's inadequate sexual performance, the lack of threat or violence by the Appellant, the absence of any disruptive conduct by the Appellant noticed by other guests in the vicinity of his room, the Complainant's lack of detailed recollection on how her underwear was removed, the absence of any damage or tear to her clothing, her failure to

[128] Hearing Transcript, 22 September 2021 (Appellant), pp. 58, 86-87, 94.
[129] Impugned Judgment, paras. 96-97.
[130] *Al Othman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-972, para. 70.

attempt to escape after the encounter, and the nature of their chats after the encounter. The Appellant argues that the Complainant had the option of leaving the room and did not physically struggle or scream during the encounter and this, along with other points above, pertains to the Complainant's "tacit" consent to the sexual encounter.

128. This view of the nature of consent to sexual activity is problematic. In the Judgment, all the Dispute Tribunal Judges note that the Complainant indicated to the Appellant that she did not want to engage in sexual intercourse but the Majority and Dissenting Judge assigned different weight to this evidence.[131] The Appellant argues that the Complainant did not physically resist or leave but remained in the room, and this amounts to tacit or implied consent or an absence of non-consent to the sexual activity, all of which amounts to a consensual encounter.

129. However, this places the burden on a complainant to, not only verbalize non-consent (which the Complainant did at the start of the encounter), but to also verbalize continuing non-consent during the entire interaction. In other words, in the present case, the Complainant, whom the Majority found credible, testified that she told the Appellant she had made a "mistake" and then that she did not want to have sex with him. However, according to the Appellant, because she did not subsequently struggle, scream, or attempt to flee the room, this subsequent passive behaviour equates to consent.

130. This is clearly incorrect and contrary to a reasonable standard of consent in sexual assault cases. The law cannot take silence, passive or ambiguous conduct as consent in these circumstances. Further, consent in sexual assault and rape cases is not simply the "perception" of behaviour by a "reasonable person" because consent must be more than "perception".

131. Rather, consent must be defined as a voluntary agreement of an individual to engage in the sexual activity in question in the form of actual statements, actions or other evidence. Whether there is consent to the sexual activity will depend on the circumstances of each case and the totality of the evidence. However, there are circumstances where there clearly can be no consent in law, including but not limited to, 1) when there has been no attempt to obtain consent and the activity is clearly forced, 2) where an individual not involved in the activity expresses consent on behalf of the complainant, 3) where the complainant lacks capacity to

[131] Impugned Judgment, paras. 66-67; dissenting opinion, para. 33.

provide consent , 4) where the individual induces the complainant to engage in the activity by abusing a position of trust, power, or authority, and 5) where the complainant communicates, by words or conduct, an express lack of agreement to engage in or continue the activity.

132. In the present case, regardless of why the Complainant went to the Appellant's hotel room or any other circumstances, the Complainant verbally expressed her lack of consent to the Appellant but rather than accept this, the Appellant continued his unwelcome conduct.

133. Based on the credible testimony of the Complainant, the Majority held that the power imbalance between the two and the extent of the Appellant's undisputed political connections were plausible reasons for the Complainant's conduct and reluctance to report the incident immediately.[132] The Majority also appropriately considered the probability or improbability of particular aspects of her testimony and disagreed that the Complainant's failure to "scream or beat" the Appellant was material, noting that her paralysis at the moment was consistent with descriptions of reactions of rape victims in the literature.

134. The Appellant submits that the Majority erred in fact by failing to consider that Complainant was "hell-bent" on benefiting from his powerful connections within the UNFPA. The Appellant claims that this was not a "Monica Lewinksy White House intern scenario," because the Complainant was a P-5 officer and he was D-1 officer, and therefore they were "contemporaries".[133] The Appellant alleged (incorrectly) that the Complainant was 6 feet tall[134] and known to be strong-willed and outspoken and thus it "beggars' belief" that she was unable to stand her ground against the Appellant. The Appellant takes issue with what he characterizes as the Majority's portrayal of the Complainant as a "meek" and "extremely vulnerable white lady".[135] The Appellant states that "if anybody should have been intimidated by a white lady (…) it should have been the Appellant".[136] These submissions are grounded in unfortunate stereotypes rather than evidence.

135. As indicated above, it is insufficient for the Appellant to rely on "tacit" consent or the absence of repeated expressions of non-consent in these circumstances. Also, rape and sexual assault do not always include threats of violence or physical restraint nor victims physically

[132] Impugned Judgment, para. 93.
[133] Appellant's Brief, para. 33.
[134] The Complainant is 5 ft 10 inches. Hearing Transcript, 23 September 2021 (Complainant), p. 11:12-13; the Appellant is 6 ft 5 inches. Hearing Transcript, 22 September 2021 (Appellant), p. 98:20-22.
[135] Appellant's Brief, para. 31.
[136] *Ibid*., para. 33.

fighting back but can occur, as here, where a person in a position of power, trust or authority compels the complainant to engage in unwanted activity. However, the Complainant did testify to being physically restrained and overwhelmed after having expressed her lack of consent. This would be a plausible rationale for the Complainant to not struggle and suffer further physical assault in the interaction. She described that her failure to scream or yell was because she was "in shock", "ashamed", and "embarrassed", as well as cognizant that she was in a "very precarious situation with the Regional Director" that could compromise her job.[137] The Majority found this a credible explanation for her behaviour which was in their purview as the trier of fact to do.

Conclusion

136. After reviewing the totality of the evidence and the Majority's conclusions based on the credibility of the witnesses' testimony, the supporting evidence, and the unsatisfactory inconsistencies in the Appellant's evidence, we find that there was no error in the findings of fact as to Count 1 that would render the impugned Judgment "manifestly unreasonable".[138] In particular, we find that the evidence established with a high degree of probability that the Appellant engaged in non-consensual sex with the Complainant, amounting to sexual assault, on 2 December 2016.

Count 2: was the Appellant's obstruction or lack of cooperation with the OAIS investigation established by clear and convincing evidence?

137. The Dispute Tribunal agreed that the Appellant's conduct, with respect to the deletions of his e-mails and WhatsApp messages and the WhatsApp application from his phone, and his false statements about the location of his room in the Hotel Laico, were established by clear and convincing evidence.[139] The issue in dispute was whether these acts amounted to misconduct.

[137] Hearing Transcript, 23 September 2022 (Complainant), p. 12:14-19.
[138] *See George M'mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 63 ("The findings of fact made by the UNDT can only be disturbed (…) when there is an error of fact resulting in a manifestly unreasonable decision, which is not the case here.").
[139] Impugned Judgment, para. 109; dissenting opinion, para. 45.

138. Staff Rule 1.2(c) and the Framework establish a broad duty to cooperate with misconduct investigations.[140] We agree with the Dispute Tribunal's caution against construing the duty to cooperate "so broadly as to deny [a] staff member's right to privacy, private property and freedom from self-incrimination".[141] The Majority proposed the application of the inclusion doctrine, such that "subsequent actions of the offender aimed at avoiding liability" to a particular charge would be subsumed within the principal charge. In this manner, a staff member's cooperation with an investigation, or lack thereof, would be treated as a mitigating or aggravating factor, respectively, when considering a sanction.[142]

139. The Appellant adopts the views in the dissenting opinion that when the facts relevant for imposing discipline would also constitute a crime under national laws (such as rape), "the right against self-implication in the disciplinary procedure must be recognized", and that he should not be disciplined for failure to cooperate, nor for failing to disclose private communications on private devices.[143]

140. Whether a lack of cooperation may be considered an aggravating circumstance will depend on the circumstances of each case because there is a positive obligation in the regulatory framework on a staff member to cooperate with an investigation. Therefore, it cannot be concluded that a lack of cooperation can never be considered a relevant circumstance in every case. The Majority correctly emphasized that it was important to distinguish between "passive lack of cooperation and active hampering of an investigation."[144]

141. In reviewing the circumstances, the Majority correctly concluded that while the Appellant had committed misconduct in furnishing false statements about the location of his room and denying sending certain e-mails, it did not find misconduct with respect to the Appellant's deletion of the WhatsApp messages on his private phone, given the lack of clarity as to the Appellant's legal obligations to preserve or disclose this content. We agree with the Majority that the Appellant had made false statements and denials in his conflicting evidence. This was more than mere inconsistencies or mere lack of recollection. The Appellant did not

[140] Staff Rule 1.2(c) ("Staff members have a duty (…) to cooperate with duly authorized audits and investigations."); *see also* UNFPA Disciplinary Framework, para. 6.1.1(q) ("Misconduct includes but is not limited to (…) failure to cooperate with a duly authorized audit or investigation.").
[141] Impugned Judgment, para. 139.
[142] *Ibid.*, paras. 139-141.
[143] Dissenting opinion, para. 49.
[144] Impugned Judgment, para. 142.

doubt his recollections but rather provided vehement and conflicting denials and statements to the investigators and at the hearing even when faced with evidence to the contrary.

142. We find that the Majority did not err in its conclusion that the Appellant committed misconduct in providing false statements regarding the location of his hotel room and sending certain e-mails.

Proportionality of the sanction

143. As the Majority concluded that the Appellant had committed the sexual assault, which usually warrants separation from service, the Majority determined that the sanction was appropriate as serious misconduct pursuant to Staff Regulation 10.1(b) and Staff Rule 1.2(f) and several other acts. The Majority noted that mitigating factors of the Appellant's long service or unblemished record were offset by the aggravating factors regarding his conduct during the investigation.[145]

144. Given that we have concluded that the Dispute Tribunal did not err in its findings of misconduct under Count 1, it cannot be gainsaid that separation from service is the appropriate disciplinary sanction. As stated by Section 3.1 of the Bulletin, sexual assault and abuse "violate universally recognized international legal norms and standards and have always been unacceptable behaviour and prohibited conduct for United Nations staff". A determination that a staff member committed rape or sexual assault is undeniably serious misconduct that must lead to an end of the employment relationship between the staff member and the Organization. Given this, we do not need to review the proportionality of any disciplinary sanction based on Count 2.

III. Did the UNDT err in law and exceed its competence when it decided to redact the Appellant's name from the impugned Judgment?

145. On 17 August 2021, the Dispute Tribunal issued Order No. 166 granting the Appellant's Motion to Conceal the Identity of the [Appellant]. The Appellant had asserted that disclosure of his identity would impact negatively on the lives and careers and wider relationships of his wife and children. Although recording these grounds relied on by the Appellant, the Dispute Tribunal did not set out the reasons upon which it granted the Order.

[145] *Ibid.*, para. 152.

It seems fair to infer, in the absence of any clear reasons, that the Dispute Tribunal accepted the assertion of the Appellant that he and his family would be affected adversely by any publication of his identity. The Order required the removal of identifying particulars on decisions that might be published including on the Dispute Tribunal's website.

146. The Dispute Tribunal issued this Order four days after the Appellant filed it (13 August 2021), and without providing the Secretary-General an opportunity to respond.

147. On 18 August 2021, the Secretary-General filed a Motion to Request Case Management Discussion and Anonymity for Witness, in which he noted that in accordance with the Dispute Tribunal's Practice Direction,[146] the Secretary-General had five working days to respond to a party's motion, which he was not afforded. The Secretary-General elaborated that he would have opposed the request for anonymity on the grounds that accountability and transparency require that the Appellant's name be included in the Dispute Tribunal's Judgment except for the most exceptional cases, which this was not. The Secretary-General submits that the Dispute Tribunal did not further address this issue and redacted all references to the Appellant's name in UNDT documents.

148. On 28 March 2022, the Dispute Tribunal issued the impugned Judgment and in accordance with its Order, redacted the Appellant's name from the Judgment without providing reasons in the Judgment for doing so.

149. The Secretary-General submits that the Dispute Tribunal erred in law and exceeded its competence when it decided to redact the Appellant's name from the Judgment. The Appellant submits that the cross-appeal is time-barred.

150. We reject the Appellant's argument that the Secretary-General has lost the opportunity to contest this issue because the Secretary-General did not file an interlocutory appeal against Order No. 166 within a period of 30 days of its issuance. Rather, it was appropriate for the Secretary-General to include a challenge to anonymity in this appeal against the substantive Judgment of which the Order is an integral part. This Order was not just a procedural or interlocutory order. The final Judgment affirmed the Order by anonymizing the Appellant's name pursuant to the terms of the Order. Therefore, the Order is a valid element of the appeal

[146] *See* UNDT Practice Direction No. 5, para. 6 ("Where the motion is contested, either as to law or fact, the opposing party may file a response. Unless otherwise directed by the Tribunal, a response to a motion filed by a party shall be filed within five working days of service of the motion on that party.").

now brought against the main Judgment. Order No. 166 is not temporary nor limited in its application but applies until the conclusion of the decision of the case on its merits. The Order still applies to the UNDT's publication of this case.

151. The Dispute Tribunal's Practice Direction No. 5, on Filing of Motions and Responses, provides, at paragraph 6, that a party opposing a motion may file a response to the motion. This implies, necessarily, that the motion will be served on or otherwise brought to the attention of the other party so that this right of response can be acted upon. However, the motion that led to Order No. 166 was not promptly brought to the Secretary-General's attention in this case. The Dispute Tribunal not only failed to comply with its own Practice Direction but it also violated the principles of natural justice and due process by failing to give the Secretary-General adequate notice of the motion and the Order and an opportunity to reply. As such, the Dispute Tribunal acted without the adversely-affected party being heard and without authority to do so. Accordingly, we agree with the Secretary-General's arguments in the cross-appeal on this point.

152. However, even if it follows that Order No. 166 suffers from procedural unfairness, that is not the end of the matter. We must consider whether such an order should have been made after consideration of the Secretary-General's grounds of opposition to it and whether indeed the Appeals Tribunal should make an order relating to our judgment in this case.

153. In his arguments for disclosure of the Appellant's name, the Secretary-General relies significantly on what he says was the General Assembly's emphasis on the internal justice system (including the Dispute Tribunal) operating "transparently", but this does not preclude the Dispute Tribunal from anonymizing persons and parties in its judgments and orders in appropriate cases and with appropriate reasoning in balancing all interests in the matter.

154. The Appellant argues that there is a need to conceal his identity because of the negative impact that disclosing his name would have on his wife's career, his children, and the overall psychological impact on his family. He also argues that the redaction should extend to all public records, not just those published on the Dispute Tribunal website.

155. Absent any order directing otherwise, the usual or standard position has been that the names of the parties are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability and that names should be

redacted "in only the most sensitive of cases".[147] The Appeals Tribunal has also previously held that "personal embarrassment and discomfort are not sufficient grounds" for redaction.[148] However, there continues to be concerns raised regarding the privacy of individuals contained in judgments which are increasingly published and accessible online. In our digital age, such publication ensures that individuals' personal details are available online, worldwide, and in perpetuity. There are increasing calls for the privacy of individuals and parties to be protected in judgments.[149]

156. The Majority of the Appeals Tribunal Judges agree that good cause has been shown in these circumstances as an exception to the general and established principle that parties' names should be included in the Judgment. The circumstances that support the exception include that: albeit extremely serious, the evidence is that this was a single act of established misconduct as opposed to a known pattern of misconduct, and that the Appellant otherwise had a long and unblemished career having worked in the Organization since 1992,[150] there is no evidence that the Appellant will re-offend or needs to be deterred in the future, and the gravity of a finding of sexual assault or rape would undoubtedly have a negative impact on his family, who are blameless in this matter.[151] We are also mindful that, in accordance with our jurisprudence, we have not decided this case on the basis of the criminal standard of beyond a reasonable doubt. Further, transparency and general deterrence can be achieved by way of the detailed reasons and outcomes of our judgments. In these circumstances, publication of the Appellant's name would be for more punitive purposes than for transparency. Therefore, after balancing the competing interests, we find that these circumstances support the anonymization of the Appellant's name in the Appeals Tribunal Judgment, and, notwithstanding our concerns about how the Dispute Tribunal proceeded in the issuance of Order No. 166, we affirm the anonymization of the Appellant in the UNDT's judgments and orders.

[147] *Mobanga v. Secretary-General of the United Nations*, 2017-UNAT-741, para. 22.
[148] *Buff v. Secretary-General of the United Nations*, 2016-UNAT-639, para. 21.
[149] *See, e.g.,* Administration of justice at the United Nations, Report of the Internal Justice Council, A/77/130, para. 22 and Recommendation 3.
[150] Impugned Judgment, para. 152 (Appellant's "long service and unblemished record [were] indeed treated as mitigating circumstances").
[151] Hearing Transcript, 22 September 2021 (Appellant), pp. 22-24.

157. Based on this, we agree with the Secretary-General's cross-appeal to the extent of the procedural unfairness underlying Order No. 166. However, for the reasons set out above and on our own consideration of the matter, the Appeals Tribunal concludes that the Appellant's name should be anonymized in the judgments and orders issued by the Dispute Tribunal and the Appeals Tribunal in this case. [152]

[152] In so holding, we have resolved the issue that we previously deferred. *See AAE v. Secretary-General of the United Nations and Registrar of the United Nations Appeals Tribunal*, Order No. 471 (2022), paras. 12-13.

Judgment

158. The Appellant's appeal is dismissed, and Judgment No. UNDT/2022/033 is hereby affirmed. The Secretary-General's cross-appeal is partially granted to the extent that there was procedural error in the issuance of Order No. 166. However, the Order is not set aside or vacated. The Appellant's name in the UNAT's Judgment and orders is anonymized, and the anonymization of the Appellant's name in the UNDT proceedings is affirmed, based on the reasoning in this Judgment.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding	Judge Murphy	Judge Colgan
(Signed)	*(Signed)*	*(Signed)*
Judge Raikos	Judge Knierim	Judge Halfeld

(Signed)

Judge Gao

Judge Murphy, Judge Colgan and Judge Knierim append a joint partly dissenting opinion as to the cross-appeal of the Secretary-General.

Judgment published and entered in the Register on this 28th day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar

Judge Murphy's, Judge Colgan's and Judge Knierim's Joint Dissenting Opinion on the Secretary-General's Cross-Appeal:

1. We, the Minority, would uphold the Secretary-General's appeal against the anonymization in the substantive Judgment of the UNDT of the Appellant's identity, based as it was, on a flawed interlocutory decision made without allowing the Secretary-General a sufficient opportunity to be heard.[153]

2. With regard to the Appeals Tribunal's separate and independent decision to redact the Appellant's name from the Appeals Tribunal's orders and judgments, we do not consider that the Appellant has established sufficiently good cause to rebut the presumption that his identity should be published. To assert, as he does without more, that his and his family's interests will be harmed by publication of his name, fails to establish how these consequences are exceptional in his case, when indeed, these are unfortunately the inevitable consequences in most or perhaps even all such cases. Nor are those additional grounds relied on by the Majority (clean past record, unlikelihood of repetition of conduct) established at all, let alone to any degree of probability.

3. It is unclear whether Article 10(9) of the Appeals Tribunal Statute (protection of personal data in published judgments) is intended to extend to the anonymization of staff members' names in judgments, or whether the UNAT retains a residual discretion where good cause not to do so may rebut that presumption. This may illustrate the desirability of reconsideration of these statutory provisions by the General Assembly. While this Tribunal's Rules of Procedure are subordinate to its Statute, they nevertheless must and do have the General Assembly's approval and Article 20(2) of the Rules provides that "[t]he published judgments will normally include the names of the parties".

[153] AAE's application for concealment of his identity was filed with the UNDT on 13 August 2021. After having been unable to access this through the UNDT's e-filing portal, the motion was received by the Respondent by e-mail on 16 August 2021. The Respondent then had 5 working days within which to respond to the motion. Order No. 166 was nevertheless made by the UNDT on 17 August 2021, granting AAE concealment of his identity. On 18 August 2021, this situation was brought to the UNDT's attention by the Respondent, but the Tribunal's error was not remedied by it as it could have done, for example, by vacating Order No. 166 and re-determining the motion having considered the Respondent's opposition to it.

4. Finally, while we acknowledge the desirability of protection of personal privacy, so too must we bring to account in a balancing exercise, the need to deter others, no less senior officials of the United Nations, from insidious and harmful sexual abuse and exploitation.

5. For these reasons we would not have found good cause to depart in this case from the UNAT's practice of naming parties in judgments, [154] and we would have allowed the Secretary-General's cross-appeal.

Original and Authoritative Version: English

Dated this 24th day of March 2023 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy, Presiding	Judge Colgan	Judge Knierim

Entered in the Register on this 28th day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar

[154] *See, e.g., Oh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-480 (denying anonymity to staff member who was dismissed from service for engaging in sexual exploitation and abuse of women).