UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/072
Judgment No.: UNDT/2013/131
Date: 29 October 2013
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Seth Levine, OSLA

Counsel for respondent:
Susan Maddox, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Operation in Côte d'Ivoire (UNOCI). On 19 October 2010, he filed the current Application with the United Nations Dispute Tribunal (the Tribunal) to contest the decision of the Under-Secretary-General for the Department of Management (USG/DM) to summarily dismiss him from service for serious misconduct (the Contested Decision).

Procedural history

2. On 8 February 2011, the Applicant filed a motion for summary judgment, which was served on the Respondent on 10 February 2011. On 25 February 2011, the Respondent filed a motion for directions in response to the Applicant's motion for summary judgment. The Respondent's motion included brief submissions on the motion for summary judgment and a request that the Applicant's motion be rejected without the need for further submissions.

3. By Order No. 013 (NBI/2013) dated 17 January 2013, the Tribunal rejected the Applicant's motion for summary judgment on the basis that: (i) there was a dispute as to the material facts of the case; and (ii) summary judgment has no place in disciplinary cases due to the quasi-criminal nature of these matters.

4. Pursuant to art. 16.2 of the Rules of Procedure of the Dispute Tribunal, the Tribunal heard the case on 11 and 12 February 2013 during which time oral evidence was given by the Applicant and on behalf of the Respondent by Ms. SB, a former investigator for the Office of Internal Oversight Services (OIOS).

Facts

5. The Applicant entered into service with UNOCI on 22 June 2004 as an Engineer at the P-3 level. He was then appointed Head of the Electrical and Mechanical Unit of the Engineering Section. Subsequently, he was selected for a

temporary position at United Nations Headquarters in New York as an Engineer at the P-4 level in the Logistic Support Division, Department of Field Support (LSD/DFS). He served in this position until his separation from service on 3 August 2010.

6. Between 21 and 23 February 2007, the *Police criminelle d'Abidjan* in Côte d'Ivoire raided five local businesses suspected of operating illegal brothels. The raids resulted in the apprehension of suspected procurers and a number of women suspected of being prostitutes. Among the women apprehended, four were from a bar called Bar Lido and were identified as VO1, VO2, VO3 and VO4 (Victims) who all claimed to have been trafficked and compelled to work as prostitutes.

7. On 5 March 2007, OIOS received a Code Cable, issued by the Special Representative of the Secretary-General (SRSG), UNOCI, reporting that three of the Victims claimed that UNOCI staff members were among their customers.

8. On 6 March 2007, OIOS initiated an investigation into the report made by the SRSG/UNOCI.

9. On 7 and 8 March 2007, OIOS gained access to the Victims who were at the time housed in an International Organization for Migration (IOM) shelter in Abidjan. IOM advised OIOS that due to the anguished state of the Victims they were to be repatriated to their country of origin at the earliest possible opportunity thus OIOS had a very limited time to conduct the interviews. The four Victims were interviewed separately and they stated that they had been approached by a woman in the Philippines and were offered employment as waitresses in a bar or restaurant in Paris, France, but ended up in Abidjan. The Victims stated that upon their arrival their passports were confiscated and they were taken to Bar Lido where they were housed and required to work as waitresses and prostitutes.

10. VO1, VO3 and VO4 stated to the investigators that they had been paid for sexual services by UNOCI staff. VO3 mentioned one SL whom she identified from a

photo array. She also mentioned another UNOCI staff member who had paid her for sexual services. According to VO3 the man was of half-Japanese and half-Korean ethnicity. The version of VO3 was corroborated by VO4. VO3 identified the half-Japanese and half-Korean individual as the Applicant from a photo spread.

11. On three occasions OIOS interviewed a police officer, AB, working in the Department dealing with human trafficking in Abidjan. AB told the investigators that the raids carried out in the bars were prompted by a report he received from Interpol in February 2007 alleging that women were being trafficked from the Philippines for the purpose of working as prostitutes in Bar Lido and other bars in Abidjan. On 21 and 22 February 2007 he raided five establishments with a view to identifying prostitutes and the owners of these establishments. He was not in a position to provide any evidence leading to the identification of any UNOCI members suspected of using the services of prostitutes.

12. OIOS interviewed the Applicant on 23 July 2007.

13. On the basis of the statements of VO3, VO4 and the Applicant, OIOS concluded in a report dated 15 July 2008 that the Applicant had paid for sexual services, including from VO3 and VO4. In this respect, OIOS concluded that the Applicant paid VO3 for sexual services at his residence on several occasions between October 2006 and December 2006 and that he paid VO4 for sexual intercourse on the premises of Bar Lido in February 2007. Additionally, OIOS concluded that the Applicant transported unauthorized passengers on multiple occasions in a United Nations vehicle that was assigned to him.

14. The Under-Secretary-General for Field Support (USG/DFS) referred the Applicant's case to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) on 8 August 2008 for "appropriate action".

15. On 10 October 2008, the Applicant received the allegations of misconduct, dated 27 August 2008, from OHRM charging him with, *inter alia*, sexual exploitation

and abuse in contravention of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) and the improper use of United Nations property for transporting unauthorized passengers in a United Nations vehicle.

16. The Applicant submitted a response to the allegations of misconduct on 15 December 2008. On 31 March 2009, the ASG/OHRM referred the matter to the Joint Disciplinary Committee (JDC) for advice on whether misconduct had occurred and, if so, the appropriate sanctions to be imposed. The Applicant submitted comments to the JDC by a memorandum dated 18 May 2009.

17. The JDC was unable to consider the Applicant's case prior to the expiration of its mandate on 30 June 2009 thus the matter was referred to the Secretary-General, in accordance with ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice), for further action.

18. On 3 August 2010, the Applicant received a memorandum dated 29 July 2010 from the ASG/OHRM informing him that the USG/DM, on behalf of the Secretary-General, had decided to dismiss him from service with immediate effect from the date of his receipt of the memorandum.

Issues

19. The issues the Tribunal will examine in the present matter are as follows:

a. Whether the facts on which the disciplinary measure was based have been established and, if so, whether the established facts legally amount to misconduct under the United Nations Regulations and Rules;

b. Whether the disciplinary measure imposed was proportionate to the offence, if any; and

c. Whether there was a substantive or procedural irregularity.

Were the facts upon which the disciplinary measure based established and if so did the established facts legally amount to misconduct under the United Nations Regulations and Rules?

Applicant's submissions

20. The Applicant submits that the evidence falls short of establishing the acts of misconduct with which he was charged. He denies all the allegations, pointing out that the evidence used to substantiate the charges consisted of: (a) unsigned hearsay statements from OIOS investigators based on alleged interviews with anonymous individuals, and (b) an unsigned hearsay statement of OIOS investigators based on an interview with the Applicant, which he submitted was in substantial part fabricated. These hearsay statements lack any of the common indicia of reliability and are entirely deficient in terms of probative value. Any reasonable person, when presented with the evidence, would have to conclude that even the lowest of standards, that is a *prima facie* case, had not been met.

21. The "interview statements" referred to in the Impugned Decision are no more than unsigned records or summaries of interviews with alleged victims prepared by the OIOS investigators. The "interview statements" are therefore not firsthand accounts of the events they purport to describe; they are an account by the investigators of what was said to him or her by the alleged victims. By definition, a report made by one person of the statements of another person is hearsay evidence.

22. The Applicant asserts that he has not had an opportunity to examine or confront the alleged victims thus there is no means to determine whether or not the information provided by the sources was truthful and accurate. Cross-examining the investigators who compiled these "interview statements" can in no way replace the opportunity to cross-examine the persons who actually made the statements.

23. Given the myriad of deficiencies in the evidence identified above (anonymity, lack of any indication that the writings were adopted by the alleged victims as true and correct, lack of ability to test the evidence in any meaningful way) and absent any

indicia of reliability to accord the records of interview any probative value and/or weight in judicial proceedings, it is clear that there was no credible basis on which to base the disciplinary sanction imposed. Admitting these statements or giving them any weight whatsoever would be wholly unfair. The Applicant urges the Tribunal to use its discretion to deny the admission of any such evidence in these proceedings, which consequently removes the legal basis of the Impugned Decision.

24. The photo spread from which the Applicant was identified should not be admitted in evidence. No weight whatsoever should be attached to these identifications as they are entirely unauthenticated and therefore without any indicia of reliability. There is no evidence whatsoever to even suggest that a proper procedure was followed.

Respondent's submissions

25. The evidence against the Applicant consists of: (a) the general circumstances of the closure of Bar Lido by local authorities on the grounds of illegal prostitution of Filipino women at the bar; (b) the fact that four of the Filipino women identified the Applicant as a customer of Bar Lido prostitutes; and (c) the statement made by the Applicant to the OIOS investigators in which he specifically stated that he used the services of women from Bar Lido.

26. In his interview, the Applicant stated that in December 2006 he went to Bar Lido with a friend and paid for two prostitutes from the establishment. The Applicant stated that he transported his friend and the two women to a local discotheque in the official United Nations vehicle assigned to him without authorization. The Applicant stated that he then transported one of the women to his apartment, where they watched a movie, consumed beverages and engaged in sexual intercourse. The Applicant stated that he gave the women from Bar Lido CFA 60,000-65,000 (approximately USD 120-130), but claimed that this payment was to show his "appreciation" after "having a good time", and was not specifically for sexual services.

27. The Applicant later sought to recant this statement on the basis that the OIOS investigators allegedly fabricated his statement. There is no indication on the record that the OIOS investigators would, in direct breach of their duties as investigators, fabricate the Applicant's statement. As is referenced in the Investigation Report, a number of UNOCI staff members were implicated in this matter but only the Applicant made a self-incriminating statement. The Applicant has provided no explanation as to why he, as opposed to the other implicated staff members, was singled out in this respect. Central to this issue is the credibility of the investigators concerned.

28. The Respondent does not accept as persuasive the Applicant’s claim that he was physica1ly incapacitated. Dr. JL's report did not support the conclusion that the Applicant was physically incapable of the conduct but that he was actually physically capable. In the absence of more conclusive evidence, the concerns raised by Dr. JL's report were found not to displace the inference that the Applicant had committed the conduct. Furthermore, even if the Applicant suffered from erectile dysfunction, this does not, in and of itself, mean that he did not procure sexual services from the women. In this connection sec. 3.2(c) of ST/SGB/2003/13 provides that "exchange of money...for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited".

29. In response to the submission of the Applicant that the evidence against him consisted merely of hearsay evidence the Respondent contends that there are no principles in the jurisprudence of the former Administrative Tribunal or the current Tribunal that require that the evidence that is attached to an investigation report should not be considered in determining if the conduct in question has been established. ST/AI/371 has always envisaged that the evidence against a staff member be assessed on the basis of the written record transmitted to the ASG/OHRM. By necessity, this would include accounts of interviews, and statements that may strictly be considered "hearsay" evidence, but which have been considered to date to be evidence of the matters set out therein, unless contradicted by other evidence.

30. As regards the probative value of the photo spread that was used by the investigators for the purposes of having the victims identify those who were paying them for sexual services, the Respondent submits that the fact that the women identified the Applicant may not be considered dispositive of whether the Applicant committed the conduct, but does raise an allegation that it was proper to put it to him. Furthermore the Applicant responded to this allegation and the Respondent submits that this provided sufficient evidence to proceed with his dismissal.

Considerations

31. In *Molari* 2011-UNAT-164, the United Nations Appeals Tribunal (UNAT) held that:

> When termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. 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.

32. In the case of *Masri* 2010-UNAT-098, UNAT held that in disciplinary matters "the role of the Tribunal is to examine whether the facts on which the sanction is based have been *established*, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence" (emphasis added). This would require a scrutiny of the evidence and this Tribunal endorses the approach it took in the case of *Diakite* UNDT/2010/024:

> Once the Tribunal determines that the evidence in support of the charge is credible the next step is to determine whether the evidence is sufficient to lead to the reasonable conclusion that the act of misconduct has been proved. In other words, do the facts presented permit the conclusion that the burden of proof has been met? The exercise involves a careful scrutiny of the facts, the nature of the charges, the defence put forward and the applicable rules and regulations.

Testimony of anonymous witnesses

33. Neither VO3 nor VO4 testified before the Tribunal. Their identities were not disclosed to the Applicant or to the Tribunal in view of the fact that they were victims of human trafficking. As such, their evidence is to be considered as anonymous. In the case of *Liyanarachchige* 2010-UNAT-087, UNAT held:

> The use of statements gathered in the course of the investigation from witnesses who remained anonymous throughout the proceedings, including before the Tribunal, cannot be excluded as a matter of principle from disciplinary matters, even though anonymity does not permit confrontation with the witnesses themselves but only with the person who recorded the statements of the anonymous witnesses.
>
> However, such statements may be used as evidence only in exceptional cases because of the difficulties in establishing the facts, if such facts are seriously prejudicial to the work, functioning and reputation of the Organization, and if maintaining anonymity is really necessary for the protection of the witness. Furthermore, it should be possible to verify the circumstances surrounding anonymous witness statements and to allow the accused staff member to effectively challenge such statements.
>
> It should be recalled, however, that even assuming that the above-mentioned conditions were met, a disciplinary measure may not be founded solely on anonymous statements. In disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defence and the requirements of adversary procedure. In this case, the charges are based solely on statements made to the OIOS investigator by anonymous witnesses.

34. UNAT does not exclude totally the use of anonymous statements but makes their use subject to the protection of the work, functioning and reputation of the Organization and the need to protect witnesses. An accused staff member should also be permitted to challenge such statements by verifying the circumstances in which they were taken. But there may be circumstances where this is not possible. Thus in the case of *Applicant* 2013-UNAT-302, the UNAT held:

> There are, however, cases in which it is impossible, or inadvisable, for such confrontation [of witnesses by the Applicant] to occur. In the

> above-cited *Hourani*[1], for example, the former Administrative Tribunal weighed the right of the accused staff member against justified "precautionary measures to protect witnesses" "likely to be suborned or subjected to threats and physical harm" and concluded that cross-examination was not an absolute right, "in certain exceptional circumstances, and so long as it is established to the Tribunal's satisfaction that the Applicant was afforded fair and legitimate opportunities to defend his or her position".

35. It cannot be disputed that the reputation of the Organization is at stake when staff employed by it resort to the services of prostitutes, the more so when the women are the victims of trafficking. The evidence in the present case that staff members of UNOCI were paying for sexual services and that the women were part of a human trafficking ring was not challenged. The Tribunal accepts that evidence in its entirety and holds that the reputation of the Organization was thereby seriously at stake. Nor was there any dispute that the women in the present case had to remain anonymous as they had been removed from a human trafficking ring and were traumatised. Two of the conditions referred to by UNAT are met for the use of the anonymous statements.

36. The third condition is the opportunity that should be afforded to an accused staff member to challenge the circumstances in which the statements of witnesses were recorded. In the present system of investigation, the investigators will never allow an accused to confront witnesses at the investigation stage in view of the rules that bind them. Here, however, the staff member was given all latitude by the Tribunal to cross-examine the investigator Ms. SB on the circumstances in which the statements of the anonymous witnesses were taken and to challenge them.

37. Once that opportunity has been given and used, it is for the Tribunal in the exercise of its inherent power to evaluate evidence to say whether the statements were successfully challenged or not. This necessitates a scrutiny of the testimony of Ms. SB and also the circumstances and time constraints in the recording of the statements of the victims.

[1] UN Administrative Tribunal Judgment No. 654, *Hourani* (1994).

38. From the documents on file and the testimony of Ms. SB it is undisputed that she was one of the investigators who interviewed the Filipino women. She was aware of how the statements of these women were taken.

39. It cannot be disputed that once the Filipino women were saved as it were from the human trafficking ring, some measures of precaution had to be taken both as regards their safety and their accessibility to investigators. They were not witnesses in the normal and ordinary sense who could be interviewed lengthily and be recalled for further clarification or who could be paraded in public for cross examination. In any criminal justice system when the courts are faced with such a situation special measures are put into place for the questioning of these witnesses. Though a criminal trial must conform to international rules of fairness, there is also an imperative need to balance the rights of an accused with that of a victim. Were it to be otherwise witness and victims would not be willing to come forward if they felt that the scales were heavily tilted in favour of an accused.

40. The interview records of the Filipino women must also be coupled with the identification of the Applicant by two of them. VO3 and VO4 identified the Applicant from a photo spread. The Applicant took strong objection to this evidence. The use of a photo spread for the purposes of identification either in a criminal case or disciplinary matter is not per se objectionable and evidence obtained from such a process is not necessarily inadmissible so long as the court or tribunal has due regard to the factors that may affect the reliability of such evidence. The types of factors that may be relevant were outlined in the case of *Fatmir Limaj et al v. Prosecutor*[2], where the International Criminal Tribunal for the Former Yugoslavia observed:

> A particular concern with photo spread identification is that the photograph used of the Accused may not be a typical likeness even though it accurately records the features of the Accused as they appeared at one particular moment. To this, the Chamber would add, as other relevant factors, the clarity or quality of the photograph of the Accused used in the photo spread, and the limitations inherent in a small two-dimensional photograph by contrast with a three

[2] Case No. IT-03-66-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Judgment, 30 November 2005.

> dimensional view of a live person. It is also a material factor whether the witness was previously familiar with the subject of the identification, i.e. whether he is "recognising" someone previously known or "identifying" a stranger. While the Chamber has not been prepared to disregard every identification made using a photo spread of one or more of the Accused in the present case, it has endeavoured to analyse all the circumstances as disclosed in the evidence, and potentially affecting such identifications, conscious of their limitations and potential unreliability, and has assessed the reliability of these identifications with considerable care and caution. Among the matters the Chamber regarded as being of particular relevance to this exercise was whether the photograph was clear enough and matched the description of the Accused at the time of the events, whether the Accused blended with or stood out among the foils, whether a long time had elapsed between the original sighting of the Accused and the photo spread identification, whether the identification was made immediately and with confidence, or otherwise, whether there were opportunities for the witness to become familiar with the appearance of the Accused after the events and before the identification, be it in person or through the media.

41. The Tribunal has analysed the photo spread used in this case, as well as the documentary evidence of the investigators involved in the process in light of the guidance provided in *Fatmir Limaj et al v. Prosecutor*[3]. The Tribunal concludes that the photo spread was of good quality and contained the photographs of a number of males. The two women who identified the Applicant were familiar with him as they stated that he had contacted and paid them for sexual services; they did not have an opportunity to see the Applicant in other circumstances such that they would be prone to pick him.

42. The Tribunal holds that the statements of VO3 and VO4 coupled with the identification of the Applicant by them are admissible.

43. One of the objections raised against the evidence was that it was hearsay and should not be admitted. The Tribunal does not exclude hearsay evidence and admits evidence if it is relevant and has probative value, subject to its discretion to exclude frivolous and irrelevant evidence and evidence that has no probative value as

[3] Ibid.

provided by arts. 18.1 and 18.5 of its Rules of Procedure. Under its power to determine the admissibility of evidence the Tribunal may also exclude evidence which may be highly prejudicial to an applicant in a disciplinary matter in view of the quasi-criminal nature of disciplinary proceedings.

44. A further objection raised against the testimony of the witnesses was that it was anonymous and therefore not admissible. The testimony of a witness whom the Applicant has not had the opportunity to confront in proceedings is not inadmissible per se. However, it is not sufficient alone to ground a decision adverse to a staff member in a disciplinary case. This is the effect of the decision of UNAT in the *Liyanarachchige* case. There must be in addition some independent evidence that can confirm the anonymous testimony, especially where the staff member has not had a chance to confront the witnesses and therefore challenge any incriminating evidence they have given against the staff member.

45. In the case of *Applicant*, quoted above, UNAT ruled that a staff member was properly found guilty of misconduct on the statements of witnesses whom that staff member could not confront as they were untraceable provided the staff had an opportunity to defend his position. This is what UNAT said:

> In the instant case, it proved impossible for the Administration to produce the Complainants to testify, and be cross-examined, before the Dispute Tribunal. This situation, while certainly regrettable, was not of the making of the Organization and should not be held against it. The United Nations operates globally and in situations which can prove highly transient or volatile. The Appeals Tribunal accepts that the Organization was unable to produce witnesses in the South Sudan almost five years after the complained-of incidents.
>
> The Tribunal is satisfied that the key elements of the Applicant's rights of due process were met: he was fully informed of the charges against him, the identity of his accusers and their testimony; as such, he was able to mount a defense and to call into question the veracity of their statements. This Tribunal is, therefore, satisfied that the interests of justice were served in this case, despite his inability to confront the persons who had given evidence against him during the initial investigation.

46. In the same case UNAT makes a distinction between the testimonies of witnesses who are not called but whose identities are known or made known to an accused staff member and the testimony of anonymous witnesses by holding:

> This decision is not inconsistent with *Liyanarachchige*, in which this Tribunal concluded that "a disciplinary measure may not be founded solely on anonymous statements". In the Applicant's case, the statements of the Complainants were neither anonymous nor the only evidence against the Applicant. The Complainants and other witnesses were named in the CRFs and in the signed interview statements they gave the Investigator, as well as in the investigation report and the ad hoc JDC report. Since the Applicant knew the identities of the Complainants and other witnesses, he was able to and did prepare a defence to each of the alleged incidents described by them.

47. It is clear that UNAT makes a distinction between two categories of witnesses, namely those whose identities are disclosed to an accused staff member and those whose identities are not disclosed. This Tribunal holds the view that such a distinction is not warranted because in both situations the witnesses are not available for confrontation by the staff member. This Tribunal considers that the requirements of due process rights will been met in relation to witness statements of both identified and unidentified witnesses if the witnesses statements have been provided to the staff member and the staff member has had an opportunity to comment on, and respond to, the statements.

Is there admissible independent evidence to corroborate the anonymous evidence?

48. The only evidence that has been presented to the Tribunal other than the written statements of VO3 and VO4 and the photo spread consists in the record of the interview of the Applicant taken by the OIOS investigators.

49. The Applicant was interviewed by two investigators. The lead investigator, Ms. SB, took handwritten notes of what the Applicant said in the interview. According to the notes taken by Ms. SB, the Applicant stated during the interview that he had received the compulsory United Nations training on sexual exploitation and sexual abuse. He added that he often frequented bars in Abidjan including Jam's, Olympique and Bar Lido. He stated that he frequented these establishments with his friend who worked in the local fishing industry. He admitted having paid for the sexual services of four prostitutes from Bar Lido and Olympique on approximately ten or twelve occasions. The Applicant admitted having gone to Bar Lido in December 2006 with his friend, and on that occasion paying for two prostitutes from the establishment. He transported his friend and the two women from Bar Lido to a local discotheque without having obtained a release of liability form from any of the passengers. He subsequently transported one of the women to his apartment where they watched a movie, consumed beverages, and engaged in sexual intercourse. He could not recall the names of any of the women that he had paid for sexual services.

50. The Applicant added that he gave the women from Bar Lido CPA 60,000 or CPA 65,000 (approximately USD 120 or USD 130). He qualified that statement by adding that the payment was merely to show them his "appreciation" after having had a "good time", not specifically for sexual services.

51. Before the interview concluded with the investigators the Applicant was asked whether he wished to make any further comment on what he had stated. He responded:

> The working girls in the bar-are they prostitutes or not? I am paying my appreciation. I was taking care of those poor ladies in a good way. I never abused any of them. I am not paying a street walker. I was just trying to help them financially. I am just showing my appreciation. We drink in [the] bar, we go out, and then I show my appreciation after having a good time. I do not see it as buying a body in the street.

52. In the course of the interview, the Applicant answered a number of questions and admitted to having used the services of prostitutes. This admission must be viewed not in isolation but in the overall context of all the answers he gave during the interview.

53. The general rule is that an admission is only admissible in a criminal case if it has been made without any inducement, fear or pressure. An admission can also be oral or reduced to writing though an admission that has been reduced to writing and signed by the maker carries more weight than one which is not put down in writing or if put in writing is not signed by its maker. In the Tribunal's view, as far as admissibility is concerned, there is a requirement that the admission must be reduced to writing before it can be admitted.

54. In her testimony Ms. SB stated that when she interviewed the Applicant no pressure and no suggestion were made to him. The Applicant stated a number of matters as they appear in the notes taken by Ms. SB during the interview. Notes taken during an interview may be admissible if they are contemporaneous notes. The test of contemporaneity is satisfied if the following conditions are met:

a. As far as possible, the statements given by the person interrogated are taken down by the note taker verbatim; and

b. The statements are taken at the very moment the person is speaking or reasonably soon thereafter; there must not be too long a delay between the interrogation and the taking down of notes because the memory of the note taker is bound to fail after a time.

55. Given the tenor of the notes and the fact that Ms. SB stated that she was recording these notes at the very moment the Applicant was answering, the Tribunal holds that the notes satisfied the test of contemporaneity thereby brushing aside the argument of the Applicant that they were not contemporaneous and therefore were fabricated.

56. The Applicant answered questions on his professional qualification as an engineer; the date on which he arrived at the mission (2004); his posting in Baghdad between 2001 to 2003; being engaged in the construction business in Korea; having moved residence in Abidjan at the end of 2005; his friend CH with whom he would hang around for drinks; the familiarity of CH with bars in Abidjan; his denial that he had ever gone upstairs in Bar Lido; the distance of his residence from Bar Lido; his friend one M who is also Korean; hearing about the raid of bars by the police; training on sexual exploitation; and his marriage and family. It would be preposterous to find that all these facts were invented and fabricated by Ms. SB.

57. If the above facts were not fabricated by her why then would she have invented the statement of the Applicant that he had paid the girls from Bar Lido for sexual services, which are contained in the same set of notes and having been drawn up in the same handwriting? Furthermore, as rightly pointed out by the Respondent, why would the investigators have fabricated any incriminating evidence against the Applicant and not against other staff members of the mission who were also being investigated for similar prohibited conduct?

58. The Tribunal rules that the record of the interviews of the Applicant is a correct reflection of the facts gathered by the investigators. It is not for the Applicant to show that he did not make the incriminating statements but for the Respondent to establish that they were made voluntarily without any coercion, pressure, promise, threat or moral or physical force.

59. The statements of VO3 and VO4 are corroborated by the admission of the Applicant as well as by the statement he made about making payments to the girls for his “appreciation after having a good time”. These constitute sufficient proof of the commission of the prohibited conduct by the Applicant. The Respondent has satisfied that burden according to the standard of proof set out in *Molari*.

Defences

60. Two other defences were raised by the Applicant. First, the Applicant asserted that the interview was conducted in English, a language of which he had only a limited working knowledge. The Tribunal finds that this is a lame defence as the Applicant has a Masters in English from a British university and conceded this fact in cross examination. He even mentioned this fact in his Personal History Profile when he applied to join the Organization. Ms. SB stated in her testimony that the Applicant had no issues with the English language. At the hearing, the Applicant testified in English and the Tribunal has no doubt that his knowledge of English was adequate enough not to put him at a disadvantage when he was interviewed by the investigators.

61. Second, the Applicant claimed that he was impotent and lacked the physical ability to engage in any sexual intercourse. The Applicant relied on the medical report supplied by Dr. JL as evidence for this argument. The Legal Officer from the Administrative Law Section pressed counsel for the Applicant to provide more conclusive evidence of the Applicant's contention of his physical incapacity; however, no such further evidence was provided.

62. The Tribunal finds that physical inability to engage in sexual intercourse is not relevant for the purpose of determining whether the Applicant is guilty of the prohibited conduct. ST/SGB/2003/13 defines “sexual exploitation” as:

> any actual or attempted abuse of a position of vulnerability, differential power, or trust, or sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.

63. The section goes on to state that “sexual abuse” means the “actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.” From these definitions it is clear that what is prohibited is not the specific act of sexual intercourse as such but the form of conduct that leads to sexual exploitation of people in a vulnerable situation. The Tribunal considers that the offence is committed at the moment payment is made for the services. There is no need to engage in sexual intercourse; it is enough that the interactions are sexual in

nature. The Tribunal is satisfied that the Applicant's statements, as noted down by Ms. SB in the interview, that "I am paying my appreciation. I was taking care of those poor ladies in a good way […] I was just trying to help them financially […] We drink in [the] bar, we go out, and then I show my appreciation after having a good time" show that he paid for services of the Victims. Even on the assumption that the confession of the Applicant cannot be relied on, the above statement standing alone is sufficient to constitute prohibited conduct irrespective of whether the Applicant actually had sexual intercourse with the Victims.

Additional comments

64. The Tribunal will open a parenthesis to point out that at the stage of the investigation by OIOS there is never any opportunity for a suspect staff member to confront witnesses as this is not permitted by the guidelines of the investigators. The former JDC, where a staff member could challenge a decision and where the Secretary-General could go for advice in disciplinary matters, has been abolished. Before the JDC it would have been possible to confront witnesses prior to a sanction being imposed.

65. Under the present system, following an investigation during which the staff member is bound to cooperate and has no opportunity to confront witnesses, a report is drawn up and the staff member is allowed to comment on it. Depending on the nature of the evidence, the matter may end up at the level of the chief supervisor of the staff member or be transmitted to OHRM in New York for action. Charges may then be drafted on the basis of the report and submitted to the staff member who is allowed an opportunity to respond on paper. A decision as to the guilt or otherwise of the staff member is then taken from all documentary records and evidence. The situation is such that a staff member may face the ultimate sanction of dismissal without having had an opportunity to confront witnesses or be heard by those who decide on his/her fate in New York.

Was the disciplinary measure imposed proportionate to the offence?

66. The disciplinary measure of summary dismissal was proportionate to the Applicant's misconduct, namely resorting to the services of women for sex, women who, as the undisputed evidence has demonstrated, were the victims of human trafficking.

67. In this connection the Tribunal recalls that the United Nations Convention against Transnational Organized Crime came into force on 29 September 2003. This Convention was supplemented by two Protocols, namely, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000, and the Protocol against the Smuggling of Migrants by Land, Sea, and Air, which came into force on 28 January 2004.

68. Art. 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

69. The Secretary-General's bulletin[4] strongly condemns the resort to women for sex in consideration for money. Both sexual abuse and sexual exploitation are viewed with the utmost gravity in the bulletin and they constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal.[5]

Were there any substantive or procedural irregularities?

[4] ST/SGB/2003/13
[5] Ibid, section 3.2(a)

Applicant's submissions

70. The Applicant submits that his due process rights have been violated. In regard to the alleged admission the Applicant made to the investigators concerning payments to the women in the establishments he had visited for sexual services, the Applicant submits that the interview was conducted in a language, namely English, and that he had limited knowledge of that language. Furthermore, the record was not read out to him either in English or a language which he understood.

71. It is a violation of the most elementary legal principles, fairness and due process for OIOS investigators to conduct interviews of persons suspected of misconduct, which written record is never shown to the suspect to provide him or her with the opportunity to verify its contents, correct any inaccuracies, and authenticate with a signature to adopt the record as his own.

72. Two cases of the European Court of Human Rights support this position. In *Lucà v Italy*[6] the Court held:

> [W]here a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 [of the European Convention on Human Rights].

73. In *Albert and Le Compte v. Belgium*[7] the Court held:[8]

> In the opinion of the Court, the principles set out in paragraph 2 (art. 6-2) and in the provisions of paragraph 3 invoked by Dr. Albert (that is to say, only subparagraphs (a),(b) and (d)) (art. 6-3-a, art. 6-3-b, art. 6-

[6] Application No. 33354/96, Judgment, 27 February 2001, para. 40.
[7] Applications Nos. 7299/75 and 7496/76, Judgment, 28 January 1983, para. 39.
[8] Art. 6(2) of the European Convention on Human Rights provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Art. 6(3) provides: "Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; […] (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;".

> 3-d) are applicable, mutatis mutandis, to disciplinary proceedings subject to paragraph 1 (art. 6-1) in the same way as in the case of a person charged with a criminal offence.

74. In Judgment No. 1246, *Sokoloff* the former Administrative Tribunal held:

> [A]s soon as the Applicant was identified as a possible wrongdoer, he should have been accorded due process, which includes being notified of the allegations in writing, provided with all the documentary evidence, and permitted to have counsel.

75. OIOS failed to advise the Applicant that he had a right to counsel because at the time of the interview it was clear that he was already a suspect of misconduct. His interview took place three months after the 'witness' interviews. Accordingly, he should have been provided with full due process, including the right to secure counsel.

76. In Judgment No. 1447, *Tissot* the former Administrative Tribunal held:

> The Tribunal does not accept the Respondent's claim that there should be a distinction between the limited due process rights applicable during preliminary investigations regarding possible misconduct and those applicable after a staff member has been charged with misconduct.

77. Upon receipt of his response to the charges, OHRM requested OIOS to provide comments on the Applicant's response. Following these comments the matter was referred to the then JDC without sharing these additional comments with the Applicant prior to the decision that the Applicant committed misconduct and referring the matter to the JDC for advice "as to the appropriate sanction to be imposed in the present case". This was arguably a prejudicial statement in violation of sec. 9(b) of old STI/AJl37/ I.

Respondent's submissions

78. On the right to have counsel present during the interview of the Applicant, the Respondent avers that under the regulations and rules of the Organization, the right to counsel attaches at the time that a staff member is charged with misconduct pursuant

to paragraphs 5 and 6 of ST/AI/371. Up until such time, the staff member is not entitled to counsel and under former staff regulation 1.2(r) is required to "respond fully to requests for information from staff members and other officials of the Organization authorized to investigate the possible misuse of funds, waste or abuse."

79. There is no mention of a right to counsel to assist a staff member until after the matter is referred to the ASG/OHRM pursuant to paragraph 3 of ST/AI/371 and a decision is made on whether to pursue the case by the ASG/OHRM pursuant to paragraphs 5 and 6 of ST/AI/371. Accordingly, the Respondent submits that the due process rights asserted by the Applicant as existing in relation to the investigation undertaken by OIOS do not apply. There is no basis in the employment context to imply higher standards regarding due process rights than those clearly provided by the terms of the employment contract.

Considerations

80. Can the Tribunal rely on the statements of the Applicant taken in the interview given that the Applicant was not assisted by counsel during the interview?

Due process requirements vis-à-vis legal representation

81. One of the issues in this case is whether the Applicant had a right to legal representation when he was interviewed by the investigators. Sec. 49 of the OIOS Manual of Investigation Practices and Policies ("OIOS Manual") provides that an ID/OIOS investigation is not a disciplinary process but a "fact finding exercise." It further states that staff members "cannot refuse to answer and are not entitled to the assistance of counsel during the ID/OIOS fact finding exercise" and that failure to cooperate may be characterized by the Secretary-General as misconduct justifying disciplinary action.

82. At the time of the interview, the investigation was in its preliminary phase and was a fact gathering exercise as provided in ST/AI/371. UNAT has held that at this

stage due process rights do not apply because they would hinder the investigation,[9] meaning thereby that an accused staff member may, without legal counsel, be freely and compulsorily interrogated even on incriminating matters. Further, UNAT has confirmed that the provisions on due process rights provided in former staff rule 110.4[10] and ST/AI/371[11] only apply in their entirety once disciplinary proceedings have been initiated.[12]

83. By prescribing in sec. 49 of the OIOS Manual that legal representation is not permitted, the Administration has taken the liberty of laying down an absolute rule that it will never allow any lawyer or other representative to appear before the investigators during any interrogation. It is a rule that denies legal representation and which compels a staff member to answer questions, and very often searching and probing ones, the answers to which may be highly incriminating and seal the fate of a staff member at the preliminary stage. However much the Tribunal questions the fairness of such a rule, it has no choice but to follow the precepts of UNAT that at the stage of the preliminary investigation an accused staff member has no right to legal representation.

84. Paragraph 50 of the OIOS Manual deals more specifically with the rights and obligations of a staff member under investigation. These rights or obligations (which essentially embody the concept of natural justice) are: (i) that a staff member is to be given a reasonable opportunity to present his/her version of the facts and to present evidence or witnesses; (ii) the staff member must be made aware of the allegations; and (iii) the staff member may be questioned further to explain inconsistencies between his/her version and that of witnesses. Further, paragraph 52 and 53 of the OIOS Manual prescribe that prior to the finalisation of the report of the investigators,

[9] *Applicant* 2012-UNAT-209 and *Powell* 2013-UNAT-295.
[10] Former staff rule 110.4(a) provides: "No disciplinary proceedings may be instituted against a staff member unless he or she has been notified, in writing, of the allegations against him or her and of the right to seek the assistance of counsel in his or her defence at his or her own expense, and has been given a reasonable opportunity to respond to those allegations."
[11] ST/AI/371 provides guidelines and instructions on the application of chapter X (Disciplinary Measures and Procedures) of the former Staff Rules, and outlines the basic requirements of due process to be afforded a staff member against whom misconduct is alleged.
[12] *Powell* 2013-UNAT-295.

the staff member must be made aware of the scope of the possible misconduct and be given an opportunity to explain why his/her action was proper and to present further evidence or witnesses. The Tribunal considers that these rights were respected in this case.

Due process requirements vis-à-vis absence of Applicant's signature on notes of interview containing admission

85. The Applicant is alleged to have admitted to the prohibited conduct. Sec. 54 of the OIOS Manual states that "[a] staff member who wishes to admit to a violation of a United Nations regulation, rule or administrative issuance may be asked to prepare and sign a statement".

86. The question arises whether in light of the admission recorded by Ms. SB the procedure laid down in the OIOS Manual on volunteering statements applies here. The answer, in the Tribunal's view, must be negative given the fact that Ms. SB explained that the interview of the Applicant was being done rather hastily and that she was taking contemporaneous notes of the interrogation. It was a question and answer exercise which was being recorded and which the Applicant was asked to comment on subsequently.

Allegation of fabrication of interview statement

87. One of the vital pieces of evidence that the case turns on is the circumstances in which the Applicant made the admission. Ms. SB was searchingly examined and cross examined on this aspect and she strenuously denied that she fabricated any evidence. Fabrication is a serious allegation that needs to be proved with coherent evidence and not by mere general assertions even if the standard of proof required of the Applicant is one of a balance of probabilities.

88. The Applicant has been given full opportunity and latitude of giving his side of the story to the Tribunal and of confronting the lead investigator, Ms. SB who interrogated him. He gave evidence and was cross examined. From the evidence that

emerged during the hearing the Tribunal is satisfied that the allegation of fabrication is unsubstantiated.

Admissibility and weight of Applicant's admission

89. Even though the Applicant's admission recorded in the notes of interview by Ms. SB may be categorised as a species of illegally obtained evidence in view of the lack of legal representation, it is not per se inadmissible. In this connection the Tribunal refers to a case of the European Court of Human Rights, *Schenk v Switzerland*[13]where the Court stated:

> 46. While article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.
>
> The court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr Schenk's trial as a whole was fair.

90. Support for this approach may be found in a decision of the European Commission of Human Rights in *G v United Kingdom*[14]. In its decision the Commission stated:

> Nevertheless, where the sole evidence against an accused is acquired in circumstances where he is not provided with access to independent legal advice, and where the accused later denies the propriety of that evidence, the guarantee of a fair trial contained in article 6, para.1 of the Convention requires a procedure whereby the validity of the evidence and its fitness for inclusion in the trial must be examined.

91. In the case of *Applicant* 2013-UNAT-302, the UNAT stated:

> The Tribunal is satisfied that the key elements of the Applicant's rights of due process were met: he was fully informed of the charges against him, the identity of his accusers and their testimony; as such, he was able to mount a defense and to call into question the veracity of their

[13] (1988) 13 EHRR 242.
[14] 9370/81 (1983) 35 DR 75.

> statements. This Tribunal is, therefore, satisfied that the interests of justice were served in this case, despite his inability to confront the persons who had given evidence against him during the initial investigation.[15]

92. After an examination of the circumstances of the recording of the admission, the Tribunal holds the Applicant was provided with a full evidentiary hearing before a court of law where he was legally represented, allowed to challenge the investigator, and put his own version. The lack of legal representation was therefore largely mitigated by the subsequent hearing so as to render the admission made during the interview inadmissible. Further supporting the admissibility of the admission is the fact that there is no evidence that it was not made voluntarily.

93. Having ruled that the Applicant's admission is admissible, the Tribunal must determine whether any weight should be placed on the admission. The Tribunal has analysed all the circumstances in which it was made and concludes the confession is true and that there is no compelling evidence or otherwise that would cast any doubt on its reliability. The Tribunal concludes that it can safely rely on it.

Conclusion

94. The application is rejected.

(Signed)

Judge Vinod Boolell
Dated this 29th day of October 2013

[15] See former Administrative Tribunal Judgment No. 494, *Rezene* (1990) and ILOAT Judgment No. 2601 (2007).

Entered in the Register on this 29th day of October 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi