UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2020/033
Judgment No.:	UNDT/2022/030
Date:	28 March 2022
Original:	English

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

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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

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

Introduction

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

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

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

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

5. The Tribunal held a case management discussion on 9 September 2021 and hearings on 9 and 22 to 24 September 2021. The Tribunal heard oral evidence from the Applicant; the Complainant; Mr. A.R, the Chief of the UNFPA Legal Unit; Ms. F.L, the then Director of the UNFPA Office of Audit and Investigation Services ("OAIS"); and Mr. A. P, Deputy Director and Chief of the UNFPA Human Resources Strategic

[1] Trial bundle, p. 469.
[2] Order No. 166 (NBI/2021).
[3] Order No. 168 (NBI/2021).
[4] Order No. 173 (NBI/2021).
[5] Order No. 183 (NBI/2021).
[6] Order No. 194 (NBI/2021).

Partner Branch.[7]

6. The parties filed their closing briefs on 25 October 2021.

7. The Dispute Tribunal examines the following elements in disciplinary cases:

a. If the staff member's due process rights were guaranteed during the entire proceedings;

b. Whether facts were established by clear and convincing evidence;

c. Whether the facts amount to misconduct; and

d. Whether the sanction is proportionate to the gravity of the offence.[8]

8. The Appeals Tribunal has clarified that "[w]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".[9]

9. In disciplinary cases, when termination is a possible outcome, the evidentiary standard is that the Administration must establish the alleged misconduct by "clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".[10]

10. The Tribunal will examine the allegations for which the Applicant was sanctioned against the elements set out at paragraph 7 above.

[7] Witnesses' names anonymized for confidentiality purposes.
[8] *Turkey* 2019-UNAT-955, para. 32; *Mizyed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024.
[9] *Sanwidi* 2010-UNAT-084, para. 40.
[10] *Turkey*, *op. cit.,* para. 32.

Procedural background and the dispute over validity of the sanctioning decision

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

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

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

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

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

disclosed."[16]

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

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

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

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

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

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

comments on 24 February 2020.[24]

20. On 4 March 2020, the Director DHR charged the Applicant with misconduct on grounds that the OAIS investigation had established that he had: (a) raped, sexually assaulted and sexually harassed the Complainant when they attended a UNFPA Regional Office for West and Central Africa ("WCARO") meeting in Ouagadougou, Burkina Faso ("Count 1"); and (b) obstructed and/or failed to cooperate with OAIS by withholding and/or failing to disclose facts material to the investigation, and/or providing false information during the investigation ("Count 2").[25]

21. The Applicant was also placed on administrative leave with full pay ("ALWP") on 4 March 2020 for the duration of the disciplinary process.[26]

22. The Applicant submitted his response to the charges on 20 March 2020.[27]

23. By memorandum dated 4 May 2020, the UNFPA Executive Director decided that the available evidence met the legal standard of clear and convincing evidence with regard to both charges and that, pursuant to staff regulation 10.1(a) and staff rule 10.1(a) and 10.2(a)(i), the disciplinary measure of dismissal was being imposed on the Applicant.[28]

The Applicant's submissions

24. The re-opening of the investigation in January 2019 at the insistence of the Respondent, and the consequent imposition of disciplinary sanctions on the Applicant, contrary to the recommendation of OAIS, was *ultra vires*, an abuse of authority, occasioned by bad faith and aimed at achieving a pre-determined purpose.

25. The Respondent lacks *locus standi* to evaluate the evidence obtained through the OAIS investigation. Pursuant to staff rule 10.3, the Respondent can only initiate a

[24] Ibid. pp. 307-308 & 310.
[25] Ibid., pp. .316-326.
[26] Ibid., pp. 360-361.
[27] Ibid., pp. 327-359.
[28] Ibid., pp. 437-468.

disciplinary process where the findings of an investigation indicate that misconduct may have occurred. Relying on *Ular*[29], the Applicant submits that, since the Respondent is not a 'finder of fact' recognised by law, he must rely on the recommendations made to it by the duly authorised 'finder of fact', i.e., OAIS. There were no such findings in this case: OAIS closed its investigation in 2017 based upon a finding that the evidence obtained was insufficient to support charges of misconduct against the Applicant. In *Mbaigolmem*[30] relied upon by the Respondent, the Respondent acted upon the recommendation of the UNHCR Inspector General's Office ("IGO") (the equivalent of the OAIS), even though the IGO had only found the allegations established at the level of preponderance of evidence. The Respondent, however, did not reject the recommendation of the IGO in the instant case.

26. The re-opening of the investigation was conditional upon "further details and/or information" being subsequently disclosed to OAIS investigators and such detail/information must have been materially "new" or "in addition" to the information and/or detail already established. This, however, was not the case. Three witnesses were interviewed as part of the re-opened investigation. One of the witnesses, Ms. K. C, the Ethics Advisor at UNFPA, had not been interviewed during the first investigation even though she had allegedly been aware of the facts of the case. The second witness, Mr. A. P, was the Complainant's supervisor, who had given a statement during the first investigation. The third witness was the Complainant herself, who needed to be re-interviewed to enable her to introduce into the re-opened investigation, some handwritten notes, which, although ostensibly written contemporaneously with the events, had not been produced hitherto.

27. Altogether, the Applicant submits, investigative actions carried out upon the Respondent's request provided no new material proof. Mr. A.P and Ms. K. C provided only hearsay and, apart from the apparent bias of these two witnesses based on their established links and/or previous connection with the Complainant, their evidence, vis-à-vis that of the Complainant, was laden with material inconsistencies that rendered it

[29] UNDT/2020/221 (this judgment is currently under appeal).
[30] *Mbaigolmem* 2018-UNAT-819 in reference to UNDT Judgment No. UNDT/2017/051.

incapable of corroborating the Complainant's account.

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

The Respondent's submissions

29. There was no abuse of authority, bad faith or bias in the re-opening of the investigation in this case.

30. On the question of abuse of authority, OAIS is the fact-finder and may issue recommendations to the Administration. However, the Administration is not bound by its recommendations: while it may accept an OAIS recommendation, it may also reject it or accept and reject it in part. UNAT held in *Mbaigolmem* that an oversight office's appreciation of the law as applied to the facts did not prevent the administration from making a different legal judgment.[31] Occasionally, OAIS concludes on the facts established that misconduct occurred and recommends to the administration that disciplinary action should be taken, but the administration concludes after legal

[31] Ibid.

analysis that no charges should be brought. The reverse, as in this case, is true as well when OAIS recommends case closure and the administration decides to bring charges. It is, therefore, fallacious to demand that if a recommendation for disciplinary action or case closure is not accepted by the administration, the facts as established must also be rejected.

31. The Administration issued a request for additional actions, not an instruction to OAIS, and specifically deferred to the operational independence of OAIS.

32. It was reasonable and necessary for the Legal Unit to request additional evidence so that all relevant facts could be gathered and submitted to the decision maker. During its 2017 investigation, OAIS did not follow up on the Complainant's statements that she had taken notes and spoken to Mr. A. P. and Ms. K. C. close to the time of the rape. Hearsay evidence is admissible in administrative proceedings.[32] In cases of sexual assault, direct eyewitness testimony is frequently unavailable, rendering circumstantial evidence, including in the form of hearsay witness testimony, especially relevant. The testimony of Mr. A. P. and Ms. K. C. provide a present sense impression of the Complainant's then-existing state of mind and her physical and emotional condition as she shared her account of the rape.

33. The Applicant's allegation that his dismissal was part of a broader conspiracy to discriminate against African men is irrelevant and baseless. The African Group's meeting agenda or general pronouncements on racism do not indicate bias against the Applicant. The Applicant tried to mislead the Tribunal by referring to "several senior African men" who were "separated for fallacious reasons" following the Executive Director's appointment although the Applicant is the only senior African male staff member who has challenged his separation since the Executive Director's appointment. Based on his testimony, the Applicant clearly instigated an unprecedented pressure campaign against the Organization by calling on his government to intercede on his behalf. Such conduct violates staff regulation 1.2(i) and staff rule 1.2(j). Any claim of

[32] Ibid.

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

Considerations

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

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

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

35. As regards the delineation of competencies and tasks in the internal regulatory framework of UNFPA, they are divided between an investigative body (OAIS) and the disciplinary organs (Director DHR and the Executive Director). OAIS is responsible for internal audit and investigation services at UNFPA.[33] After receiving an allegation of misconduct, the Director, OAIS, determines whether an investigation is warranted; decides on the conduct of the investigation; and may decide at any time during the investigation that the matter does not warrant further investigation and close the case.[34] OAIS determines the scope of its interventions and the methodologies used to conduct its work as it deems necessary. At the conclusion of the investigation the Director, OAIS, submits the Investigative Dossier to the Legal Advisor for consideration.[35] The Director and personnel of OAIS must avoid being placed in situations which might create any conflict of interest that may impair their judgment on audit and investigation matters.[36]

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[33] OAIS Charter, paragraphs 1, 3 and 25 (trial bundle, p. 588).
[34] UNFPA Disciplinary Framework, section 9.2 (trial bundle, p. 604).
[35] Ibid., section 12.4.1. (p. 611).
[36] OAIS Charter, paras. 47 and 51 (trial bundle, p. 592).

36. The UNFPA Legal Advisor receives the Investigation Dossier from the Director, OAIS, and provides legal support and advice, and makes recommendations to the Administration on matters falling within the UNFPA Disciplinary Framework.[37]

37. The Director DHR, on the basis of a review of the Investigation Dossier, is authorized to either issue the Charges of Misconduct or close the case where there are no or insufficient grounds warranting disciplinary action.[38] The Director DHR may request clarifications or further inquiries from the Director, OAIS, if he/she considers that the staff member's reply to the Charges of Misconduct and/or any evidence submitted by the staff member merit further investigative activity. The Director, OAIS, will accommodate such a request as he or she deems appropriate.[39]

38. At the Applicant's request, the Tribunal heard evidence from Ms. F. L., former Director, OAIS, and Mr. A. R., the Legal Advisor, to elicit information about the practice arising from the application of the framework described above. Their testimony was consistent that there had not been a violation of a competence norm.

39. Ms. F. L.'s evidence was that the request from the Legal Advisor was not a request to reopen the case; rather, it was a request for additional evidence. It neither breached her independence nor constituted a conflict of interest because it was within her authority to accept or reject the request. The decision to reopen the investigation was her sole decision to make in her capacity as the Director of OAIS, in accordance with the authority bestowed pursuant to section 15.4.1 of the Disciplinary Framework. Her report of 7 May 2019 did not result in a fresh recommendation from OAIS because that was not the purpose of the Legal Advisor's request; moreover, her understanding of the Disciplinary Framework does not include a review of the recommendation, or a fresh recommendation, in a situation where OAIS is responding to a request for additional evidence or clarification. It is a common procedure for the Legal Unit to ask for additional information or clarification, or for OAIS to consider its investigative steps. OAIS has also accepted requests to re-interview witnesses. Fact finding is

[37] UNFPA Disciplinary Framework, section 9.4 (trial bundle, p. 604).
[38] Ibid, section 9.3.
[39] Ibid, section 15.4.1 (trial bundle, p. 615).

conducted by OAIS and OAIS may reach conclusions regarding the allegations. The legal assessment of the facts, on the other hand, is not the remit of OAIS and OAIS recommendations are not binding on UNFPA management. She recalled cases where OAIS recommended action, but management decided that it was not warranted or the other way around.

40. Mr. A. R.'s evidence was that, at UNFPA, OAIS is the sole entity that conducts investigations. OAIS uses the terms "close" and "reopen" in the context of its investigations, which is, however, different from the disciplinary framework. Whether or not to charge a staff member, is a decision within the executive power of the Director of DHR. The Director DHR never closed the instant case because he neither accepted nor implemented the OAIS recommendation for closure. The decision maker is bound by the facts as established during the investigation, but he/she decides whether the findings of the investigation indicate whether or not misconduct has occurred.

41. In the instant case, the OAIS report dated 19 October 2017 was submitted to him pursuant to section 9.4 of the Disciplinary Framework. There were UNFPA operational reasons, unrelated to the case, which caused that the report was analysed late. Eventually, however, after a careful review of the case by the whole team, he decided that UNFPA could not implement the recommendation to close and that the case required a further fact-finding from OAIS. He requested a follow up on the Complainant's note because it had been mentioned in one of the interviews, but OAIS had not followed up on it. Moreover, the report and the transcript of the interview with the Complainant showed that she had had conversations with Mr. A. P. and Ms. K. C. close to the incident, and that OAIS had not followed up on this either. Administrative tribunals look at contemporaneous notes and early reports, such as phone calls, and the investigative report established that the Complainant had spoken to certain people in close proximity to the alleged event and sought counselling and treatment by a psychologist in connection with the event. Eventually, using the same set of facts, the Administration arrived at different conclusions, that is, that the evidence met the clear and convincing standard required for a case of serious misconduct.

42. The Tribunal finds that the Applicant's arguments on the score of "reopening" of the case raise two questions. The first one is whether or not there has been a breach of a competence norm that would formally invalidate the sanctioning decision without the need to show a prejudice to the Applicant's rights. The second one is whether or not the reopening caused prejudice to Applicant's due process rights, amounting to such invalidity.

43. On the first question, the Charges of Misconduct and the sanctioning decision were obviously issued by statutorily competent organs, that is, the Director DHR and the Executive Director, respectively. As concerns the import of OAIS findings and recommendations on the decision-making in the disciplinary process, while paragraph 47 of the OAIS charter asserts that OAIS is an operationally independent entity that freely determines its work program and its methodology in conducting investigations, the operational independence of OAIS, or, for that matter, any investigative body, does not render their conclusions legally binding on the administration. On the language of the UNFPA regulatory acts alone, such construct would contradict the very notion of "recommendation" or "submission for consideration". The lack of binding effect of OAIS' positive recommendation (i.e., in favour of prosecution) results also from the higher norms, starting with art. 97 of the Charter of the United Nations, which establishes the function of the Secretary-General, as the Chief Administrative Officer, in staff discipline. Interpreting a binding effect of investigative bodies' recommendations on the Secretary-General would contradict this function.

44. The matter is less clear regarding negative recommendations by OAIS. Here, the Applicant avers that a positive investigative recommendation would be indispensable for instituting disciplinary proceedings, akin to a requirement of an action of an authorised prosecutor, or a requirement of concurrent approval of two organs as a form of check on the exercise of the executive power. The Tribunal is prepared to accept that, theoretically, the proposed distribution of authority would not be unthinkable. *De lege lata*, however, it does not find the basis for construing it. In interpreting the norm expressed by staff rule 10.3(a) " […] may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have

occurred", the Tribunal considers that guarantors of due process and prevention of the abuse of power are found in two elements of the applicable framework: investigation is a necessary prerequisite for any disciplinary process, moreover, investigative bodies are vested with operational independence and exclusivity as to the conduct of investigation. In this framework, the role of the investigation is to gather evidence in a professional, independent and impartial manner, to establish a record of it for the sake of enabling rational decision making, and, finally, to evaluate the results. In this sense, the investigative bodies are responsible for fact finding. Here, however, the role of the investigative body ends. Conversely, organs of the disciplinary procedure do not collect evidence. They are, nevertheless, responsible for analysing the material put before them in the legal aspects, which, among other, involves evaluation of the evidence to assess which facts have been established and whether they suffice for attribution of a misconduct. In this sense, under staff rule 10.3(a), the function of assessment of fact is not exclusive to either organ.[40]

45. The Tribunal agrees with the Respondent that the *Mbaigolmem* case confirms the above conclusion. Specifically, the UNDT held in relation to the disciplinary organ evaluation going beyond investigative conclusion as to the sufficiency of evidence:

> …[I]n her advice to the High Commissioner, the Director, DHRM, took the stance that a higher standard of proof was satisfied, albeit she had essentially the same evidence before her, and, certainly, no additional incriminatory elements. In this sense, she proceeded to an elevation of the standard considered to be met. It is for the Tribunal to ascertain if such elevation was well-founded.[41]

46. Even more directly on point went this Tribunal's holding in *Elobaid*:

> As regards the question of responsibility for the findings of misconduct for the purpose of attributing it to the staff member, the Tribunal considers that this is the ultimate competence of the administrative

[40] Notably, the arrangement whereby an independent body conducts the investigation while decisions concerning prosecution is taken by the executive is not foreign to criminal law systems on the national level and the variance from it goes rather in the direction of broadening the role of the executive in evidence gathering. As long as judicial review is enabled of decisions concerning rights, the competence to perform evidence assessment does not involve the question of due process.
[41] *Mbaigolmem* UNDT/2017/051 para. 60, implicitly confirmed by *Mbaigolmem* 2018-UNAT-819 in this respect.

> organ applying the disciplinary or administrative measure. While these organs, i.e., ASG/OHRM, USG for Management or persons with delegated authority, are not those who usually hear the evidence, they are nevertheless required, at minimum, to critically review the record and the findings of the investigation, and establish whether the required threshold of proof has been met and whether the acts, as established, amounted to misconduct. This has consistently been the practice of USG for Management in disciplinary cases before this Tribunal.[42]

47. Conversely, *Ular* UNDT/2020/221 on which the Applicant relies, is inapposite. Leaving aside that *Ular* is under appeal at the moment, the Applicant ignores the specific context of that case: (i) the controlling legal document in *Ular* was ST/SGB/2008/5, which has a very precise reporting requirement (sec. 5.18); (ii) the impugned decision went in the opposite direction than in the present case, namely, UNDP did not agree with the conclusion of the Office of Internal Oversight Services ("OIOS") investigation that the applicant's complaint had been substantiated and closed the case; (iii) the UNDT took issue with the fact that UNDP failed to provide the applicant with a reasoned explanation for closing the case although OIOS considered the complaint to be substantiated rather than with UNDP going against the recommendation of OIOS.

48. In conclusion, the argument of the lack of *locus standi* to issue either the Charges or the sanctioning decision is fallacious. By the same token, regarding the contention of abuse of power in relation to re-opening of the investigation, the Tribunal finds no such abuse.

49. On the score of specific rights, the Applicant invokes the principle of legal certainty as an element of due process. The Tribunal agrees that the issue is live, not only in the aspect of right, but also as a concern of rational, pragmatic and morally acceptable policy of disciplining. It raises questions of procedural grounds, authority and time limits to reopen the case, as well as highlights the lack of statute of limitation on prosecuting the misconduct. The Tribunal agrees that, at a minimum, a staff member who has been investigated for misconduct is entitled to a closure, and such closure should be attained by establishing the time limits for conclusion of the disciplinary case

[42] *Elobaid* UNDT/2017/054, implicitly confirmed by *Mbaigolmem* 2018-UNAT-822 in this respect.

as well as the grounds and time-limits for re-opening it. In this regard, the Tribunal agrees that the regulatory framework on the junction of review of OAIS investigative dossier by the UNFPA disciplinary organ is not precise and does not confer sufficient procedural guarantees. This said, in the Applicant's case the legal certainty was not infringed through a violation of a technical norm because his case was never "closed" pursuant to section 15.3 of the Disciplinary Framework. Viewed, on the other hand, as the function of the passage of time, the principle of legal certainty was also sustained, as the time that elapsed from the recommendation for closure to the reactivation of the case was not excessive, especially considering the grave nature of the alleged act. As such, there was no breach of legitimate expectation on the part of the Applicant that the case would not ever be revived.

50. Finally, as to the argument about the lack of import of the evidence sought in the Administration's request dated 31 January 2019, the Tribunal will deal with it in the section committed to assessment of evidence. However, notwithstanding the weight of evidence gathered, the Tribunal does not find the request *per se* unreasonable in the face of the gravity of the allegations, which mandated a heightened scrutiny. The request was certainly not unreasonable to the degree that could indicate an ulterior motive.

51. As concerns the remaining allegation of bad faith, the Tribunal finds that the Applicant's claim that his dismissal was part of a broader conspiracy to discriminate against African men, is irrelevant and baseless. Admittedly, the Applicant's case fell within the scope of UNFPA's, and, more generally, the Organization's, policy of zero tolerance toward sexual misconduct. The policy accords with the norms consistently embraced by the Organization since decades[43], and is not discriminatory on its terms.

[43] See ST/SGB/253 (Promotion of equal treatment of men and women in the Secretariat and prevention of sexual harassment) of 29 October 1992, (abolished and replaced by ST/SGB/2008/5 on 1 March 2008), stressing that sexual harassment constitutes unacceptable behaviour for staff working in the United Nations and ST/AI/379 (Procedures for dealing with sexual harassment) of the same date, (abolished and replaced by ST/SGB/2008/5 of 11 February 2008), which defines sexual harassment and establishes informal and formal procedures for dealing with incidents of sexual harassment; ST/SGB/2003/13 providing that_sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal; see also A/RES/59/287 of 21 April 2005 which stresses that sexual exploitation and abuse constitute serious

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

Other due process issues

The Applicant's submissions

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

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

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misconduct and fall under category I and notes that sexual harassment constitutes a serious concern to Member States; ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) (superseded by ST/SGB/2019/8 issued on 10 September 2019) providing that sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another. Finally, see Staff regulation 10.1(b): Sexual exploitation and sexual abuse constitute serious misconduct and Staff rule 1.2(f): Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

[44] *Haidar* 2021-UNAT-1076; *Karkara* 2021-UNAT-1172; *Michaud* 2017-UNAT-761; *Applicant* 2013-UNAT-302; *Ramos* UNDT/2021/082/Corr.1; *Applicant* UNDT/2021/164; A*lexandrian* UNDT/2015/119.

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

The Respondent's submissions

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

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

Considerations

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

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

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

57. Regarding the circumstances of the Applicant's separation, notwithstanding how unfortunate the failure to organize his repatriation may have been, this alleged irregularity does not impact on the fairness of the process leading to the impugned decision.

58. The Tribunal finds no merits in the Applicant's arguments on the score of due process.

Whether the facts in relation to count 1 have been established by clear and convincing evidence

Background facts

59. The Complainant was recruited by UNFPA as a Human Resources Strategic Partner at the P-5 level in 2014. Previously she had worked as a human resources specialist in UNICEF and in private corporations. In January 2015, she was deployed in Dakar where problems soon emerged in her working relationship with the Regional Director who was appointed approximately four months later. This Regional Director hampered her access to the Representatives and staff members in the field, had a

[47] World Bank Administrative Tribunal ("WBAT"), African Development Bank Administrative Tribunal ("AfDBAT"), Asian Development Bank Administrative Tribunal (AsDBAT).

hierarchal approach and wanted to make all decisions whereas the Complainant was used to coming up with and presenting ideas and being proactive. Frustrated with her job, the Complainant considered her prospects after the expiry of her fixed-term appointment. Mr. A. P. characterises the Complainant as a strong, outspoken woman who stood her ground and spoke back to the Regional Director.[48]

60. The Applicant had a successful career with the Organization since 1992. At the time of the events in question, he held the position of UNFPA Representative to the African Union and the United Nations Economic Commission for Africa at the D-1 level in Addis Ababa, Ethiopia.[49]

61. Between 29 November and 2 December 2016, the Applicant and the Complainant attended a WCARO Regional Management Team ("RMT") meeting in Ouagadougou. Along with other meeting participants, the Applicant and the Complainant stayed at the Hotel Laico in Ouagadougou.[50]

62. On 2 December 2016, the Applicant, the Complainant and the other meeting participants attended a dinner that was organized by the Country Office.[51] The Complainant introduced herself to the Applicant, whom she had not yet met, in an effort to build her network.[52] They sat next to each other at the dinner table and chatted about personal and professional matters. She told him about her passion for horses and her challenges with her position/role because of her difficult relationship with the Regional Director. He shared with her his experiences working with various United Nations entities, his pictures with former President Barack Obama and his future plans within and outside of UNFPA. Both the Applicant and Complainant stated that they had a good conversation during the dinner. At the end of the dinner, they used the same car that transported UNFPA staff back to the hotel.[53] The Complainant had "at least

[48] Mr. A. P's oral evidence on 9 September 2021; see also trial bundle, p. 282, lines 94-96.
[49] Applicant's oral evidence on 22 September 2021.
[50] OAIS investigation report, paras. 17, 35, 38 and 40 (trial bundle, pp. 6, 10 & 11).
[51] OAIS investigation report, paras. 18, 36, 38 and 40 (trial bundle, pp. 6, 10 & 11).
[52] Complainant's OAIS record of interview, 13 April 2017, lines 20-22 and 333 (trial bundle, pp. 22-23); Complainant's oral evidence of 23 September 2021.
[53] Complainant's OAIS record of interview, 13 April 2017, lines 24-30 and lines 479-490 (trial bundle, pp. 23 & 39).

one glass of wine" whereas the Applicant did not drink any alcoholic beverage.[54] By the end of the dinner, the Applicant felt there was some "chemistry" between him and the Complainant.[55]

The incident in question

63. The facts detailed in this section were gleaned from the Complainant's OAIS record of interview dated 13 April 2017, her oral evidence before the Tribunal on 23 September 2021, the Applicant's OAIS record of interview of 23 May 2017 and his oral evidence before the Tribunal on 22 September 2021.

64. It is undisputed that, after the arrival to the hotel, around 9.00 p.m., the Complainant went to her room which was on the fourth floor. The Applicant called her on the hotel phone shortly thereafter, with a proposal to continue their conversation. The Complainant agreed to come to his room on the third floor, having been provided with the room number by the Applicant. As regards the details of this part of the events, the accounts differ: (a) the Applicant says the Complainant willingly provided her room number when he asked for it while they were in the lobby. The Complainant denies providing him with her room number; (b) the Complainant says that the Applicant initially asked to come to her room, but she refused. The Applicant denies making this request; (c) the Applicant says that he invited the Complainant to his room so that they could continue their conversation. He did not invite her to go to the bar because he does not drink. The Complainant says that he had agreed for them to go down to the bar and she went down one floor to pick him up on the way to the bar; and (d) the Complainant says the Applicant's door was open when she arrived and that she found him standing at the far end of the room, by the balcony. The Applicant says his door was closed when the Complainant arrived, and that he escorted her to the balcony after opening the door for her.

65. It is however undisputed that the Complainant entered into the Applicant's

[54] Complainant's OAIS record of interview, 13 April 2017, lines 416-439 (trial bundle, pp. 37-38); Applicant's OAIS record of interview, 23 May 2017, line 58 and 89-90 (trial bundle, pp. 86 & 88).
[55] Applicant's OAIS record of interview, 23 May 2017, line 20 (trial bundle, p. 83).

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

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

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

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

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

Events that occurred after the 2 December 2016 incident

69. On 3 December 2016, the Applicant emailed the Complainant and then started a WhatsApp conversation with her.[56] The tenor of these exchanges indicates that the Applicant was pursuing the Complainant, assuring her of his good intentions and the desire to spend another night with her, whereas she was not reciprocating his advances.[57] One of the Complainant's WhatsApp messages was clear that the encounter was not normal for her, that the Applicant would not let her leave and that she was uncomfortable.

Complainant:

[56] Trial bundle, pp. 189-197.
[57] Ibid., pp. 189-201.

> "*Merci. Mais tu sais que la nuit dernière ne m'a pas fait sentir à l'aise. Tu ne m'a pas permet de partir.*" (Translation: "*Thank you. But you know that the last night did not make me feel at ease. You did not let me go*.")
>
> The Applicant did not push back: "*L'amour est compliquée, cherie...*" ("*Love is complicated my dear*")

Another exchange of the same date goes:

> Applicant:
>
> *"let's invest in joy, complicity and happiness".*
>
> Complainant:
>
> *"Hmmm. Tu aimes d'avoir le pouvoir sur les femmes? Hier. Ce n'est pas normale pour moi." ("Hmmm. You like having power over women? Yesterday. It's not normal for me.")*
>
> Applicant:
>
> *"No complicity and respect".*
>
> Complainant:
>
> *"Ah. Hier nous avons complicite?." ("Ah. Yesterday, we had complicity?")*
>
> Applicant:
>
> *"Je sais (I know), forget about yesterday and be more constructive. Yes, some complicity…only difference you were rationale and me not..."* [58]

70. On 3 December 2016, the Complainant returned to her duty station.[59] She testified at the hearing that already on the way back she had searched the internet for advice how to proceed for rape victims. On 4 December 2016, she emailed the UNFPA Regional Security Advisor for the contact information of the Stress Counsellor. She did not pursue this contact because "he asked [her] what was wrong".[60] She also called a medical referral service in Dakar called SOS to see if she could find an English-speaking female counsellor to talk to but was unsuccessful. She then tried unsuccessfully to find a counsellor in the United States.[61]

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[58] Ibid., pages 196-197.
[59] Ibid., p. 236.
[60] Ibid., pp. 232-233.
[61] Complainant's oral evidence of 23 September 2021.

71. The Complainant maintains that on 5 December 2016, she asked Mr. A. P. for a mutually agreed termination because she had been struggling professionally and wanted to leave her duty station. Mr. A. P. refused her request. She then asked if her role could be moved elsewhere. Mr. A. P. promised to discuss with someone else and get back to her.[62] This is not confirmed by Mr. A. P., as described in para. 75 below.

72. According to the Complainant, sometime during the week of 5 December 2016, she created a note of the 2 December 2016 incident describing how she had been raped.[63] In the disciplinary process the note was discarded for the lack of evidentiary value because the file had been modified prior to sending it to investigators.

73. Between 6 and 11 December 2016, the Applicant called and sent messages to the Complainant on WhatsApp and passed a gift for her.[64] In March 2017, the Applicant passed by the Complainant's office when she was absent. She did not respond.

74. Mr. A. P., the Complainant's supervisor, was interviewed twice in the investigation and heard by the Tribunal. He presented a consistent account of the events. He recalled that in December 2016 in New York, the Complainant came in his office and described how, after the final session of the meeting, she and the Applicant had contemplated going to the hotel bar to have drinks, how she had gone down to meet him at the door or in his room, found the door open but the Applicant was not coming out; how she stepped in then had been overpowered and raped by him. She did not provide any details of what the Applicant had actually done to her[65] but she provided his name.[66] She further described that afterwards she had received playful text messages from the Applicant, to some of which she had responded, that she had not requested the post-exposure kit because it would have to go through the office of the Country Representative.[67] He remembers the Complainant breaking down in tears and

[62] Trial bundle, p. 236; p. 74, lines 1675-1683; p. 75, lines 1690-1691.
[63] Ibid., p. 231.
[64] Ibid., pp. 198-201.
[65] Ibid., pp. 279-280, lines 52-66.
[66] Ibid., p. 288, lines 192-195.
[67] Ibid. 274, lines 100-101.

having difficulty speaking on this part[68], which was in stark contrast with her usual demeanour. He was shocked but found the Complainant believable.[69]

75. Mr. A. P. recalled that the Complainant expressed that she was not ready to file a formal complaint as long as she was in Dakar given her bad working relationship with the Regional Director, moreover she feared encountering the Applicant in meetings in the region.[70] She had not kept any evidence of the rape and she loathed to make a report at that time. She asked him not to tell anyone. This put him in a difficult position because he wanted to respect her privacy, yet he was under an obligation to report misconduct. He followed up with her about three times to check if she had filed a complaint.[71] He sought advice from the Ethics Advisor about the incident.[72]

76. His conversation with the Complainant about her moving to another location had been ongoing before the 2 December 2016 incident because she had a challenging work relationship with the Regional Director in her duty station.[73] Mr. A. P. does not confirm that the Complainant had asked for an agreed separation in connection with the rape incident.[74] Rather, unhappy with her work in Dakar, she had been contemplating her options after the expiration of her fixed-term appointment in Dakar and saying she would go to a head-hunter. After she had complained about the assault, there were discussions with the then Director of Human Resources, Mr. M.E., where agreed separation may have been mentioned, but finally the incident led to the decision of moving her to New York. This was a unilateral decision based on the Complainant's needs and not the Organization's needs. [75]

77. On 19 December 2016, Mr. A.P. approached the UNFPA Ethics Advisor for advice on what the Complainant had told him without revealing her identity. The Ethics

[68] Mr. A. P oral evidence on 9 September 2021; trial bundle, pp. 273-274.
[69] Mr. A. P oral evidence on 9 September 2021.
[70] Trial bundle, pp. 262-263, lines 29-41, pp. 282-284, lines 91-127, testimony before the Tribunal.
[71] Trial bundle, p. 281, lines 80-82.
[72] Ibid., pp. 285-286, lines 151-165.
[73] Ibid., pp. 282-284, lines 91-127.
[74] Ibid., p. 296 line 179; lines 92-96; 284-285 lines 133-134.
[75] Ibid, pp.282-284 esp. line 121; p. 287 line 183.

Advisor advised him to encourage the Complainant to report the incident.[76]

78. On 27 December 2016, the Complainant communicated with a stress counsellor.[77]

79. On 30 January 2017, the Complainant contacted the Ethics Advisor via email requesting a meeting on a personal issue.[78] The Complainant and the Ethics Advisor had a Skype call on 1 February 2017 during which the Complainant told the Ethics Advisor about the 2 December 2016 incident in detail and her attempts to move out of her duty station because of the rape/sexual assault. The Ethics Advisor advised her to report the matter directly to the Chief of OAIS.[79] On 3 February 2017, the Ethics Advisor sent the Complainant a follow up email to see if she had reported the matter to OAIS.[80] The Complainant responded on 14 February 2017 that she was uncomfortable and did not feel safe filing a complaint while she was still in her duty station. She said would take leave so she could care for herself and find another job.[81]

80. On 13 February 2017, the Complainant requested Special Leave Without Pay.[82]

81. Between 23 February and 23 March 2017, the Complainant had Skype sessions with a psychoanalytic psychotherapist regarding the 2 December 2016 rape/sexual assault.[83]

82. On 1 April 2017, the Applicant was appointed the UNFPA Representative for Madagascar and Country Director for the Comoros, Mauritius and the Seychelles.[84] He travelled to Madagascar on 20 May 2017 to assume this new role.[85]

83. On 13 April 2017, the Complainant reported the 2 December 2016 incident to

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[76] Ibid., p. 245, line 73.
[77] Ibid., p. 234.
[78] Ibid., p. 258.
[79] Ibid., p. 241, line 37; p. 257.
[80] Ibid., p. 256.
[81] Ibid., p. 254.
[82] Ibid., p. 236.
[83] Ibid., pp. 524-525.
[84] Respondent's reply, para. 1.
[85] Applicant's oral evidence of 22 September 2021.

OAIS.[86]

The Applicant's submissions

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

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

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

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

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

The Respondent's submissions

88. That standard of clear and convincing evidence is met in the present case, namely: (i) the consistent, coherent and highly believable account of the assault provided by the Complainant on two occasions to OAIS; (ii) the Complainant's early report to her supervisor, Mr. A. P, about two weeks after the incident; her report to Ms. K. C, the UNFPA Ethics Adviser, after approximately two months; and her eventual report to the OAIS; (iii) her demeanour and genuine emotion and distress during her three reports as well as in the interview with OAIS; (iv) the corroborating evidence provided by Mr. A. P, Ms. K. C and the Complainant's therapist; (v) the WhatsApp messages, one of which specifically states that Applicant did not let her go, to which he did not express any objection; (vi) the evidence of Complainant's attempt to manage the effects of the rape through stress counselling by reaching out to the United Nations Department of Safety and Security ("UNDSS") for stress counselling options and the evidence that she sought and received counselling from a therapist; (vii) the Applicant's proven lie about the location of his hotel room, seeking to undermine the logic of Complainant's account and the inherent possibility of the situation as recalled and described by Complainant; and (vii) the Applicant's deletion of electronic evidence that was material to the allegation.

89. The inconsistencies in the Complainant's statements that the Applicant points out are minor ones, which can reasonably be expected after a passage of time. The Complainant maintains her version of the material issues, i.e., what happened, and is clear about what she said, what she felt and what she wanted, across her accounts.

90. Conversely, the Applicant's account is characterized by stereotypical challenges against rape victims. The Applicant's explanation that the Complainant invented the rape allegation to either take revenge on him for not wishing to commit to a long-term relationship or to be transferred out of her then duty station is not credible. The Complainant had no motive to fabricate the allegation. The Complainant's messages to the Applicant were not vengeful but showed efforts to understand the incident. This is consistent with victim behaviour confirmed by established research.

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

91. On the other hand, the Administration took into consideration the false and/or inconsistent statements made by the Applicant in relation to: how he obtained the Complainant's room number; whether his door was open or closed when the Applicant arrived; the Complainant's height and weight; whether the Complainant was clothed; the Complainant's alleged request for a long-term commitment; the length of time the Complainant was in his room; how the Applicant obtained the Complainant's cell phone number; and their WhatsApp communication.

Considerations

92. The majority of the Tribunal's panel ("the Majority") find the Complainant credible, agreeing with the reasons elaborated by the Respondent in his closing submission. The Complainant showed good recollection and observation of detail (e.g., circumstances when she had first noticed the Applicant, what they were wearing at dinner, what they ate), she further displayed honesty and emotion, including self-blame for her lapse of judgment in staying in the Applicant's room and description of embarrassment on the day after. She maintained coherence and consistency on material details, some of which are unique and personalized (e.g., her motives for seeking the Applicant's company; the situation of rooms in the hotel; the words used by the Applicant; the fact that the Applicant used a fireman's lift to fling her on the bed). The Majority concede that the Complainant's description of the time spent in the Applicant's room is less detailed than other parts of her story and does not precisely account for the interaction that must have lasted around one hour. In trying to comprehend how two mature persons, senior United Nations officials, both knowledgeable of norms upheld by the Organization in respect of sexual autonomy of person, found themselves in the situation contemplated by this Judgment, the Majority allow that the Complainant may be underestimating or downplaying the level of encouragement she had given the Applicant by agreeing to stay in his room – especially

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

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

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[88] In addition to sources cited by the Respondent, see Littleton, H., Downs, E. & Rudolph, K. The Sexual Victimization Experiences of Men Attending College: A Mixed Methods Investigation. *Sex Roles* 83, 595–608 2020, https://doi.org/10.1007/s11199-020-01133-1; TeBockhorst, S. F., O'Halloran, M. S., & Nyline, B. N. Tonic immobility among survivors of sexual assault. Psychological Trauma: Theory, Research, Practice, and Policy7(2) 2015, https://doi.org/10.1037/a0037953; Gbahabo D., Duma, S. "I just became like a log of wood … I was paralyzed all over my body": women's lived experiences of tonic immobility following rape, Heliyon, Volume 7 (7) 2021, https://doi.org/10.1016/j.heliyon.2021.e07471; Mgolozeli, S., Duma, S "They destroyed my life because I do not feel like a man anymore": An Interpretative Phenomenological Analysis of Men's lived experiences of rape victimization, Heliyon, Volume 6, Issue 5, 2020, https://doi.org/10.1016/j.heliyon.2020.e03818; Moller et al. "Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression", Acta Obstetrica et Gynecologica Scandinavica 7 June 2017 https://doi.org/10.1111/aogs.13174; the latter widely publicized, among other by Amnesty International: "la sidération est une réaction physiologique et psychologique couramment constatée en cas d'agression sexuelle, qui empêche la personne de s'opposer à l'agression, l'obligeant même souvent à rester immobile. Ainsi, une étude clinique suédoise de 2017 a établi que 70 % des 298 femmes victimes de viol ayant participé à l'étude avaient été frappées de « paralysie involontaire » pendant l'agression" at https://www.amnesty.fr/focus/cinq-choses-a-savoir-sur-le-viol; Galliano G. et al Victim reaction during rape/sexual assault: a preliminary study of the immobility response and its corelates, Journal of Interpersonal Violence Volume 8 issue 1, 1993, https://doi.org/10.1177/088626093008001008.

the United Nations and to the Executive Director of 11 and 27 May 2020, show how the Applicant was able to capitalize his political weight and mobilize his government's machinery and the media to pressure the Administration to circumvent its legal processes and to withdraw the dismissal, and to instigate a pressure campaign against the Organization and the new Executive Director.

94. The Complainant, nevertheless, prior to filing a complaint at OAIS, established the record of the incident in other ways: she sought out stress counsellors in WCARO immediately after the rape; she promptly informed her supervisor; she spoke to a United Nations Stress Counsellor in New York in December 2016; she was also treated by a psychotherapist. Obviously, the Complainant is human resources specialist, with experience in international organizations and knowledge about documenting workplace abuse or easy access to pertinent information; as such, her post-incident actions can hardly be regarded as intuitive or spontaneous. This, however, does not render these actions evidentiary insignificant; rather, they demonstrate the Complainant's determination. Against this background, the Complainant's note for file is of no importance, especially given that it proved impossible to date it with certainty. The Majority, however, does not consider the note to have been a result of "forgery", as maintained by the Applicant. There are technical reasons for which the file may have been corrupted; the Complainant had other means had she intended to fabricate her own note; besides, it was not her who insisted on introducing that note in evidence in the first place.

95. Of all the circumstantial evidence, however, the Majority find that the most weight is carried by WhatsApp exchanges on the day after the incident. These messages, albeit not explicit, convey in a sufficiently clear manner that the Complainant had experienced compulsion the night before. The Majority consider, moreover, that the overall tenor of the messages, including the absence of outright accusation of rape, is illustrative of the Complainant's effort to process and understand what had happened, at the same time, on her own words, in an effort not to antagonize the Applicant.

96. Further, the Majority fully agree with the Respondent that the Complainant had no motive to fabricate the allegation. Regarding the Applicant's supposition that she falsely accused him because he had refused to commit to a long-term relationship, the Majority find it implausible. The Applicant and the Complainant had just met that night in a work setting and were due to return to Ethiopia and Senegal within 48 hours. Forming an expectation for a long-term relationship based on this short encounter is unlikely. The actions of the Applicant and the Complainant following 2 December 2016 demonstrate, moreover, that it was the Applicant who pursued the Complainant by asking her number, calling, emailing and texting her, sending gifts and going by her office in Senegal in March 2017. In contrast, the Complainant rejected the Applicant's advances and ceased all communication with him after 3 December 2016.

97. Regarding the Applicant's supposition that the Complainant fabricated the allegation because she wanted to change her duty station from Senegal, the Majority consider it similarly implausible. As justly pointed out by the Respondent, had the Complainant had such a perverse plan, it would have been more rational to fabricate allegations within WCARO and claim impossibility of maintaining any working relation there, rather than target a colleague whom she had just met in a conference abroad. If anything, the Majority would be prepared to accept a possible connection between the Complainant's frustration at WCARO and her decision to report the incident but not that she would have invented the incident as such. The Complainant had absolutely no guarantee that she would be moved to New York, indeed, as the Respondent describes, it was for her a path marked with demotion, uncertainty and short-term appointments, and only three years later resulted in securing a P-4 position. It is moreover clear from the testimony of Mr. A. P. that the Complainant's transfer to New York was mainly related to her unworkable relation with the Regional Director, as evidenced by the fact that already before the incident she had been considering her options after the end of her fixed-term appointment, and that even after the placement of the Applicant on ALWP and his swift separation thereafter, she was not returned to

her previous post.[89]

98. The Applicant, on the other hand, is generally lacking credibility. In addition to clearly false statements regarding material facts about the room placement and the sending of the email on 3 December 2016, which are discussed *infra*, his account is replete with statements that are internally inconsistent and/or implausible.

99. One of them concerns the matter of how the Applicant got the Complainant's room number. The Applicant maintained that he had asked the Complainant for her room number, and she had given it to him.[90] Later, he stated that he had called the reception.[91] Then he stated that while he could have gotten the hotel reception to transfer his call, he had nevertheless gotten the Complainant's room number from her.[92] Then, he stated spontaneously that he had called the reception, and "they" had given him her room number.[93] At the hearing, the Complainant testified that she had not given the Applicant her room number. The Applicant maintained that she had given it to him but later conceded that he could not remember if he got her room number from the Complainant or from the reception,[94] departing from his interview with OAIS. The Majority would be prepared to accept that the Applicant could not remember how he obtained the room number, however, an inescapable conclusion is that he insisted that the Complainant had readily given him her room number to support his story that she was a willing participant in a consensual relationship.

100. Another contradiction concerns whether the Applicant was clothed: The Complainant maintained that she had kept her dress on.[95] The Applicant told OAIS that he had taken her dress off and that, apart from her bra, the Complainant had been naked during sex, and had gotten dressed afterwards.[96] Later, he changed his story and stated

[89] Testimony of Mr. A. P, 9 September 2021.
[90] Applicant's OAIS interview on 23 May 2017, paras. 20, 25 to 26, 184 to 190, 213 to 214, 224 to 235.
[91] Ibid., para. 184.
[92] Ibid., paras. 715 to 721.
[93] Ibid., para. 727.
[94] Applicant's Testimony, Tape 1 at 2:47:09 to 2:50:33.
[95] Complainant's 2017 interview paras. 40, 1234, 1262, 1354.
[96] Applicant's interview, paras. 474, 492 to 493, 504 to 505, 521.

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

101. Yet another inconsistency concerns the circumstances of obtaining the Complainant's cell phone number: The Complainant maintained that the Applicant had asked for her phone number the day after the rape, *i.e.,* 3 December 2016. She had given him a wrong number first, but later felt pressured to give him the right one when he had come back for it.[99] The Applicant denied the Complainant's account and stated that she gave him her correct phone number on "the first day".[100] However, evidence shows that the Applicant called the Complainant's hotel room on 2 December 2016 and only started sending messages to her cell phone at 5:07 p.m. on 3 December 2016, corroborating the Complainant's account. Further, in his response to the charges, the Applicant conceded that he got the Complainant's number on 3 December 2016 without providing any further details.[101]

102. The Majority agree with the Respondent that the Applicant's false statements to OAIS and his changing stories were not minor or reasonable discrepancies that could be attributed to the passage of time and stress of being investigated in a second language. The Applicant repeatedly made strong assertions to present the Complainant as the party actively seeking further interactions. He then changed those assertions, without any convincing explanation as to why he had advanced them in the first place, probably realizing that he was not capable of presenting a version coherent with the Complainant's rejection the day after, or that those details of preceding interactions, even if accepted as proven, would not have justified imposing himself on the Complainant.

103. The Majority find the fact that witnesses, Dr. K. and Mr. A. P. did not confirm certain peripheral details of the Complainant's account to be of no significance. These

[97] Ibid., paras. 822, 863 to 886.
[98] Applicant's Investigative statement paras 391-409
[99] Complainant's 2017 interview, paras. 40 to 42, 1443 to 1447; Complainant's testimony at 27:00.
[100] Applicant's interview, paras. 914 to 916.
[101] Applicant's response to the charges, para. 87.

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

Whether the established facts amount to misconduct

Applicant's submissions

104. The evidence obtained from their investigations in the instant case, was incapable and/or insufficient to support any charges of misconduct against the Applicant. As there was no foundational basis for the disciplinary sanctions imposed on the Applicant, the Respondent has simply 'sought to place something on nothing'.

105. The Applicant submits that consensual sex occurred between him and the Complainant. There is no rule or principle declaring consensual relations between two consenting adults to constitute misconduct.

Respondent's submissions

106. The Respondent submits that the Applicant's actions amounted to serious misconduct because: it was a significant departure from the standards of conduct expected of an international civil servant; had a negative impact upon the welfare of the Complainant; and put the reputation of the Organization at risk. Further, the Contested Decision advances the Organization's legitimate policy of zero tolerance in cases of sexual misconduct, sexual exploitation and abuse and is a rational means of achieving that policy.

107. The legal framework relied upon by the Respondent includes United Nations Staff Regulations 1.2(b) and 10.1(b); Staff Rule 1.2(f); ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse); paragraphs 6.1.1(c) and (s) of the UNFPA Policy and Procedures Manual ("PPM") Disciplinary Framework (2014) as well as the UNFPA PPM, Prohibition of Harassment, Sexual Harassment and Abuse of Authority (2013); Standards of conduct for the International Civil Service (2013), para. 5.

Considerations

108. The Majority concur that the act of forcing sexual intercourse - by the Applicant on the Complainant - (i.e., rape), amounted to sexual abuse in a grave form and, as such, constituted a serious misconduct prescribed by staff regulation 10.1(b) and staff rule 1.2 (f), and several other lower-ranking acts mentioned by the charging and by the sanctioning letters. Raining upon the Applicant all other legal characteristics though, such as "rape and sexual assault", "sexual harassment" and "failure to report misconduct", was superfluous. There is no ambiguity as to that the charge pertained to a single act of rape, which falls under the statutory notion of sexual abuse. Other terms employed by the Respondent for legal characterization of the act, notwithstanding that some among them do not appear in the applicable framework, are either included in or subsumed by the principal charge.

Whether the facts relating to Count 2 have been established by clear and convincing evidence.

109. Under Count 2, the Respondent established that the Applicant obstructed and/or failed to cooperate with OAIS by withholding and/or failing to disclose facts material to the investigation, and/or providing false information during the investigation. The objective factual elements relevant for this charge are undisputed. The argument and, accordingly, the Tribunal's review of the findings that underpin the impugned decision focus on the subjective element of the Applicant's conduct, that is, knowledge and intent.

Denial and deletion of the email

110. On 3 December 2016, the Applicant sent an email to the Complainant from his iPhone stating "[d]ear [Complainant], I'm trying to reach you. Please call rm 314. Thanks".[102] The Applicant denied sending this email, even though it clearly indicated that it had been sent from his personal iPhone and questioned its authenticity.[103] After

[102] Trial bundle, p. 10.
[103] Trial bundle, p. 125, lines 962-968.

analysis of the technical data, the UNFPA Technology Services and IT innovations, Information Technology and Solutions ("ITSO") concluded that the email was genuine but was not present in the "sent items" folder because it had been deleted. During the hearing, the Applicant confirmed that he had sent the email and explained that his initial denial had been due to the fact that he had been unable to remember sending it at the time.

Statements regarding his room location at Hotel Laico

111. The investigation established that the Complainant's room during her stay at Hotel Laico was on the fourth floor[104] while the Applicant's room was on the third floor.[105] The Applicant, however, insisted during his 23 May 2017 OAIS interview, even after being shown his own email dated 3 December 2016 indicating that his room number had been 314[106], that his room had been located on either the seventh or eighth floor.[107] He nevertheless signed all the necessary waiver to enable the investigators contact Hotel Laico and gain access to information regarding the whereabouts of his stay there.

Deletion of WhatsApp messages and application

112. Further, on 3 December 2016, the Applicant started a lengthy WhatsApp conversation with the Complainant. Between 6 and 11 December 2016, he called and sent further messages to her on WhatsApp.[108] During his OAIS interview, the Applicant did not initially mention his WhatsApp communication with the Complainant that had taken place on 3 December 2016. OAIS visually examined the Applicant's phone and particularly the WhatsApp application. It was found that there were no messages to the Complainant although her name remained in his WhatsApp contact list. OAIS informed the Applicant that they needed to further examine his phone. The Applicant deleted the entire WhatsApp application from his phone before

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[104] Complainant's OAIS record of interview, 13 April 2017, lines 34 and 212 (trial bundle, pp. 23, 24 & 31).
[105] 12 September 2017 email from a reservations agent at Hotel Laico (trial bundle, p. 202).
[106] Trial bundle, p. 10.
[107] Ibid., p. 124 lines 943-944; p. 126, line 975.
[108] Trial bundle, p. 127, lines 1000 – 1017.

handing it over.[109]

Respondent's submissions

113. The Respondent's case is that the Applicant provided false information to the investigators during his 23 May 2017 and his comments submitted on 24 February 2020. Moreover, he failed to disclose facts material to the investigation and deleted evidence material to the investigation. In summing up, the Applicant failed to cooperate with OAIS during its duly authorized investigation.

114. The Respondent submits that the Applicant's explanation that he could not recall sending the 3 December 2016 email when OAIS asked him about it due to the passage of time is not credible. He never stated vis-à-vis OAIS that he could not "recall" sending it. Rather, he offered multiple emphatic denials even after seeing the email during the OAIS interview. The email had probative value because it confirmed that the Applicant's room was on the third floor and not on the seventh or eighth floor as he had maintained. It was reasonable for the Administration to infer that the Applicant deliberately deleted the email to bolster his story and discredit the Complainant. Likewise, the Applicant made false statements regarding the location of his room to discredit the Complainant's testimony that she had gone to his room intending to pick him up and go down to the lobby.

115. On the question of WhatsApp messages, the Respondent impugns that the Applicant did not voluntarily disclose his WhatsApp messages to the Complainant, where his conduct is juxtaposed with the Complainant who shared them with her manager, OAIS and the Ethics Adviser; moreover, the Applicant provided different explanations for the deletion.[110]

116. Throughout the process, the Applicant gave different explanations for deleting the WhatsApp application. The only reasonable explanation was that the Applicant deleted the application to obstruct OAIS' investigative activity and to divert their

[109] Investigation Report, para. 77; Applicant's Testimony, Tape 1 at 2:33:30 to 2:33:54.
[110] Charge letter p. 325 of the Trial bundle.

resources and attention.

Applicant's submissions

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

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

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

Considerations

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

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

his room at Laico Hotel.

121. Regarding the email of 3 December 2016, the Tribunal accepts that the Applicant could have initially forgotten sending it. This, however, was not his statement to OAIS. Rather, he vehemently denied authoring the email shown to him, which provoked the need to forensically examine the electronical data. It was only after the authenticity of the email had been confirmed in this way that the Applicant conceded at the hearing that he had sent the email.

122. The Tribunal considers it normal that people forget their floor or room number months after a hotel stay. Indeed, the Applicant stated initially that he had arrived from another conference and that he did not remember the room number at Laico which "maybe was on seventh or eighth floor". The Applicant, however, ultimately did not express any doubt about his recollection to OAIS and maintained that his room at Laico was on the "*seventh or eighth floor*" and "*definitely above*" the Complainant's room[113], even after the investigators showed him the 3 December 2016 email referring to room 314.[114] The Applicant's subsequent explanation that his memory failed is not convincing and not exonerating. The room was the scene where the impugned conduct took place and, admittedly, the Applicant and the Complainant first spent around 30 minutes on the balcony and contemplated the view; these elements made the location of the room memorable. On the same occasion, the Applicant remembered the Complainant's room being on the fourth or fifth floor[115] without ever visiting it.

123. The Applicant had interest in misrepresenting his room location. It was lending credibility to the Complainant's account that she had intended to pick the Applicant up on their way down to the lobby, whereas the location indicated by the Applicant was serving his version that the Complainant's visit to his room had been a goal in itself. That the Applicant ultimately signed a waiver allowing verification of his room number with the Laico hotel does not change the fact that he had lied about a material fact.

[113] Trial bundle, p. 114.
[114] Ibid., pages 124-126.
[115] Trial bundle pages113-114.

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

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

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

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

[116] Trial bundle, p,168.
[117] Trial bundle p.162.
[118] Trial bundle p. 462.

phone.

127. The Respondent, however, charged the Applicant for supplying different reasons for the deletion. With this respect, the Applicant explained in his interview before OAIS that he had deleted the messages time ago because he had feared that his wife and/or children would discover them.[119] This explanation was spontaneously supplied and the Tribunal agrees that, given the Applicant's marital status, it is not unreasonable that he would have been eager to conceal his extra-marital relationship with the Complainant. This explanation is repeated in the Applicant's response to the charges of March 2020. In his earlier 24 February 2020 response to the investigative dossier, the Applicant spoke of "deletion of messages from my privately owned mobile phone, in order to enhance the storage capacity thereof, prior to the commencement of your investigation." Noting the shift in the motivation invoked, the Tribunal however considers that the stated purposes for deletion of messages are not mutually exclusive; at the same time, the expression used in the Applicant's response to the investigative dossier is not precise enough - for example, does not specify the kind of messages concerned, email or WhatsApp - to attribute prevarication.

128. As concerns the charge of "not volunteering" information of WhatsApp messages, the Tribunal finds that the Applicant volunteered that, the day after the incident in question, he had spoken with the Complainant, had called in the evening in an attempt to see her again, and that, upon return from the conference, had called and written her two or three messages.[120] Subsequently, when inquired, he said:

> 582. **App**.: Yeah, the next day, I don't know, that's not something I remember exactly, but I know we talk. I can't remember it was through phone, no I think, it was through phone. I, I call her, okay, I'm not very sure, but in any case, I wanted us to, to meet again […]" to which the investigator (LM) asked […]:
>
> 585. **LM:** Which phone did you use to call her?
>
> 586. **App:** Hotel extension.
>
> 587. **LM:** The same one as before, the room phone?

[119] Trial bundle p. 110.
[120] Trial bundle, p. 84.

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

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

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

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

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

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

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

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

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

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[121] Trial bundle, p.107.
[122] Ibid., p. 110.
[123] Ibid., p. 124.
[124] Ibid., p.127.

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

134. As concerns the deletion of the entire WhatsApp application, the Applicant has furnished diverse explanations. He explained during the hearing that he had deleted the WhatsApp application because: (i) the investigators had only indicated an interest in his emails and not his WhatsApp correspondence; (ii) he had stored his family and banking information in WhatsApp; (iii) he had thousands of confidential messages between himself and government officials that he could not delete individually within the few hours he had been given to turn in his phone. In his closing submission, the Applicant misrepresents his testimony during the hearing to have been that he had had a habit of deleting messages on his phone regularly in order to free-up space thereof and that it had in fact occurred well before he became aware of the investigation in April 2017.

135. The Tribunal considers that, once again, the Applicant's explanation volunteered in the hearing appears spontaneous and more plausible than subsequent ones. It is undisputed that the Applicant's phone had contained the WhatsApp application at the time of the interview and that the investigators had checked that there

[125] For example, as the record demonstrates, the Complainant was also unsure of the date of the incident and subsequent communications (Investigative record of Complainant's interview, trial bundle p. 22) and her means of communication with Mr. A. P (Trial bundle p. 75).

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

Whether facts relating to count 2 amount to misconduct

136. In considering whether the facts so established amount to misconduct, the Tribunal recalls that the basis for the charge, in addition to the general reference to highest standards of integrity from staff regulation 1.2(b), and paragraph 5 of the Standards of Conduct for the International Civil Service, was staff rule 1.2(c), whereupon "Staff members have the duty to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations." UNFPA Disciplinary Framework provides in para. 6.1.1(q) that "Misconduct includes but is not limited to … failure to cooperate with a duly authorized audit or investigation."

137. The extent of cooperation expected of the staff member is provided in the UNFPA Disciplinary Framework as follows:

> Section 11.1
>
> The obligations of all UNFPA staff members, including but not limited to Subjects of Investigation, include:
>
> (a) to cooperate with any Investigation, answer questions, provide documentary evidence in their possession or which should reasonably be expected to be in their possession, and to assist the Director, OAIS, as required, in accordance with Staff Regulation1.2(r);
>
> (b) not to interfere with any Investigation, and, in particular, not to withhold, destroy or tamper with evidence, and not to influence or intimidate the complainant and/or potential witnesses;

138. This is complemented by section 12.3.4,(f), whereby the following, *inter alia*, authority is ascribed to the investigative body:

> *Documentary evidence:*
>
> (ii) The Director, OAIS, may collect and obtain any documentary evidence. UNFPA personnel shall provide any documentary evidence, in original form or as copies, or access thereto without delay and as requested by the Director, OAIS.
>
> *Physical evidence:*
>
> (iii) The Director, OAIS, may collect and obtain any physical evidence. UNFPA personnel shall provide any physical evidence to the Director, OAIS, without delay.
>
> *Electronic evidence:*
>
> (iv) The Director, OAIS, may collect any electronic evidence. […]

139. The above provisions of the UNFPA Disciplinary Framework delineate broadly the duty to cooperate whereas they do not determine the extent of non-cooperation that may constitute misconduct. Some inter-related considerations are however readily relevant. Whereas the above-cited provisions do not discriminate between staff members subject to investigation and the staff appearing in another capacity, it is nevertheless obvious that it is necessary to sometime construe impunity for the subject, either on the ground of the procedural law, or the substantive one, or both, to avoid absurd results. Another consideration is that the duty to cooperate must not be construed so broadly as to deny staff member's right to privacy, private property and freedom from self-incrimination. Exacting by the Administration of the duty to cooperate needs to be vetted with the view to these rights.

140. In the procedural area, staff rule 10.3 and the UNFPA Disciplinary Framework, section 10, recognize that the subject is entitled to due process, thus raising a question whether the concept of due process encompasses a right against self-implication akin to right against self-incrimination in the criminal procedure. A rule for not prosecuting for not confessing or for denying own misconduct might be derived from the presumption of innocence, a principle firmly confirmed by the Appeals Tribunal's

jurisprudence,[126] as well as expressly confirmed in UNFPA investigative processes[127], which normally implies the right to silence, i.e., that no negative inferences will legally follow from the subject's passive stance in the process. The Majority are aware that on the municipal level there are regulatory frameworks for public servants that grant the right to silence while other ones do not. However, assuming that in UNFPA regulatory proceedings the notion of due process does not include a general right to silence, to construe an unlimited duty of a staff member to volunteer inculpating evidence against self would transcend a reasonably understood notion of "cooperation". At minimum, there are situations where staff members should be exempt from answering certain questions or be afforded specific protections before answering them.[128]

141. Second, prosecution of a culprit for not reporting himself under staff rule 1.2(c), would be precluded by the substantive law's principle of inclusion of the related subsequent actions of the offender aimed at avoiding liability, which presupposes that meting out a sanction for the principal offence accounts for a lesser one stemming for it, which therefore, is considered included.[129] While this construction is expressed by the doctrine rather than by legislation, the practical acceptance of this doctrine is demonstrated by the fact that none of the applicants appearing before the Dispute Tribunal, to the knowledge of this Panel, has ever been disciplined for not reporting or denying his conduct, or for not volunteering evidence against himself. This practice

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[126] Presumption of innocence has been articulated as the staff member's right in the jurisprudence of the Appeals Tribunal consistently over the period of 10 years (see 087-UNAT-2010 para 17; 2012-UNAT-207 para 28; 2017-UNAT-718 para 24; 2019-UNAT-956 para 41; 2019-UNAT-973 para16 and 2020-UNAT-1024), just as it has been used at ILOAT (see e.g. Judgments Nos 1340, 2351, 2396, 2879, 2913, 2914, 3083). To the extent it may be argued that presumption of innocence refers principally to criminal proceedings, this Tribunal concedes that adopting the term to context of disciplinary proceedings may have been a matter of convenience, whereas, more precisely, it should have been expressed as presumption of non-liability, or lack of fault, in a staff member's conduct.

[127] Notice of formal investigation, trial bundle p. 149: "Personnel against whom an allegation of wrongdoing has been made are presumed innocent throughout the investigation process".

[128] As demonstrated by the fact that municipal legal systems widely protect various kinds of privileged information as well as generally exempt testifying persons from the duty to give a self-incriminating answer. As concerns public officials answerable pursuant to a regulatory framework, the latter point is illustrated by the emerging US doctrine of "Garrity rights" and "Lybarger warning", which guarantee that an answer given in a regulatory procedure which potentially could be incriminating will not be disclosed outside.

[129] Referred to as negligible/omittable concurrence of infractions or "not punishable post factum" or "lesser included". The concept does not extend over acts that bear no sufficient nexus with the main act and those of considerable gravity.

does not distinguish between a disciplinary charge of a "criminal nature" and a purely administrative one, which would favour a rapist, an embezzler or a thief whereas staff member charged with workplace harassment or improper use of Organization's property would be still obliged to report himself, a clearly absurd result. Instead, the fact of cooperation with the investigation or lack thereof is treated as mitigating circumstances or absence thereof. This approach, which the Majority call inclusion rule, is rational from the point of view of effective discipline while properly takes into account impracticality of having self-denunciations as standard.

142. Furthermore, in deciding on the attribution of misconduct for non-cooperation it is necessary to discern passive lack of cooperation and active hampering of an investigation. It appears to be universally accepted that hampering of an investigation through discrete forms of prohibited activity, such as false accusation, putting pressure on witnesses, fraud, destruction of evidence through criminal means, may entail punitive action independent from the liability for the principal act. As regards passive non-cooperation, however, the issue requires a more nuanced approach, where gravity of the principal charges alone does not suffice to construe an overarching obligation for a staff member to supply information and for the administration to sanction for a refusal. As noted by this Tribunal, "respect for private property, as well as privacy in general, dictate restraint in making requests for surrender of private assets, i.e., acting for a good cause and with proportionality […] whereas sanctioning a refusal to surrender as unsatisfactory conduct should be an exceptional case".[130]

143. First, thus, there is necessity requirement, in that a demand for disclosure must be rationally connected to the purpose of the investigation. A proper consideration for these concerns is exhibited by the OAIS' request for access to email databases. [131] Even more so, the claim to access a private phone[132] is not to be used for fishing expedition.

[130] See Order No 172 (NBI/2020).
[131] Trial bundle, p. 155.
[132] The Tribunal considers that the powers widely expressed in the UNFPA Disciplinary Framework do not encompass seizure of private assets and documents (see Order No 172 (NBI/2020).

The proportionality requirement has multiple facets[133], however, it would rarely justify a demand for a blanket disclosure of all communications with third persons on private devices. Finally, in order to attribute "withholding" evidence amounting to misconduct, a staff member would need to have evidence in his/her purview as well as be aware that it is relevant and required by the investigation. The doctrine denying staff members the right to silence has, as a corollary, a requirement to give notice of coercive question, so that the staff member could knowingly decide whether to answer or risk being dismissed. The same rule, in the Tribunal's opinion, applies to exacting disclosure of private communications on private devices, where it would be appropriate to issue a prescribed order to a staff member to retain and preserve his/her discoverable materials, such as IT communications, before withholding of evidence could be attributed.

144. In the present case, the Applicant was informed about his obligations under section 11.1 of the Disciplinary Framework.[134] There was however, no notice of coercive questions, or an order to preserve private communication data, specifically, that he would be risking being disciplined for a removal of WhatsApp application even after he had admitted to sending the messages shown to him. Neither was the Applicant notified what information the investigators wanted to collect from his private phone. While the sanctioning letter blames the Applicant for censoring the content of the phone despite the "investigative interest in reviewing […] WhatsApp application", there is no explanation given, not even ex post to this Tribunal, what was the actual investigative interest in the WhatsApp application, considering that the investigators were in possession of messages received from the Complainant's end, that these messages were admitted by the Applicant, and that they had already been deleted from his phone.[135] Assuming that the investigators may have wanted to "ascertain any communication with any other person where the incident or [the Applicant's and the Complainant's] relationship may have been discussed", as it was one of the purposes

[133] At minimum, the extent of required cooperation would need to determined taking into account the function held by the staff member, the nature and gravity of the alleged infraction, and the nexus with the function.
[134] Pages 149-151 of the Trial bundle.
[135] Not claiming expertise in IT, the Tribunal notes that, to the extent the investigative interest could have been in examining backup of WhatsApp messages, this possibility, if a backup had been set up, should not have been disabled by the deletion of the application.

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

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

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

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

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

principal charge according to the principle of inclusion. What is, in any event, clearly improper, is to penalise an applicant twice for the lack of cooperation with the investigation: first as an aggravating circumstance and then as a discrete form of misconduct, as the Respondent did in the present case.[138] As this issue, as it is considered below, had no impact on the disciplinary measure ultimately applied, the Tribunal does not intervene.

Proportionality of the sanction

The Applicant's submissions

148. The Applicant does not concede that he was in fact guilty of the misconduct charged. Still, the disciplinary measures imposed on him were excessive and did not take into account mitigating circumstances such as: his long, illustrious and unblemished career with various United Nations entities; and his proven track record of defending the rights of girls and women and the mandate of UNFPA. In upholding the dismissal of the applicant in *Mbaigolmem*[139], the Tribunal found that the applicant had a previous history of sexually assaulting and harassing women. That is not the case here. The severity of the sanction imposed on the Applicant in this case, was disproportionate to the circumstantial evidence adduced and relied upon by the Respondent in making a finding of misconduct against the Applicant.

149. The sanction imposed on the Applicant caused reputational and irreparable damage to him and his family because the Respondent allowed information regarding his dismissal to be released and communicated to the host country government, the United Nations Country Team, and members of the diplomatic community at his duty station.

The Respondent's submissions

150. The Respondent submits that the sanction imposed on the Applicant is not unreasonable, absurd or disproportionate. The Applicant does not identify any valid

[138] Sanctioning letter, page 467 of the Trial bundle.
[139] *Mbaigolmem* 2018-UNAT-819.

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

Considerations

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

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

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

aggravating ones.

153. The Tribunal considers that the misconduct, such as found established under Count 2, did not require meting out a separate sanction, given that the sanction for Count 1 takes the facts of hampering the investigation into account as aggravating circumstances. Overall, nevertheless, the measure of dismissal is not disproportionate.

JUDGMENT

154. The application is dismissed.

(Signed) *(Signed)*

Judge Klonowiecka-Milart Judge Adda

Dated this 28th day of March 2022

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

(Signed)

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

DISSENTING OPINION by Judge Francesco Buffa

1. I am here dissenting from my learned Colleagues following a divergent evaluation of the regularity of the proceedings and the merits of the case.

Whether the staff member's due process rights were guaranteed during the entire proceedings.

2. I agree with the Majority that in disciplinary cases the first element to be examined, before assessing the merits of the charges, is whether the staff member was accorded his due process rights during the entire proceedings. As to the regulation of the proceedings in the case at hand, according to staff rule 10.3, the disciplinary power belongs to the Secretary-General only, who "may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred".

3. Pursuant to this rule, the legal evaluation of the facts assessed by the investigators (in this case, the OAIS) is to the Administration, who can take interlocutory steps (see paras. 13.2 and 15.4.1 of the Disciplinary Framework) and can also contradict the conclusion of the investigative report in its discretional evaluation of the case. Indeed, the independent investigative bodies are solely responsible for fact-finding and the organs of disciplinary procedure do not collect evidence; the latter, however, evaluate the evidence in its legal aspects, to assess whether the facts constitute or do not constitute misconduct.[144] I therefore agree with the Majority that the Applicant's claim that a positive investigative recommendation would be indispensable for instituting disciplinary proceedings fails. Indeed, it is within the authority of the Secretary-General to take an autonomous evaluation of the facts, although, of course, any departure from the investigator's recommendation could weaken the final decision.

4. There are, however, some guarantees for the accused person that must be respected, in particular, when the evaluation by the Administration contradicts the

[144] *Elobaid* UNDT/2017/054, confirmed by 2018-UNAT-822; for some limits to this discretion, see *Ular* UNDT/2020/221.

recommendation by the investigators. The Disciplinary Framework provides as follows on "case closure":

> 12.5.1 If, in the view of the Director, OAIS, the information obtained during Investigation (i) does not give rise to a reasonable conclusion that Misconduct occurred or (ii) would not otherwise merit the continuation of an ongoing Investigation, the Director, OAIS, may close the case, recording the reasons in writing, and inform the complainant accordingly.
>
> …
>
> 12.6 Notifying the complainant within six months
>
> 12.6.1. In accordance with the terms of the UNFPA Policies and Procedures Manual, Protection against Retaliation for Reporting Misconduct or for Cooperating with an Authorized Fact-Finding Activity, paragraph 7(b)(iii), the Organization is required to inform the complainant of the status of the matter within six months. Accordingly, the Director, OAIS, will notify the complainant within such time frame, provided that the individual disclosed his or her identity and accurately indicated the way he or she can be contacted. Such notification is required only with regard to the status of the matter.
>
> …
>
> 16. TIMEFRAME
>
> 16.1 To the extent possible, and depending on the complexity of the matter, the period between the date on which the staff member was informed that he or she is an Investigation Subject and the date on which he or she is either issued Charges of Misconduct or informed that the case is closed, should not under normal circumstances exceed six months.

5. Even with the clauses "[t]o the extent possible and depending on complexity of the matter" and "under normal circumstances", a deadline of six months is clearly set to close the case or to accuse the staff member. This deadline is not imposed on the investigators (who implicitly bear stricter statutory limitations), but on the Administration, who is the only authority empowered to close the case or issue the charges.

6. The staff member has a protected interest in respect of this deadline in both cases: in case of accusation, in order to be able to prepare a timely defence and, in case

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

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

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

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

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

(about 15 months) asked for a new investigation on facts which were not new, being already available at the time of the initial investigation. In particular, these facts were: 1) the Complainant's notes, which were later considered irrelevant to substantiate the accusation; 2) the testimony of a person - which was already available - on what the Complainant told her; 3) a witness already heard on a different fact non strictly related to the events of the accusation.

11. None of these facts were considered decisive for the case (as the Respondent admits: see also the statements by the witness Mr. R). In other words, despite the absence of any new facts, the Administration pursued the disciplinary process; in substance, in the case we have a fresh evaluation of the same facts, made well after the end of the first investigation. In my view the reopening could not be an instrument to simply overcome the time limit set in art. 16.1 of the Disciplinary Framework, nor to remedy any inaccuracies or negligence by the first investigators.

12. The Majority recognize (at para. 49) that a staff member who has been investigated for misconduct is entitled to a closure, and such closure should be attained by establishing the time limits for conclusion of the disciplinary case as well as the grounds and time-limits for re-opening it. I agree with this statement in that it is inconceivable that a "Damocles's sword" be pending on the life of the accused person without limits. I am aware that the case was never formally closed by the Administration, but I cannot agree with the Majority's conclusion that the regulatory framework does not confer sufficient procedural guarantees.

13. Firstly, the results of the investigation and the conditions for additional investigations were clearly indicated to the Applicant; they founded a legitimate expectation on the part of the Applicant that the case would not be revived without those conditions for reopening being met; the conditions set up in rules for additional investigations, indeed, shall be respected in taking the decision to re-investigate the case, and a simple pretext cannot be used for that reopening.

14. Secondly, the provision of a deadline to inform in ordinary circumstances the accused person of the outcome of the Administration's assessment of the investigation

would be without effect if the evaluation by the disciplinary organ of those facts could be rendered without temporal limitations, as the principle of legal certainty (recalled by the Majority) requires the final decision to be taken timely.

15. I agree that the six months deadline is not a strict one, because some difficulties can come into play (as allowed by the above-mentioned clauses contained in the legal provision), so that the Administration can refer to a "reasonable time" within certain limits. Of course, in the assessment of this "reasonable time", the time elapsed from the day the alleged misconduct occurred to the date of the final disciplinary decision has to be taken into consideration.

16. It is worth recalling that in *Masylkanova*, 2016-UNAT-662, para. 23, where "there were several differently constituted panels to hear one complaint and a total of 26 months elapsed before a decision was given", UNAT held that there was a breach of the ST/SGB/2008/5, "which requires that complaints are addressed promptly".[145]

17. The assessment by the Majority in para. 48 that the "time elapsed from the recommendation for closure to the reactivation of the case was not excessive" is therefore too narrow, because the whole period in art. 16.1., as above mentioned, must be taken into account. I also add that the assessment of the "reasonable time" should require the evaluation not only of the gravity of the allegations (para. 49 of the Majority's judgment), but mostly of the complexity of the investigation of the facts.

18. With reference to this case, I understand that the reopening of the investigation was made owing to the seriousness of the charges and that the Legal Unit needed to provide fully informed advice to the decision maker, but I found that this element needs to be balanced with staff member's guarantees (clearly provided under art. 16.1, as repeatedly recalled) and with the principle of reasonability of the time for a new investigation or evaluation of facts.

19. In conclusion, even without recalling the statements of Ms. L (who testified that

[145] See, although referred to the right of the complainant, also *Benfield-Laporte* 2015-UNAT-505, para. 40, and *Abubakr* 2012-UNAT-272, para. 44; and *Applicant*, UNDT/2010/148.

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

20. I agree with the Majority, instead, that the Applicant's case is about his individual acts and personal liability, and that there is no evidence of racial discrimination by the Administration in accusing and punishing him. The allegations that the Complainant fabricated her accusations for the private scope of changing duty stations and that the Administration exploited the situation to get rid of some powerful high-level African UNFPA staff members (after the death of the previous Executive Director in late 2017), showing at the same time a zero-tolerance policy towards sexual harassment and abuse, although suggestive, remain unproven.

Whether facts were established by clear and convincing evidence.

21. This is the key issue as to the charges under Count 1, because in the case we have two contradictory series of incompatible statements by the Applicant and the Complainant that render it extremely difficult to assess where the truth lies, especially in the case where, as the Majority recalled (in particular in para. 92, line 10, and 102 as to the Complainant, and paras. 98 to 102 as to the Applicant), and as it emerges from a prejudice-free reading of the Investigation Report too, both parties' recollection of facts is incomplete and partially inconsistent and the facts themselves are ambiguous.

22. I am aware that this Tribunal[146] has held that in sexual harassment cases, credible oral victim testimony alone may be sufficient to support a finding of serious misconduct, without further corroboration being required. I am cognisant too of the heavy difficulties encountered by a victim of rape to denounce the crime and to recollect the facts precisely without blanks or discrepancies.

23. Even considering the legal literature on rape, however, we cannot depart from the specific facts as resulting from the records. The first investigation was closed for lack of evidence and moreover because the Complainant's "friendly disposition

[146] *Hallal* UNDT/2011/046, at para. 55 (affirmed by the Appeals Tribunal in *Hallal* 2012-UNAT-207). See also, *Applicant* UNDT/2021/043, para. 41.

towards the Applicant … was exculpatory of him having assaulted her" (to use the Applicant's wording recalled in para. 84 of the Majority's Judgment). As already mentioned, the additional investigation required by the Administration added no relevant element to reach an assessment of facts divergent from the previous one: the Complainant's notes were of uncertain date and probably modified (the Majority qualifies them "corrupted" and "of no value" in para. 93) and the two witnesses provided only – and long time after the events - hearsay from the Complainant herself (who instead was heard soon after the complaint).

24. Given the above and having in mind the results of the fact-finding investigation, the documents on record and the evidence collected at the hearing, I cannot but express the view that, for the contest of the facts (the private hotel room of the alleged rapist, where the alleged victim deliberately went), the length of the permanence in that room (at least one and a half hours, as emerges from the messages sent before and after the meeting and from what the Complainant herself acknowledged in her personal notes) – in particular considering that a relevant part of that permanence continued after the Applicant shows clearly his intentions-, for the gaps in the recollection of the facts by the Complainant (which is not detailed at all especially on the core moments and which glosses over what happened during a very long period in a clear situation, and whose gaps are not justified by the alleged shock suffered), for the length of a situation with clearly sexual connotations (see in particular line 1009 of the investigation report: "*So for an amount of time you were on the bed, he's on top of you*"), for the complete lack of any sign of threat or violence by the Applicant (as only his persistent attempt –within the limits of what is allowed- emerges from records), for the time – some long minutes as a minimum - spent in the room after intercourse when the Applicant was in the bathroom with the door closed and couldn't prevent the Complainant from leaving the room immediately), it is difficult to exclude a consent by the Complainant to the sexual intercourse or at least to say that there is a clear and convincing evidence of a rape.

25. It is worth stressing that the records do not show any sign of threat or violence by the Applicant. On the contrary, the Investigation Report shows that the Applicant, notwithstanding his continuous persistent advances, was not aggressive at all, nor at

the beginning of the meeting (line 889.HW: *He still was like very calm, like he wasn't aggressive*), when he kisses her at the balcony (line 918.HW: *It wasn't aggressive*), during and after the intercourse (line 1419. LM: *Okay. What's his tone when he's talking to you?* 1420. HW: *The same, non aggressive tone*.).

26. The Complainant explained (para. 67 of the Majority's judgment) that she did not scream or tell the Applicant to stop immediately when he started touching her, because she viewed him as a powerful man in the Organization and was afraid to upset him, and that also she did not want the Applicant to give additional negative information about her to the Regional Director when her job was already in a precarious situation.

27. It is really difficult to recognize that an alleged victim of assault and rape, in a situation showing no sign of threat or violence at all (and instead showing "*kissing and caressing each other for long*" between the Applicant and the Complainant: para. 68 of the Majority's judgment), will accept the sexual intercourse because she was "afraid to upset" the perpetrator, or because she had in front of her a person perceived as a "powerful person".

28. When the borders of a situation of mutual respect are crossed, indeed, no gentle relationship could be kept and a reaction by the victim is expected according to "*id quod plerumque accidit*", that is what usually happens to ordinary people; indeed, the embarrassment invoked by the Complainant cannot justify the acceptance of sexual advances without any reaction.

29. At least, in a situation – I repeat - without threat or violence, the lack of any reaction by the person who is the object of sexual advances, whatever could be its motivation, cannot be interpreted as a clear dissent to the sexual intercourse.

30. In other terms, given that the Complainant - also at the hearing - explicitly admitted she "*didn't say stop, didn't yell*" and no real constraints have been even alleged nor emerged impeding her to attempt a physical minimal defence and to leave

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

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

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

> line 1009: So for an amount of time you were on the bed, he's on top of you.
>
> …
>
> line 1198. HW: -- and then I think he removed my underwear at that point.
>
> …
>
> line 1200. HW: I think he removed his pants. I still wasn't -- I wasn't struggling as much, like I think I sort of like gave up.
>
> …
>
> line 1365 I didn't say anything" (while he kissed her on her mouth while having sex).

33. The Majority gives excessive importance to the fact that the Complainant at a certain point told the Applicant she had made a mistake going into the Applicant's room and she did not want to have sex with him (para. 66); however, this happened in the very first moments of the meeting (see the Complainant's interview and her testimony at the hearing too), while there is no clear evidence that the Complainant reiterates her denial later on, when they were in the bed for long in unequivocal behaviour and her behaviour could be seen by the Applicant being completely inconsistent with the first weak resistance.

34. The Majority itself allows (para. 92) that "the Complainant may be underestimating or downplaying the level of encouragement she had given the

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

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

36. Certainly the expectations that a young staff member – with work-related problems and frustrations – may have placed in a powerful and sly colleague with a high position in the United Nations hierarchy and well connected (running for presidency in his country, friend of the Regional Director and of the former President of the United States of America, Barrack Obama) remained frustrated after she realized – at the end of the intercourse and not before and probably only when the Applicant told her he was married and with his own life - he had purely sexual objectives, she had made a mistake and she had been used as an object. However, this is not sufficient to substantiate an accusation of rape.

37. In this confused and equivocal evidentiary scenario, the Majority would find a confirmation of the rape on one hand on the inconsistencies of the Applicant's narrative of the events (in particular with reference to her hotel room number –para. 99- or his room floor -paras. 120 and 121 in particular, but the issue is recurrent also in paras. 64, 111 and 11420) and, on the other hand, in the content of some WhatsApp messages (para. 69) exchanged the day after the events (whose evidence would be implicitly corroborated by the deletion of them by the Applicant in his cell phone: paras. 125 and following).

38. As to the first point, I found completely irrelevant the Applicant's forgetfulness about the position of his room in the building, given that the Complainant in any case went to his room, entered in it and remained there for a long period.

39. As to the second point, let alone the absolute irrelevance of the deletion of the messages (which I am examining in depth below), the messages show only that, even

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

58. As to protection of privacy, specific rules apply, as the legal system can provide different means of intrusion in the private sphere to gather evidence: for instance, inspection of private premises, strip-searches, seizure of personal items could be allowed by law under certain conditions in order to discover crimes or to find evidence about them or their author; the privilege against self-incrimination does not extend to the use in criminal proceedings of material which may be obtained from the accused through recourse to compulsory powers but which has an existence independent of the will of the suspect, such as documents acquired pursuant to a warrant or sample for the purpose of DNA testing.[149]

59. Similarly, internal United Nations rules allow the Administration to collect any personal data stored in the electronic means belonging to the Organization, in compliance with the policy agreed on the use of information and communication technology resources and data.

60. These powers however are not the same: in the first situation, the interference with privacy is general and, under the foreseen conditions, also private devices or communication can be subjected to the investigation powers. Out of a public prosecution of crimes, instead, an interference toward private devices cannot be envisaged, for the simple reason that it is not provided and it cannot be included in the general authority of the Administration (see also para. 143, footnote 132 of the

[149] See the ECHR judgments: *Saunders v. the United Kingdom* [GC], § 69; *O'Halloran and Francis v. the United Kingdom*, op. cit. § 47.

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

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

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

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

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

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

(Signed)

Judge Francesco Buffa

Dated this 28th day of March 2022

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

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi