Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KRAMO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Adrien Meubus, ALS/OHRM
Cristiano Papile, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) based in the Central African Republic (CAR).

2. On 23 May 2016, he filed an application contesting a decision dated 29 March 2016 to impose on him the disciplinary penalty of separation from service with compensation in lieu of notice and without termination indemnity in accordance with staff rule 10.2(a)(viii).

3. The Respondent filed a reply to the application on 24 June 2016.

Facts and Procedure

4. The Applicant served with OCHA in Haiti since 2010 as an Information Management Officer at the P-3 level and subsequently was reassigned to OCHA in CAR in 2014.

5. On 15 September 2013, the Applicant was arrested by the Haitian local police on accusations of associating with local Haitian minors. He was kept in detention for three weeks and was subsequently released on 8 October 2013.

6. On 13 August 2015, the Office of Human Resources Management (OHRM) informed the Applicant of allegations of misconduct, namely, that he had used his United Nations Laptop to access pornographic materials and had recourse to one or more prostitutes in 2012 or 2013.

7. On 15 September 2015, the Applicant provided comments denying the charges.

8. On 29 March 2016, the Officer-in-Charge, OHRM, informed the Applicant that the Secretary-General had decided to separate him from service with compensation in lieu of notice and without termination indemnity.

9. On 20 to 21 June and on 19 September 2017, the Tribunal held hearings during which it took the testimony of the Applicant, witnesses Mr. Marc Etienney and Ms. Maria Komiati, the Applicant's neighbour from the same residential compound in Port-au-Prince, Haiti. The parties did not require any further live evidence. On the Applicant's motion, the Tribunal accepted

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

Applicant's Case

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

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

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

c. He did not have exclusive access to the laptop. The laptop was often left in the office during the Applicant's absence where, because the password was known to other staff members, it could have been accessed by numerous other persons. Samples indicate that the activity occurred after work hours when the Applicant had no control over the laptop. Pages containing pornographic images were also accessed at the dates when the Applicant was incarcerated or absent from Haiti.

d. The conclusion of the OIOS investigators that the pornographic images, which they claimed were found on the computer, were consistent with manual, voluntary browsing,

rather than with the presence of automatically accessed content does not address the issue of who might be responsible. There was no verification undertaken of who was present at the time the images were allegedly created. Some appear to have pre-dated and/or postdated the Applicant's presence in Haiti. No further investigation took place into whether the creation of the images corresponded to the Applicant's physical presence, whether similar patterns occurred on other computers or into the security of user passwords in the mission.

e. Once his criminal charges were dismissed and it was clear that no minors had ever been involved, it is unclear on what authority OIOS impounded the computer. Moreover, the computer was not accessed by investigators in the Applicant's presence contrary to the provisions of ST/SGB/2004/15 (Use of information and communication technology resources and data).

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

11. It is false that he had recourse to the services of prostitutes in 2012 and 2013.

a. The sole source of evidence for this charge is an alleged admission he made when he was in detention without being informed of his rights or being allowed counsel. He signed a document prepared by the police but did so without reading the particulars and while under extreme duress after being ordered to do so to secure his release.

b. Despite being detained for three weeks, the United Nations Stabilization Mission in Haiti (MINUSTAH) authorities, who were responsible for ensuring the respect for the privileges and immunities of the Organization in Haiti, acted in conjunction with local police and made no effort to secure access to him while the criminal action was pending.

c. A criminal investigation was engineered by MINUSTAH security but the Haitian court dismissed all the charges against him once the complainants recanted.

d. The various informants relied upon by MINUSTAH and OIOS alleged that he was bringing several minors home every day to abuse them. He explained that he organized parties for the Ivorian community in the compound he was renting. One United Nations Security Officer living in the compound was angry that outsiders were using the swimming pool and wanted the Applicant out of the compound. This was the basis for the rumors that began circulating.

e. Much of the testimony accumulated by OIOS that the Applicant was exploiting minors frequently is mere hearsay. Following these complaints, undercover police officers, as stated in their report, watched his every move from 13 to 15 September 2013 without seeing him with any minor as alleged by MINUSTAH.

f. At the time of his arrest, there was no minor present contrary to the statement of MINUSTAH officials who reported such to the police. All the actors were adults and no impropriety was observed. He was arrested without a warrant for committing "flagrant delit" (caught in the act) outside the Haitian legal framework.

g. A warrant can only be executed before 6.00 p.m. The arrest itself was thus illegal. Although there was no minor identified, he was kept at the Brigade de Protection des Mineurs (Brigade for the protection of minors) for 48 hours without being charged. In addition, the police stated that he was HIV positive and was trying to spread the virus to local women. While in custody, he was forcefully made to submit to an HIV test and the matter was silently dropped when it proved negative.

12. He was denied due process.

a. Haitian criminal law mandates that an accused be read his rights before any interrogation takes place which did not happen in his case. It is settled law that no statement is properly received into evidence unless the accused was informed of the right to have counsel present and the right not to speak to the police in the absence of a lawyer.

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

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

13. The Applicant requests the Tribunal to find that he did not violate staff regulations 1.2(b) and 1.2(q) and that he did not fail to adhere to the provision of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) and section 3 of ST/SGB/2004/15. In the alternative, should it be determined that he erred in judgment in failing to report or take appropriate action on improper images on his laptop or any other violation of the applicable rules, the Applicant submits that the penalty of separation is disproportionate to the offence.

a. The Applicant requests the Tribunal to rescind the disciplinary measure imposed on him and to reinstate him as Information Management Officer at the P-3 level with back pay.

b. He also seeks compensation for moral damages caused by the severe emotional distress the Organization inflicted on him by subjecting him to an unwarranted arrest and criminal proceeding, wrongful incarceration, by failing to provide the minimal assistance

to a staff member arrested as required by ST/AI/299 and failing to respect his due process rights leading to his termination.

c. He seeks compensation for the damage to his personal and professional reputation occasioned by his wrongful termination and loss of livelihood and costs for the abuse of process in this case.

14. The Applicant makes the following submissions in respect to damages.

a. He has been the victim of a particularly heinous false allegation. This was exacerbated by leaks to the press that resulted in radio broadcasts during his incarceration disseminating information that he was a rapist who was infected with HIV and who was trying to spread the virus to Haitian women. His professional reputation and family relations have been injured and he has been subjected to needless emotional stress which has intensified with his separation from service.

b. He had periodic recourse to the MINUSTAH and OCHA stress counselors while he remained there. During his reassignment to the CAR, he continued to have access to the OCHA Stress Counselor. He is currently seeing a private psychologist for his emotional stress which has become more intensive since the loss of his job.

Respondent's Case

15. The Respondent's case is summarized as follows.

16. The facts are established by clear and convincing evidence.

Use of official United Nations laptop to access pornographic content

a. During its investigation, OIOS found 5840 pornographic images, 101 of which were directly associated with the Applicant's user profile which meant that they were accessed at a time when the Applicant was logged into his computer with his username and password. In addition, his browsing history showed 1253 individual records relating to pornographic websites. There is no dispute that websites providing links that lead to a

cracked software may result in pornography being involuntarily displayed on a user's computer. However, the evidence clearly shows that the Applicant himself deliberately searched for and viewed pornography on his official computer.

b. The Applicant's browsing history revealed that he manually inputted searches for pornographic material both on Google and on various pornographic websites using different search parameters. Even if the Applicant used cracked software or visited websites offering cracked software, this would not explain why he manually inputted the specific search terms into Google and the search engines for pornographic websites.

c. Contrary to the Applicant's assertions that there is no technical evidence or expert testimony on this point, the conclusion that the Applicant voluntarily accessed pornographic material was supported by an OIOS Forensic Investigator, who explained why the forensic analysis of the Applicant' computer established that he voluntarily accessed pornographic material and that it was not the result of pop ups or cracked software.

Sexual exploitation and abuse

d. On 15 September 2013, the Applicant was interviewed by an officer of the Haitian Judiciary Police of the Brigade for the protection of minors in relation to allegations that he had engaged in non-consensual sexual relations with a minor, ("V01"). During the interview he explicitly admitted that he had recourse to the services of prostitutes while in Haiti. The Applicant's references to his use of prostitutes in his statement to the Judiciary police, as reflected in the *procès-verbal*, went far beyond vague references as characterized by the Applicant in his application.

e. The *procès-verbal* offers sufficient guarantees of reliability to constitute clear and convincing evidence of the Applicant's admission that he had recourse to the services of prostitutes while in Haiti including the following:

i. The statement was taken by an officer of the Judiciary Police in the regular course of his functions as an auxiliary of justice.

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

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

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

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

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

17. The facts amount to misconduct.

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

Applicant demonstrated a lack of integrity in violation of staff regulation 1.2(b) in failing to abide by the Regulations and Rules of the Organization.

b. With respect to the Applicant's use of prostitutes, the Applicant's conduct constitutes a violation of the provisions of ST/SGB/2003/13. In particular, his conduct is in breach of section 3(c) of that policy which prohibits the exchange of money, employment, goods or services for sex.

18. The disciplinary sanction imposed is proportionate.

a. Cases of sexual exploitation and abuse have consistently led to cessation of the employment relationship. Together with the use of ICT resources to view pornography, the Applicant's conduct warrants a sanction that results in the cessation of the employment relationship.

b. In *Cobarrubias* 2015-UNAT-510, the United Nations Appeals Tribunal (UNAT/Appeals Tribunal) upheld a sanction of separation from service with compensation in lieu of notice and without termination indemnity for the staff member's use of ICT resources for pornography.

c. In *Oh* 2014-UNAT-480, both the Dispute Tribunal and the Appeals Tribunal upheld the decision to separate a staff member who admitted that he had recourse to the service of prostitutes.

d. The lapse of time between the Applicant's conduct and the imposition of the disciplinary measure was considered as a mitigating factor.

19. The Applicant's due process rights were respected.

a. The Applicant's procedural fairness rights were respected throughout the investigation and disciplinary process.

b. He was interviewed twice in connection with the investigation. He signed the transcripts of his interviews and was given ample opportunity to respond to the

allegations that he had used the services of prostitutes while in Haiti and that he used his official computer to access pornography.

c. The Applicant provided comments on the draft investigative details which were duly considered.

d. In the allegations memorandum, the Applicant was informed of his right to seek the assistance of counsel and was given an opportunity to respond to the allegations against him which he did.

e. With respect to the Applicant's contention that ST/SGB/2004/15 requires that the computer be accessed in the presence of the staff member, section 9(c) of the said SGB only relates to physical access to the ICT resources not the examination of its contents. The Applicant was on administrative leave in connection with the allegations against him at the time the laptop was handed over to investigators by the Administration on 27 November 2013.

20. The Applicant's contentions in connection with his arrest and detention are not properly before the Tribunal for review.

a. The Applicant's allegations of non-compliance with the terms of ST/AI/299 relate to the administrative decisions that have not yet been the subject of mandatory management evaluation in accordance with staff rule 11.2(a) and are not properly before the Tribunal for review.

b. The Applicants claim that the provisions of ST/AI/299 were not complied with is however without basis. In particular:

i. A representative of the Mission was present next to the waiting room where the Applicant was held at the police station in the evening of 15 September 2013 after his arrest and until he was presented to the prosecutor on 16 September 2013.

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

iii. The Applicant retained an attorney to represent him in the case. The head of OCHA in Haiti was kept informed of the developments in the Applicant's case.

iv. On 18 September 2013, by code cable, United Nations Headquarters was apprised of the matter and given all information with respect to the Applicant's arrest and detention.

v. On the same date, the Mission informed local authorities that the Applicant was not covered by any privileges and immunities with respect to the actions in which he was alleged to have engaged. The Applicant was released on 8 October 2013.

21. For the above reasons, the Respondent requests that the Tribunal reject this application.

Considerations

Scope of review

22. As the starting point the Tribunal recalls that, as per the UNAT full bench holding in *Applicant*, "[j]udicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration."[1] The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable.[2] In its jurisprudence since *Applicant*, the UNAT has maintained that it is not the role of the UNDT to

[1] *Applicant* 2013-UNAT-302 at para. 29, citing to *Messinger* 2011-UNAT-123, presumably in that "it was not the task of the UNDT to conduct a fresh investigation into the harassment complaint; rather its task in this case was to determine if there was a proper investigation into the allegations", and confirmed since in *e.g.*, *Nyambuza* 2013-UNAT-364, *Diabagate* 2014-UNAT-403, *Toukolon* 2014-UNAT-407, *Jahnsen-Lecca* 2014-UNAT-408, *Khan* 2014-UNAT-486, and *Mayut* 2018-UNAT-862 para 48.
[2] *Bagot* 2017-UNAT-718 at para. 46 citing *Mizyed* 2015-UNAT-550, para. 18; Applicant 2013-UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; and *Molari* 2011-UNAT-164, paras. 29 and 30.

conduct a *de novo* review of the evidence and place itself "in the shoes of the decision-maker"[3], as well as that the definition of "judicial review" articulated in *Sanwidi* retains actuality in disciplinary cases:

> During [its] process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.[4]

23. The Tribunal is mindful of one of the recent judgments by UNAT in *Mbaigolmen*[5] where a preference has been expressed for making determinations of misconduct in a hearing:

> Firstly, cases of alleged misconduct typically require determination of disputed factual issues. This is best done in an oral hearing involving an adversarial fact-finding process which tests the credibility, reliability and probabilities of the relevant testimony. Secondly, factual findings of misconduct are of far-reaching import. A judicial finding that a staff member has committed sexual harassment, fraud, theft or the like has life-altering consequences. Hence, the determination of misconduct should preferably be done in a judicial hearing by conventional adversarial methods.
>
> …
>
> The right of a staff member to "appeal" an administrative decision imposing a disciplinary measure in terms of Article 2(1)(b) of the UNDT Statute, is not restricted to a review of the investigative process. On the contrary, it almost always will require an appeal *de novo*, comprising a complete re-hearing and redetermination of the merits of the case, with or without additional evidence or information, especially where there are disputes of fact and where the investigative body *a quo* had neither the institutional means or expertise to conduct a full and fair trial of the issues.[6]

24. The Tribunal notes, nevertheless, that the preference for having an adversarial hearing over disputed facts in *Mbaigolmen* is not meant to be a matter of right, but rather a matter of utility. This is confirmed by the following *passus*:

[3] *Wishah*, 2015-UNAT-537, para. 21 and 23.
[4] See *Ouriques* 2017-UNAT-745 para 14 and 15, citing to *Sanwidi* 2010-UNAT-084.
[5] *Mbaigolmen* 2018-UNAT-819.
[6] Ibid., at paras. 26 and 27.

> 28. However, that said, there will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand. Should the evidence be insufficient in certain respects, it will be incumbent on the UNDT to direct the process to ensure that the missing evidence is adduced before it.
>
> 29. Thus, while there may be occasions where a review of an internal investigation may suffice, it often will be safer for the UNDT to determine the facts fully itself, which may require supplementing the undisputed facts and the resolution of contested facts and issues arising from the investigation.

25. Noting that the *Mbaigolmen* Judgment was not out at the date of the closure of the hearing in this case, this Tribunal however had considered, consistent with the gist of para. 23 reproduced above, that holding a complete re-hearing in this case was neither requested by the parties nor necessary. The main evidence relied upon by the Respondent regarding the sexual exploitation charge consist in an official record of the judicial police, taken in the native language of the Applicant and signed by him on each page. The authenticity of it is not disputed. The question before the Tribunal was to weigh its reliability. Regarding the charge of storing pornographic materials on the United Nations computer, the evidence consists in documents and expert witness testimony. The latter was heard directly before the Tribunal and subject to cross-examination.

Sexual exploitation and abuse

Reliance on the procès-verbal

26. The Applicant challenges the fairness of proceedings in relying on the statement made when he was in detention without being informed of his rights or allowing counsel; he signed a document prepared by the police but did so without reading the particulars and while under extreme duress after being ordered to do so to secure his release.

27. There is no question that the statement in the *procès-verbal* obtained without informing the accused of the right to have counsel present and the right not to speak to the police in the absence of a lawyer is not admissible under the Haitian criminal procedure, just as it would be inadmissible under most of the municipal criminal law systems. This standard, however, is applied to protect the right against self-incrimination, to ensure integrity of investigation and

eliminate dispute on whether a confession was freely given in criminal cases. The exclusionary rule is usually express. It is not absolute, as there are systems that allow the use of such statements in favor of the defendant or for purposes other than as proof in criminal trial. Conversely, the imposition of disciplinary measures taken against persons subordinated to a high degree of administrative control, such as civil servants, does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law under art. 14.1 of the International Covenant on Civil and Political Rights (ICCPR), nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of art. 14.1.[7] Likewise, the Appeals Tribunal underlined that the United Nations disciplinary process is not governed by the standards of criminal procedure.[8] Moreover, it is trite law that under art. 18.1 of the Dispute Tribunal's Rules of Procedure, the UNDT has broad discretion to determine the admissibility of evidence and the weight to accord evidence before it.[9] Absent UNDT-specific exclusionary rules, apply only those of universal validity, such as the prohibition under art. 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which is not the case. Such as it is, the Tribunal finds no ground to find the statement *ex lege* inadmissible; rather, it must be reviewed for its reliability.

28. Regarding a statement made in detention without being informed of one's rights or allowing counsel, considering the inherently intimidating nature of such circumstances, coupled with a vested interest on the part of the judicial police to have allegations confirmed, this Tribunal would be reluctant to admit in evidence an admission to the criminal allegations. The case at bar, however, does not concern an admission to the criminal charges but a circumstance, i.e., using prostitution, which was entirely neutral in this respect, not even a legal defence. Just as the Haitian judicial police had no reason to make up this information and input it in the *procès-verbal*, or coercing the defendant to supply it, so the Applicant could have provided another explanation for his relationship with multiple women, as he did in these proceedings, where he described that he had maintained consensual relationship with three women who were

[7] *Paul Perterer v. Austria, Communication,* No. 1015/2001, U.N. Doc. CCPR/C/81/D/1015/2001 (2004); *see also* HRC General Comment 32.
[8] See for example in *Jahnsen-Lecca* 2014-UNAT-408 at para. 24.
[9] *Lemonnier* 2017-UNAT-762; *Gehr* 2012- UNAT-236; *Larkin* 2011-UNAT-134; and *Messinger* 2011-UNAT-123.

autonomous and independent. When asked by the Tribunal about the reason why he had told the judicial police that the women were prostitutes he stated that it was "because the police were armed." This does not logically explain providing information about using prostitution. It also confirms that apart from the mere presence of armed officers no inducement to supplying this information is alleged. The Tribunal concludes that the circumstance of using prostitutes was volunteered for the *procès-verbal* by the Applicant.

29. On 15 September 2013, the Applicant was "interviewed" by the Haitian Judiciary Police in relation to allegations that he had engaged in non-consensual sexual relations with a minor.[10] The relevant parts of the interview are reproduced below:

> *Si j'ai eu une relation avec [V01] il faut dire que c'etait une prostituee mais j'aurais fait usage de préservatif.* (If I had relations with V01 it's because she was a prostitute, but I would have used condoms).
>
> *Oui, une fois j'ai appelé une prostituée, je lui indique le chemin et elle est venue d'elle-meme.* (Yes, once I called a prostitute, I told her how to get to my place and she came by her own means).
>
> *Depui mon arrivée en Haiti il n'ya qu'avec une seule prostituée que j'ai couché à deux reprises.* (Since I arrived in Haiti, there is only one prostitute with whom I slept with twice).
>
> *À cette époque [à la fin 2012 ou début 2013] je couchais avec des prostituées.* (At that time [the end of 2012 or beginning of 2013], I slept with prostitutes.)
>
> *Quand j'ai perdu mou ordinateur [à la mi 2012 ou début 2013], j'ai appelé une des prostitués pour lui demander si elle ne l'avait pas vu pour moi.* (When I lost my computer [in mid-2012 or beginning of 2013], I called one of the prostitutes to ask her whether she had seen it).
>
> *J'appelé cette prostituée [à propos de l'ordinateur] parce qu'elle est venue chez moi à deux reprises.* (I called that prostitute [about the computer] because she had come to my home twice).

[10] *Procès-verbal* No. 11 dated 15 September 2013, page 29 of the joint trial bundle.

> *La première fois que la prostituée était venue chez moi, je suis allé la déplacer vers Pétion-Ville.* (The first time that the prostitute came to my home, I brought her to *Pétion*-Ville).
>
> Je ne connais pas l'âge exact des prostitués avec lesquelles je couche, mais je me rassure toujours qu'elles ne sont pas mineures. (I do not know the exact age of the prostitutes with whom I sleep, but I always make sure they are not minors).
>
> *Pour savoir si elles [les prostituées] ne sont pas mineures, je leur juge sur leur morphologie.* (To know whether they [the prostitutes] are minors, I judge them on their shape).

The statements recorded in the *procès-verbal*, as reproduced above, are express, detailed and unambiguous. The Tribunal agrees with the Respondent's analysis that the level of detail and consistency with facts stated later could not have simply been fortuitous and would be uncharacteristic of a fabrication. This evidence meets the requirement of being "clear".

Supporting evidence

30. As to the question whether the evidence from the judicial police record should be accepted as "convincing", the Tribunal considered that it finds support in the evidence from the sworn testimony which the Tribunal took from Ms. Komiati, the Applicant's neighbor in Haiti. Several times, mainly on weekends, she witnessed the Applicant bring different young women in his car, park his car and lead them into his apartment. She described his routine in parking close to the stairwell wherefrom the women would go straight to his place. She described that they wore clothes that were rather more typical for Haitians than Ivoirians. Among them, she saw a very young local woman who, sometime later, approached her at the compound's gate, in tears and asking for help. The witness had it confirmed later at a United Nations meeting that the woman complained with the Haitian National Police. Thus, no doubt the witness describes V01, termed by the Applicant in the *procès-verbal* as a prostitute. Her testimony finds corroboration in the interview given to OIOS by Mr. Nelson Charles, the security guard of the compound, who had heard from V01 that she had been sexually exploited by the Applicant. The fact that V01 was not credible in filing and then recanting criminal allegations claiming she had been exploited as a minor, is irrelevant.

31. The witness further described that on one weekend she decided to monitor the Applicant's activity and she witnessed him shuttle three different women: he parked his United Nations car close to the entrance, took a woman to his apartment for approximately 1,5 hours, then drove her away and brought another one. The witness corrected her statement from the investigation, per which there had been nine women; she explained that this had been extrapolation from the frequency that she had observed herself and from what she had been told by another inhabitant of the compound. This detail clarified, the Tribunal sees no grounds to doubt the veracity of Ms. Komiati. The fact that, as per her admission, she had decided to watch the Applicant based on wide-spread rumors, has no bearing on what she had seen herself. The Tribunal found that the witness did not attempt to unduly incriminate the Applicant and was straightforward in admitting that she had no knowledge of whether the women were prostitutes nor what had been going on once they entered the Applicant's apartment. She however distinguished the Applicant's "official" girlfriend from those women. The Tribunal finds that facts described by Ms. Komiati are consistent with statements on the record arising from the investigation, those of Mr. and Mrs. Ubalijoro, the compound residents, and Ms. Jean Philipe, the Ubalijoro's maid, who witnessed the Applicant bring different young women to his apartment while acting in the same manner.

32. In light of this evidence, the Applicant's testimony, according to which he only maintained relationships with three financially and otherwise autonomous women, is implausible. Regarding written statements furnished in support of the Applicant by "character witnesses", Mr. Kokue and Ms. Clervin, the Tribunal does not find them relevant. Mr. Kokue had stopped sharing an apartment with the Applicant in 2011 so his attestation as to his conduct may not be well informed. Similarly, Ms. Clervin, the Applicant's lady friend, did not co-habit with him and could not have known all his activity. The statement of Mr. Djaka, who attests that the two women with whom he and the Applicant were found at the time of the Applicant's arrest were not prostitutes, has no import because the allegations do not concern the events of that day. In conclusion, clear and convincing evidence was obtained which is consistent with the Applicant's sexually exploiting local women and the impugned decision was well-founded.

Use of official United Nations laptop to access pornographic content

33. The Tribunal heard the testimony of Mr. Etienney, who had conducted analysis of the forensic image of the hard drive of the Applicant's laptop. This testimony was offered to explain the conclusions of documentary evidence. Underlying this evidence are several documents.[11]

34. Regarding Mr. Etienney's credentials, he began his career as a criminal investigator with the French Police in 2001 where he trained as a Forensic Examiner and Cyber Crimes Investigator until 2004 when he was officially registered as a Forensic Investigator. After that, he took several classes in more general information technology fields, such as networking, between 2006 and 2009. He holds a Masters Degree in Law and obtained a Masters Degree in Forensic Computing and Cybercrime Investigation between 2010 and 2012. During those years, he also obtained several certifications related to the computer forensics field: for the use of mobile phone forensics software; access data certified examiner; certified computer examiner's certification; and a computer fraud examiner's certification. He conducted and supervised investigations in this field. The Tribunal is satisfied that Mr. Etienney possessed expertise relevant for the issue at hand.

35. Mr. Etienney explained that while the forensic image of a pop-up is not necessarily different from data accessed through intentional browsing, examining the pattern of opening websites in a large browsing history allows one to conclude whether the content was accessed purposefully or not. By way of example, he discussed before the Tribunal browsing trails that took place on 3 December 2012. Starting at page 670 of the agreed trial bundle, entries 4792-5032 are associated with the user name "Jean-luc Kramo" and show access to the webpage "tubegalore.com". It has the encoding for the search terms used to access this webpage plus a number of technical data. The title of the webpage was "Public Masturbation, Masturbation in public – Tube Galore". This webpage was deleted 15 times and the second to last column shows where it was pulled out of the unallocated clusters of the Applicant's hard drive. Unallocated clusters are parts of the hard drive that are not in use by a particular file but that could contain

[11] Email from Mr. Etienney to Mr. Moore dated 14 April 2014, page 410 of the Trial Bundle; Email from Mr. Etienney to Mr. Moore dated 3 April 2014, page 446 of the Trial Bundle; Email from Mr. Etienney to Mr. Moore dated 30 April 2014, page 455 of the Trial Bundle; and Forensic Analysis Report (erroneously dated 5 March 2013) at page 724 of the Trial Bundle.

content of previously deleted files. Based on the url of that webpage, this is typically a webpage that would come from manual browsing and not from pop-ups. Pages that appear from pop-ups usually point to a generic homepage of the website or a page designed to advertise a website. Based on the structure of the url, the address of the webpage, this particular webpage was accessed by using a search function on a website using the keywords, "public masturbation". This is not typically the functioning of pop-ups but show that someone went to the website, typed in those keywords in a search box and accessed that page.

36. Further, entries 6350 – 6461 starting at page 685 of the trial bundle, are the browsing trails with a keyword search conducted on the website google.com. The fact that it is a search engine is indicated by "search?hl=fr". The search was conducted manually using the French language and the keywords used to conduct the search are "black girls with strip man - Recherche Google". Entry number 6366 shows access to a video that is hosted on a pornographic site, "xvideos.com" and the title of the video is "black girl sucks a stripper". This was part of the results of the google search. There is no reason for software allowing pop-ups to track users to google. The reason for a website with cracked software is to direct a user to specific pages because that is how income is derived from the use of cracked software. There is no point for cracked software to randomly direct a user to search results for google, as this would be both complicated and inefficient.

37. Entries 7196 – 7287 starting on page 699 of the agreed bundle, once again show the browsing of a website using a keyword search. This was not a pornographic website but a generic one that hosts videos usually uploaded by users. In this particular case, the keywords used to search this website were "black gils public masturbation vidéos sur Dailymotion". The spelling mistake at "gils" is another indication that the keywords were entered manually. At the end of the url there is a "/3" which indicates that this is the third page of results for this keyword search.

38. Entry 9683 on page 708 shows an attempt to register with a website "citysex.com". The email used to register on the website was kramojl@yahoo.fr. Citysex is an online dating website which offers "sexual intercourse" on the same day of registration.

39. Starting on page 785 is the menu for the "FTK Case Report". It is a print out of a webpage that is hosted on the hard drive of the computer and gives access to different items. There was a bookmark found called "pornographic erotic images" which corresponds to all the pornographic images found on the hard drive by the initial OIOS investigator. Mr. Etienney split the items in this bookmark into three to better explain how or if those particular files could be attributed to the Applicant. Page 786 and below show files found in the area of the hard drive reserved for the Applicant's user name. They were downloaded and saved, some from the Mozilla browser. There is a very high probability that those files were created as a result of the actions of that particular user. Page 732 and below display all the pornographic files found on the Applicant's computer that could not be directly associated with him but that had been created at a time when the Applicant was in possession of the computer.

40. Altogether, Mr. Etienney found over 1000 traces of access to different pornographic websites, over a period of more than 40 different days. Most of this access could be technically linked to the Applicant's user profile. Mr. Etienney acknowledged that part of the records could have been the result of the pop-ups appearing on the cracked software, notably where a large number of pornographic links had been accessed in a quick succession. The pattern, however, that was found in 70-80% of the browsing history, loaded for of the use of the search functions on both pornographic and non-pornographic websites, allowed him to conclude that the user browsed manually/deliberately and the websites were not generated by pop-ups as a result of cracked software. This included that many pages were accessed in succession, each corresponding to a new category of pornography and the fact that each page appeared to have been used for several minutes.

41. Last, Mr. Etienney explained, in reference to page 451 of the agreed bundle, that the computer was assigned to the Applicant in the period from at minimum July 2012 until September 2013, with the majority of the pornographic browsing dating May-July 2013. Records post-dating the Applicant's departure from Haiti, such as those from April 2014, could have been created by the investigators processing the hard drive. Regarding the Applicant's assertions that the pornography was accessed after working hours and that, as a result, he had no control over the laptop computer, the Applicant had told investigators that he brought the laptop home with

him most of the time except when he was on Rest and Recuperation leave. This is plausible, also considering the admitted fact that his own laptop had at some point been stolen.

42. The Applicant claims that he had given his username and password to other staff members; therefore, he cannot be attributed the accessing and storing of the material. The Tribunal cannot accept this. The Applicant admitted that he had downloaded and installed the cracked software that had caused pornographic material to appear on his computer. He neither named any person with whom he shared the password nor for what specific purpose would have been for such a sharing. The frequency of accessing the pornographic material under the Applicant's user name, storing it in his "documents" folder and an attempt at accessing a pornographic site from the Applicant's private account render it highly improbable that this would have been done by others without his acquiescence. Had indeed anyone else been given access to the Applicant's official laptop and used it to access pornographic material, the Applicant tolerated it which renders him complicit.

The manner the laptop was accessed

43. With respect to the Applicant's contention that ST/SGB/2004/15 requires that the computer be accessed in the presence of the staff member, there is no dispute that the Applicant was on administrative leave in connection with the allegations against him at the time when the laptop was handed over to investigators by the Administration on 27 November 2013. Whereas a question might be posed as a general matter as to an appropriate method of documenting the access to the computer where the user is absent, the Tribunal notes that the Applicant's contention is not that the content was corrupted by the investigators but that accessing the pornographic content present on his computer was not of his doing but either resulted from pop-ups or by accessing pornographic content by other persons who had access to his laptop. As such, the Tribunal sees no relevance for entertaining the procedure of accessing the laptop.

The Applicant's contentions in connection with his arrest and detention

44. The Tribunal offers its sympathy to the Applicant because of the ordeal of his arrest, detention and negative press coverage which he suffered due to the accusations that proved

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

CONCLUSION

45. The Tribunal finds that the relevant facts were established by clear and convincing evidence, that the Respondent properly found that the conduct amounted to misconduct and that there were no violations of the procedure that might have had impact on these findings. The Tribunal furthermore finds that the disciplinary measure that was meted out is not disproportionate and indeed consistent with the established practice and the jurisprudence of the Appeals Tribunal.

The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 5th day of December 2018

Entered in the Register on this 5th day of December 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi