UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/004
Judgment No.: UNDT/2022/082
Date: 20 September 2022
Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

OKWAKOL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Sétondji Roland Adjovi, *Etudes Vihodé*

Counsel for the Respondent:
Jacob B. van de Velden, AAS/ALD/OHR, UN Secretariat
Andrea Ernst, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a former Chief Resident Auditor with the Office of Internal Oversight Service/Internal Audit Division ("OIOS/IAD") at the P-5 level working with the United Nations Organization Stabilization Mission in the Democratic Republic of Congo ("MONUSCO").[1] He filed an application with the United Nations Dispute Tribunal ("UNDT/the Tribunal") in Nairobi on 4 January 2022 to contest the decision to impose on him a disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity, in accordance with staff rule 10.2(a)(viii).[2]

2. The Respondent filed a reply on 4 February 2022 and requests the Tribunal to reject the application.

Facts

3. The contested decision, taken by the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/MSPC"), was conveyed to the Applicant by a letter dated 4 October 2021 from the Assistant-Secretary-General for Human Resources ("ASG/HR"). In this letter, it was stated that,

> based on a thorough review of the entirety of the record, including your [Applicant's] comments, and on the basis of the considerations set out in the annex to this letter, the USG/MSPC, has concluded that the allegations against you [Applicant] are established by clear and convincing evidence and your actions [Applicant] constituted serious misconduct in violation of staff regulations 1.2(b), staff rules 1.2(c), (e) and (g), and section 3.2(f) of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse).[3]

4. Regarding the factual background for the contested decision, the ASG/HR indicated that based on the memorandum of allegations:

a. On 25 November 2019, you [Applicant] were informed by Mr.

[1] Reply, para. 1
[2] Application, section V, para. 1.
[3] Reply, annex 6 (Sanction letter).

> RL, Mail Assistant, MONUSCO that V01, an employee of a service vendor at the United Nations Organization Stabilization Mission in the Democratic Republic of Congo ("MONUSCO") had filed a complaint with the MONUSCO Conduct and Discipline Team ("CDT") alleging that JM, a UN Volunteer had raped her earlier that year. You were also informed that RL was implicated in the complaint as he had failed to report the allegation. You then agreed to participate in a meeting to be held later that day with V01, RL, JM and BK, Resident Auditor at MONUSCO, the Office of Internal Oversight Services ("OIOS") to discuss V01's complaint.
>
> b. During the meeting, you urged V01 to withdraw her compliant from CDT, told her to say that she was withdrawing the complaint of her own volition, and participated in negotiations concerning an agreement pursuant to which JM would pay V01 USD2,000 in return for the withdrawal of her complaint and/or in connection with her complaint of rape.
>
> c. On 11 December 2019, after having received notice from OIOS investigators of the investigation into his conduct and of his upcoming interview, you participated in a meeting with RL and JM. During that meeting, you discussed the OIOS investigation and gave advice to RL regarding what he should say during his upcoming interview with OIOIS.[4]

Standard of review in disciplinary cases

5. The general standard of judicial review requires the Tribunal to ascertain: (a) whether the facts on which the disciplinary measure was based have been established; (b) whether the established facts legally amount to misconduct; (c) whether the disciplinary measure applied was proportionate to the offence; and (d) whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

6. It is established that "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".[5] "The Dispute Tribunal is not

[4] *Ibid.*
[5] *Sanwidi* 2010-UNAT-084, para. 40.

conducting a "*merit-based review, but a judicial review*" which is concerned with "*examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision*".[6] Among the circumstances to consider when assessing the Administration's exercise of its discretion: "*[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion*".[7]

7. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred[8] and where termination is a possible sanction, the evidence of wrongdoing must be established with clear and convincing evidence,[9] which "means that the truth of the facts asserted is highly probable".[10] The Appeals Tribunal clarified that clear and convincing evidence can either be "direct evidence of events" or may "be of evidential inferences that can be properly drawn from other direct evidence".[11]

Whether facts were established by clear and convincing evidence.

a. <u>The failure to report misconduct.</u>

8. In both his subject interview and in his testimony, the Applicant admits that on 25 November 2019, RL visited him in his office.[12] He, however, denies that RL

[6] *Ibid.,* para. 42.
[7] *Ibid.*, para. 38.
[8] *Liyanarachchige* 2010-UNAT-087, para. 17; *Hallal* 2012-UNAT-207, para. 3.
[9] *Nyambuza* 2013-UNAT-364.
[10] *Turkey* 2019-UNAT-955, para. 32.
[11] *Negussie* 2020-UNAT-1033, para. 45.
[12] Hearing of 5 August 2022, Applicant's testimony, p. 18, lines 21-24; investigation report (16 December 2019, audio-recorded interview of the Applicant, part 1; Doc 100; investigation report, *op. cit*, Doc 74; Applicant's testimony pages 11-18, 42, lines 230-391, 936-943; investigation report, *op. cit,* part IV interview heled on 24 July 2020, Doc 173, p.7-8, lines 141-161. (The Applicant initially said that, during this meeting RL informed him that the CDT said that V01 had brought an allegation of rape to his attention, and he did not report it because he saw it as a misunderstanding about money. The Applicant then changed his account.)

informed him that V01 had filed a rape complaint against JM with MONUSCO CDT.[13] RL, however, confirmed that on that occasion he informed the Applicant that V01 had filed a rape report with the Conduct and Discipline Unit ("CDU"). He also informed the Applicant that V01 had reported to him (RL) the rape in July 2019 but that he (RL) did not report it to the Organization.

9. The chronology of events as narrated by RL[14] and partly confirmed by Mr. AA, the Conduct and Discipline Officer,[15] however, renders the Applicant's assertion implausible. According to RL, on 25 November 2019, Mr AA called him to his office. Mr. AA told him that he had not reported V01's case of sexual harassment which V01 had reported to him, and that Mr. AA was going to send the case (including the fact that he had not reported the rape) to New York.[16] This scared RL, and since he believed that it was to the Applicant (who he knew as an auditor with OIOS) that the case had been sent, and since the Applicant was his colleague and his office was close to his,[17] RL went looking for him seeking advice about the case.[18]

10. RL emphasises that he told the Applicant that the issue between V01 and JM was sexual abuse,[19] and that while he explained the money issue as well to him, his main concern was the sexual abuse case which he viewed as dangerous to his career. The Applicant informed him that the case had not been sent to him but confirmed that it was going to impact his career and that he might lose his job.[20]

11. Based on these facts, the Applicant's assertion that RL only informed him about the money issue is rejected as false.

12. The chronology of events supports RL's account that he went to see the Applicant in relation to his failure to report V01's sexual exploitation and sexual abuse

[13] Applicant's testimony, p. 19, line 2.
[14] Hearing of 4 August 2022.
[15] Hearing of 8 August 2022, testimony of Mr. AA, p. 24, lines 11-21.
[16] Hearing of 4 August 2022, RL's testimony, p. 16, lines 8-9.
[17] *Ibid.*, p. 17, lines 18-25.
[18] *Ibid.*, pp, 14, 16 and 17.
[19] *Ibid.*, p. 22, lines 1-2.
[20] *Ibid.*, p. 25.

("SEA") complaint to the authorities. He only looked for the Applicant after interacting with Mr. AA who had informed him that the SEA case and his failure to report it were to be forwarded to New York. RL could not have talked to the Applicant about money issues which had not been the subject of his interaction with Mr. AA. The Tribunal finds that RL informed the Applicant about the SEA complaint and RL's failure to report it. Since the Applicant does not deny that he did not report this misconduct which RL brought to his attention, the Tribunal finds that the facts that the Applicant failed to report misconduct were established by clear and convincing evidence.

b. Pressuring V01 to withdraw her rape complaint

13. The Applicant admits that he hosted and participated in the meeting of 25 November 2019.[21] He does not dispute the fact that the attendees of the meeting included V01, RL, JM and BK.[22] His assertion[23] that the meeting was not about V01's rape complaint, contradicts his testimony[24] in which he re-affirmed statements in his subject interview, in which he admitted that this meeting in fact concerned a rape complaint. It moreover contradicts the logical chronology of events as relayed by RL and corroborated by the Applicant himself.

14. Both RL and the Applicant do not dispute the fact that at their first interaction RL explained to the Applicant his predicament, which we now know as RL's failure to report to the authorities the rape complaint which V01 had reported to him. It is not denied that the Applicant told RL that he should have reported V01's allegation of sexual abuse as soon as she informed him.[25] They agreed that he (RL) would return to the OIOS/IAD office later that day with V01 and JM so that the Applicant could hear their accounts and explain the implications of V01's complaint.[26] Later that afternoon

[21] Application, para. 26; reply, annex 5, para. 2(ii).
[22] Applicant's testimony, p, lines 14 and 17.
[23] *Ibid.*, p. 27, lines 6-14.
[24] *Ibid.*, p. 27, ln 22.
[25] Investigation report, RL interview of 13 December 2019, Part I, Doc 83, pp.17, 50, 53-56, 58, 62-64, lines 374-381, 1116-1119, 1196-1225, 1234-1240, 1264-1266, 1291-1296, 1310-1320, 1396-1405, 1426-1438.
[26] Investigation report, Applicant's interview of 24 July 2020, part iv; Doc 173, pp.7-8, lines 157-161.

(of 25 November 2019), RL and JM went to the Applicant's office[27] and all attendees discussed the SEA complaint before V01 joined the meeting. When she joined the meeting which the Applicant admits was recorded, the Applicant opened the discussion[28] and explained to V01 the next steps that would follow her complaint to CDT.[29] The above account leaves no doubt that the meeting concerned V01's rape complaint. The Applicant's suggestion that it did not is far from the truth and is rejected.

15. About the Applicant's alleged pressuring of V01 to withdraw her complaint, it is in evidence that the Applicant told V01 that it was urgent and that she should state to CDU that her withdrawal of her complaint was of her own volition. He is reported to have specifically told her that, "You will go there and it is not to say that people have…" [RL "Influenced you."]… or threatened you… no, it was your own will."[30] The Applicant is recorded again saying, "it is you to, you see, the best you can do if you can go back where you put the case and say it was a misunderstanding; I don't want that case, please stop it".[31]

16. The Applicant asked V01what she wanted for withdrawing her complaint.[32] His explanation that by this statement he was asking V01 what she really wanted to achieve out of this whole case contradicts his admission that he said, *"Okay, okay. I see she's stuck on it, but I think she's agreeable to instalments."* "*Okay, let me see, if he's able to raise like 300, 200, are you happy or will you not be happy? Is okay?"*[33] These statements clearly show that the Applicant was in fact negotiating V01's withdrawal of her complaint. All factors considered, the Tribunal finds that the facts of the Applicant's pressuring of V01 to withdraw her rape complaint were established by clear and convincing evidence.

[27] Investigation report, Applicant's interview of 16 December 2019, Part I, Doc 74, p.42, lines 944-945.
[28] Hearing of 5 August 2022, Applicant's testimony, p. 30, ln. 4.
[29] *Ibid.*, lines 21 and 25.
[30] *Ibid.*, p. 3, lines 4-15.
[31] *Ibid.*, p. 32, lines 7-9, 14, 17; p. 34, lines 10-13, 15-18.
[32] *Ibid.*, p. 33, lines 3-6.
[33] *Ibid.*, p. 35 lines 1-5, 8,14 and 17.

c. *Interfering with the investigation; the meeting of 11 December 2019.*

17. It was alleged that at a meeting of 11 December 2019 with RL, the Applicant discussed the OIOS investigation with him and JM. The Applicant does not deny that, by 11 December 2019, he had been informed that there was an investigation and that he and RL were going to be interviewed by OIOS.[34] He, however, maintains that no meeting took place on 11 December 2019 and he did not advise RL and JM about what to say during his OIOS interview, or tell them not to discuss the USD2,000 payment arrangement with V01. He did not tell them to maintain that it was a financial dispute.[35]

18. The Respondent seeks to rely on RL's testimony[36] in which he affirms his interview statement[37] that the Applicant advised him to tell the investigators that,

> *this is all it's about money issue, so you stick to the money issue, whatever you say, whatever James say, they will know even himself, they will call him later also, maybe they will call the girl… they will call everybody and him, they will call him last. So its … he will tell them it's a misunderstanding about money, because they didn't share the money, right, and that's why the girl want to punish James*,

and invites the Tribunal to find the Applicant's United Nations vehicle carlog and logbook data,[38] sufficiently corroborative of RL's evidence.

19. The data shows that the Applicant activated the vehicle at 11.18 a.m. on 11 December 2019, drove to and entered the MONUSCO Regional site at about 11.20 a.m. and left the Regional site at about 11:26 a.m. with two other persons on board. It shows that the vehicle was turned off between 11.27 a.m. and 12.41 p.m. It then shows that the vehicle was restarted at 12.41 p.m., entered the Regional site at about 12.46

[34] *Ibid.*, p. 36, ln. 18.
[35] *Ibid.*, p. 37, ln. 8.
[36] Hearing of 4 August 2022, RL's testimony, p. 39, lines 18 and 20, p. 40, lines 2 and 16, p. 41, ln. 12.
[37] Investigation report, RL interview of 16 December 2019, part III, Doc 81, pp.4-6, lines 78-123, and RL's interview of 13 December 2019, Doc. 82, part III, p. 3-12, 15-19, lines 54-268, 337-345, 365-394, 410-413, 432-435 and Reply, annex 4.
[38] The Applicant's movements in the United Nations vehicle UN-25064 on 11 December 2019 have been documented by carlog data and logbook data of the regional site and the Applicant's residential compound. Reply, annex 4; investigation report, Doc. 174, Note to file, Analysis of Carlog reports and other data, 8 April 2020; Doc. 130, Carlog reports UN-25064, December 2019; Docs. 35, 38 and 52, photographs of gate log data.

p.m. with two persons on board, left the Regional site at about 12.48 p.m. with one person on board and entered the Applicant's residential compound which was located across from the Regional site, at about 12.45 p.m.

20. The Tribunal is, however, not inclined to find that the carlog and logbook data which only relates to the Applicant's car movements on 11 December 2019 corroborates evidence that the Applicant met with JM and RL at restaurant/hotel Centre d'Accueil Caritas, and that they discussed the investigation. Such evidence is not corroborative of evidence that RL sought advice from the Applicant about what he should say in his interview with OIOS, or that the Applicant and RL discussed the payment of USD2,000 to V01 and that the Applicant told RL not to discuss the arrangement to pay V01, but instead advised him to say that the dispute between V01 and JM was a misunderstanding about money.

21. The Tribunal, however, considers it safe for the decision maker to have grounded an adverse finding on RL's uncorroborated evidence. In the first place, RL re-affirmed his interview statement at the hearing. Secondly, his evidence was inculpatory of him. He did not seek to exonerate himself by implicating the Applicant. He therefore had no ulterior motive in testifying in the way he did. The Tribunal believed RL's evidence relating to the 11 December 2019 meeting and found that the facts relating to the Applicant's interference with the investigation were established by clear and convincing evidence.

Whether the established facts amount to misconduct

22. The Applicant does not address this issue at all. He only asserts that his rights were violated and the integrity of the investigation and the credibility of V01 were tainted. He states that the only established fact is that he hosted a meeting on 25 November 2019 where he tried to mediate a resolution based on the desperate exhortations of RL to resolve what he believed to be a financial dispute between V01 and JM. He acted only with best intentions to assist colleagues in resolving a dispute, not to violate any rules and regulations.

23. The Applicant's actions however, violated staff regulation 1.2(b), staff rules 1.2(c), 1.2(e) and 1.2(g), and section 3.2(f) of ST/SGB/2003/13 as outlined below.

Failure to report misconduct

24. When he failed to report the information that RL had been aware of a rape allegation, the Applicant violated staff rule 1.2(c) and section 3.2(f) of ST/SGB/2003/13. He also violated staff regulation 1.2(b) since he failed to uphold the highest standards of integrity required of staff members.

Pressuring V01 to withdraw her rape-complaint.

25. When the Applicant hosted and participated in a meeting during which he pressured V01 to withdraw her rape complaint in exchange for a compensation payment, and instructed her to say that she had not been influenced or threatened, and negotiating a financial payment of USD2,000 to V01 by JM in exchange for the withdrawal of the rape complaint, he violated staff regulation 1.2(b), staff rule 1.2(e) and section 3.2(f) of ST/SGB/2003/13.

Interference with the investigation

26. By attempting to interfere with the OIOS investigation, the Applicant violated staff rule 1.2(g). When he participated in the meeting on 11 December 2019 with RL and JM to discuss the OIOS investigation and provided advice about what they should say during his upcoming OIOS interview, including telling him to withhold information from OIOS, the Applicant violated staff regulation 1.2(b) and staff rule 1.2(g). The Applicant interfered with the OIOS' investigation and mandate to establish the facts.

27. All the Applicant's actions are inconsistent with the obligations of staff members to report breaches of the Organization's regulations and rules and to create and maintain an environment that prevents SEA. The Applicant contributed to an atmosphere in which misconduct may have gone unpunished, but also the SEA, which

RL had failed to report, may have gone un-investigated and unpunished and therefore persist.

Whether the Applicant's due process rights were respected during the investigation and disciplinary process

28. The Applicant maintains that his due process rights were violated in the following ways:

a. violation of his presumption of innocence,

b. violation of his rights by OIOS interviews,

c. the illegality of V01's audio recording during the 25 November 2019 meeting and its completeness being questionable,

d. the 29 January 2021 charge letter was authored by the Director, Administrative Law Division, Office of Human Resources ("DALD/OHR") without any delegation of authority to do so, and

e. he was sanctioned based on an allegation for which he was never charged.

The alleged violation of his presumption of innocence

29. Regarding the alleged violation of his presumption of innocence, the Applicant submits that OIOS had already improperly concluded that he was guilty before he was charged by the Administration. He seeks to support this assertion by the fact that the investigation report is entitled "investigation report on prohibited conduct" such reports in other case are titled, "allegations of prohibited conduct". In his view, the attributions of misconduct in section VIII of the 18 June 2020 investigation report did not respect his presumption of innocence and violated his due process rights. Therefore, the OIOS investigation was biased against him, their report was unreliable and should be dismissed.

30. The Tribunal, however, considers that the mere wording of the title to the investigation report does not amount to evidence that the Applicant's presumption of innocence was violated. In the absence of concrete evidence to substantiate this complaint, the Tribunal finds it lacking in merit.

Violation of his rights by OIOS interviews.

31. The Applicant further alleges that the OIOS interviews violated his rights. He states that the OIOS investigator did not ask questions, rather he abused, berated and lectured the Applicant as if he was his supervisor conducting a performance evaluation meeting. The Applicant, accordingly, opines that the conduct of the investigator and the failure to respect his due process rights should result in the entire investigation being thrown out.

32. The Applicant does not however, dispute the Respondent's explanation that these complaints were addressed. It is argued that he was re-interviewed, and a new investigation report dated 18 September 2020 was issued following his complaints. His responses in the additional interview were dully considered. The Tribunal agrees with the submission that the Applicant's further assertions do not pertain to the interview or other means of evidence on which the investigation report of 18 September 2020 was based, and that they are not to the point and not substantiated.

The illegality of V01's audio recording during the 25 November 2019 meeting and its completeness being questionable

33. The Applicant contests the admissibility of the recording of the 25 November 2019 meeting on the ground that it is incomplete. He argues that the beginning of the meeting when the Applicant introduced the subject matter of the meeting referring to the financial dispute between V01 and JM which he was trying to resolve, is missing. He also maintains that the OIOS tried to cover up how the recording was undertaken, who instructed V01 to take it and how it was provided to the OIOS.

34. These assertions are however against V01's testimony that she is the one who decided to record the meeting. She states that "it was my own idea, to be able to prove".

She also states that she recorded the meeting from its onset to the end, leaving out nothing. In her words she says, "From the start to the end, when I got in, and they said hello to me in Kiswahili, that's when I started recording. I missed nothing. "I had a right to use my phone, nobody could have stopped me, when I got in -- in the room, because I did not know why they had invited me to the meeting." Assertions that the OIOS tried to cover up how the recording was undertaken, who instructed V01 to take it and how it was provided to the OIOS are therefore satisfactorily clarified in V01's testimony.[39]

35. The Applicant moreover had the opportunity to comment on the recording, which has no interruptions, editing or other modifications. It was shared with him together with the transcripts, as part of the annexes to the formal allegations.[40] His comments on these documents in his comments on the allegations were duly considered by the Organization.[41]

36. The Applicant further argues that the recording violates privacy laws and principles against illegally obtained evidence. He also argues that it violated Congolese law. The Appeals Tribunal has however, provided the following guidance concerning the handling of secret recordings;[42]

> … There is no difficulty in principle regarding the admissibility of the recorded conversation on the basis of the manner in which it was procured, even though it perhaps involved an element of entrapment. Where evidence has been obtained in an improper or unfair manner it may still be admitted if its admission is in the interests of the proper administration of justice. It is only evidence gravely prejudicial, the admissibility of which is unconvincing, or whose probative value in relation to the principal issue is inconsequential, that should be excluded on the grounds of fairness. Hence, the problem in this case is not the secret recording of the conversation; it is rather the weight to be given to it. …

[39] V01's testimony, p. 71, lines 12-24; p. 72, lines 16-18.
[40] Reply, annex 4; investigation report, Doc. 9, (Audio-recording of meeting at the OIOS/IAD office on 25 November 2019; Doc. 178, (transcript three of the audio-recording of the meeting on 25 November 2019); Application, annex 3 (transcript four of the audio-recording of the meeting on 25 November 2019).
[41] Reply, annex 6.
[42] *Asghar* 2020-UNAT-982, para. 43.

37. As has been found, the purpose of the meeting at which the recording was done was to negotiate the withdrawal of a SEA complaint against a member of staff. Money was offered to the victim in exchange for her withdrawal of the complaint. There can be no doubt that a SEA complaint is high stakes, considering the Organization's SEA zero-tolerance policy. The Applicant's actions of trying to secure a withdrawal of the complaint was, therefore, similarly high stakes and could only be executed under very high levels of secrecy. These factors support a conclusion that the recording was the only reasonable way of obtaining credible evidence about the Applicant's misconduct. This alone would ground the reception of the recording in evidence.

38. The Tribunal is, moreover, persuaded by the submission that the Applicant himself hosted the meeting in which he pressured V01 into withdrawing her rape complaint in exchange for monetary compensation. He, therefore, had no fair expectation for that meeting to stay secret. On the contrary, V01 had reasonable concerns to prepare this recording as a precaution where she meets her alleged rapist. V01 indeed mentions that she decided to record the proceedings *"because [she] did not know why they had invited [her] to the meeting"*[43].

39. Based on the above considerations, the Tribunal finds the recording, which also documents the Applicant's participation in the negotiations, as having probative value and not prejudicial to him since he admits the material particulars of its contents. Its admission is therefore in the interest of the proper administration of justice.

40. In conclusion, since the meeting at which the recording was done indeed took place and the contents of the recording represent what transpired at the meeting, there is no basis for the argument that reliance on this evidence is unfair.

The complaint that the 29 January 2021 charge letter was authored by the DALD/OHR without any delegation of authority to do so

41. This complaint is factually incorrect. Section 8 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) provides that the

[43] V01's testimony, p. 72, lines 17-18.

Assistant Secretary-General for Human Resources Management ("ASG/OHR") decides whether to initiate a disciplinary process by issuing written allegations, and as was demonstrated by the Respondent, the ASG/OHR indeed authorised the DALD/OHR to do so.[44]

The complaint that the Applicant was sanctioned based on an allegation for which he was never charged.

42. The Applicant contends that he was never charged with failing to report RL's failure to report rape and yet he was sanctioned for it. The allegations memorandum[45] however relayed information to the Applicant that "*You were also informed that RL was implicated in the complaint as he had failed to report the allegation."* Based on this fact, the Tribunal agrees with the Respondent that the assertion that the Applicant was sanctioned for something he was never charged for, is erroneous. The Applicant's contention that he was only informed about a possible violation of staff rule 1.2(c) regarding his failure to report the alleged rape of V01 and not his failure to report the misconduct of RL is wrong. By the time of the meeting of 25 November 2019 when the Applicant became involved in the matter, the alleged rape had already been reported by V01. It is not credible that the Applicant thought he was charged for not reporting misconduct that had already been reported. The complaint that the Applicant was sanctioned based on an allegation for which he was never charged is without merit.

43. The Tribunal finds that the Applicant's procedural fairness rights were respected throughout the investigation and the disciplinary process. The Applicant was interviewed by OIOS and was provided with an audio-recording of the interview. He was provided all supporting documentation, was informed of the allegations against him, his right to seek the assistance of counsel and he was provided the opportunity to comment on the allegations. The Applicant's comments on the allegations were duly considered.

[44] Reply, annex 3.
[45] Application, annex 10.

Whether the sanction is proportionate to the gravity of the offence

44. The United Nations Appeals Tribunal ("UNAT") has held that a decision to impose a specific disciplinary measure for established misconduct may only be reviewed by the Tribunal "in cases of obvious absurdity or flagrant arbitrariness."[46] To interfere with the decision on the basis of proportionality, the disciplinary measure must be "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity,"[47] "altogether disproportionate" and akin to "taking a sledgehammer to crack a nut."[48] The UNAT has recognized that in imposing a sanction, decision-makers enjoy wide discretion, and due deference will be shown to the exercise of that discretion.[49]

45. The Applicant emphasizes that he was wrongfully separated based on a biased, flawed and vindictive investigation designed from the outset to find him guilty where the presumption of innocence was not respected, and his rights violated. Further, the Administration's reliance on his position in OIOS Audit as an aggravating factor was unfair and inappropriate.

46. The Respondent submits that the Applicant engaged in serious misconduct under Chapter X of the Staff Rules. Further, that the sanction imposed on him accords with the practice of the Secretary-General in similar cases and with the policies of the Organization.

47. The Applicant not only failed to report an allegation of failure to report SEA, but he in addition took active steps to conceal the allegation from the Organization. He also sought to interfere with its ordinary investigative processes. The Tribunal fully agrees with the Respondent that the Applicant engaged in serious misconduct under Chapter X of the staff rules. It is also true that the sanction imposed on him, accords with the practice of the Secretary-General in similar cases and with the policies of the Organization. The Tribunal finds that all relevant factors including the Applicant's

[46] *Jaffa* 2015-UNAT-545, para. 22; *Sanwidi* 2010-UNAT-084, paras. 39-42.
[47] *Portillo Moya* 2015-UNAT-523, para. 21; see also *Sall* 2018-UNAT-889, para. 41.
[48] *Doleh* 2010-UNAT-025, para. 20.

position in OIOS Audit were rightly considered in determining the appropriate sanction. The disciplinary measure applied was proportionate to the offence.

JUDGMENT

48. The application is dismissed for lack of merit.

(Signed)
Judge Margaret Tibulya
Dated this 20th day of September 2022

Entered in the Register on this 20th day of September 2022

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi