Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MAKEEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Bang Dut Uguak

Counsel for the Respondent:
Isavella Maria Vasilogeorgi, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Team Assistant at the GL-4 level with the United Nations Mission in South Sudan (“UNMISS”) on a fixed-term appointment, in the Aweil Field Office, is challenging the decision by the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) to impose on him the 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. The disciplinary measure was imposed on grounds that the Applicant engaged in serious misconduct, in violation of the regulations and rules prohibiting sexual exploitations and sexual abuse.

Procedural background

3. On 29 July 2022, the Applicant filed an incomplete application to the United Nations Dispute Tribunal sitting in Nairobi *via e*mail requesting urgent relief under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend the decision mentioned in para. 1.

4. The disciplinary measure was imposed on grounds that the Applicant violated staff regulations 1.2(a) and 1.2(b), staff rule 1.2(e), and sections 1, 3.1, 3.2(a), (c), and (f), and 3.3 of ST/SGB/2003/13 (Special measures for protection from sexual exploitations and sexual abuse).

5. The Applicant completed his application on 10 August 2022.

6. On 11 August 2022, the Tribunal issued Order No. 112 (NBI/2022) dismissing the Applicant’s motion for suspension of the impugned decision. As the Applicant had already been separated at the time of filing, the Tribunal determined that it had no jurisdiction to suspend a decision that had already been implemented.

7. The Respondent filed his reply on 23 September 2022.

8. The Tribunal has carefully reviewed the parties' submissions and determined that this matter is suitable for adjudication on the basis of the written record available to it.

9. On 29 June 2023, the Tribunal issued Order No. 114 (NBI/2023) informing the parties that this matter was suitable for adjudication on the basis of the written record. The parties were invited to file their closing submissions by 4 July 2023.

10. The Respondent filed his closing submissions as directed.

Factual background

11. The Applicant met V sometime in March 2020.She lived with her aunt and uncle in Aweil, who were the Applicant's neighbours.

12. Around the same time the following year, the Applicant had sex with her four times, according to V, and this was her first sexual relationship.

13. In April 2021, V discovered she was pregnant and told the Applicant. She also told him that her uncle would be filing a complaint against him. She then moved into the Applicant's house with her belongings and spent the night there. He had asked her to stay put at her uncle's. The next day, the Applicant took V to the house of a local chief (the sultan) Mr IH; she stayed there for a further two days.

14. On 26 April 2021, V's uncle filed a police report against the Applicant alleging statutory rape of a minor. She was thought to be approximately 17 years old at the time. The Applicant was arrested on the same day, but later released on bail.

15. A medical examination of V was ordered, and her pregnancy was confirmed.

16. The Applicant was rearrested on 5 May 2021, and held in custody until 20 May 2021 until he was bailed out.

17. The Applicant's family tried severally to get V's uncle to withdraw the criminal complaint, in exchange for an out-of-court settlement that included the possibility of marriage. V's Uncle did not withdraw the compliant he had filed.

18. Nevertheless, the Applicant and V's family arrived at an out-of-court settlement which included marriage and payment of cattle.

19. The Applicant was placed on Administrative Leave with pay on 11 May 2021. He was interviewed by the Office of Internal Oversight Services ("OIOS") on 2 June 2021.

20. On 30 June 2021, the High Court in Aweil dismissed the criminal matter on the basis of the settlement agreement between the parties. The Court made no findings on the facts and merits of the complaint.

21. OIOS issued its initial report on 19 August 2021. The matter was referred to Office of Human Resources ("OHR") for appropriate action on the same day.

22. On 11 October 2021, the Applicant confirmed receipt of the Memorandum of Allegations that was sent to him by OHR on 30 September 2021.

23. On 29 October 2021, the Applicant submitted his response to the allegations.

24. V delivered a baby boy on 12 December 2021, whom the Applicant acknowledges as his own.

25. The Applicant submitted further responses to the allegations on 3 December 2021, 6 January 2022, and 7 March 2022. All his responses were consistent in his denial of the allegations against him.

26. On 6-8 April 2022, OIOS conducted an additional investigation into the Applicant's case as requested by OHR. This investigation entailed further witness interviews, including that of the Applicant, as well as collection and verification of evidence.

27. OIOS submitted its findings to OHR on 13 April 2022.

28. On 19 April 2022, the Applicant was asked to comment on these findings. The Applicant submitted his comments on 29 April 2022.

29. On 21 July 2022, the Assistant Secretary-General ("ASG") for Human Resources wrote to the Applicant to inform him of the sanction. The ASG said:

> I dropped the aspect of the allegations against you regarding [V] being under 18 years of age. However, the USG/DMSPC concluded that the remaining allegations against you, that you engaged in sexual relations with [V], who was a member of the local population without independent financial means and who occasionally provided unpaid domestic help to you, that you impregnated [V] and that you agreed to marry [V] and pay a dowry to her family only after your arrest and in the hope that you would not face a possible trial concerning rape charges, are established by clear and convincing evidence. The USG/DMSPC further concluded that your actions constituted serious misconduct in violation of Staff Regulations 1.2(a)and 1.2(b), Staff Rule 1.2(e), and Sections 1, 3.1, 3.2(a), (c), and (f), and 3.3 of ST/SGB/2003/13.

Submissions by the Parties

30. It is the Applicant's case that his conduct was in keeping with the laws and customs of South Sudan. Put simply, he entered into a relationship with a young lady, she fell pregnant, and he married her. The High Court in Aweil recognised the circumstances leading up to the settlement agreement and dismissed the case before it on this very basis. Nothing about the settlement agreement was forced. Rather, it was amicably agreed between the parties by mutual consent. V was of legal age, and there was nothing exploitative about the arrangement between them.

31. The suggestion that he raped her and that she was employed by him as domestic help is absolutely false. The Respondent has unlawfully and improperly drawn an adverse inference from the fact that the marriage took place after his arrest.

32. The Respondent takes the position that the facts alleged and charged have been proven by clear and convincing evidence and that the Applicant's arguments to the contrary are not sustainable.

33. In essence, the impugned decision was made because the Applicant engaged in sexual activity with V, who was a vulnerable female member of the local population, without independent means, and impregnated her. While the Applicant

agreed to marry her, this was only after charges of rape were made against him before the local courts. He paid her family dowry to avoid criminal responsibility. In other words, the Respondent argues, the Applicant derived a social and financial benefit, from his agreement to marry V after being arrested for rape. According to the Respondent, "but for this agreement, the Applicant would have faced criminal charges, trial and possible imprisonment."

34. The Respondent argues that the Applicant's contention in the application that he was charged for being poor is without merit. The Applicant had a steady income from UNMISS, which far surpassed the median income in South Sudan. He was able to obtain a significant number of cattle to pay dowry for V within a very short period of time from when the complaint was filed (26 April 2021) until the marriage agreement was reached (25 June 2021). In contrast, V lived under "austere" conditions, the daughter of a destitute widow living in extreme poverty in rural South Sudan, and was unemployed. By the time she got pregnant from and married to the Applicant, so that he might avoid criminal conviction, she had not completed her education and had no independent prospects of her own. V's ingrained vulnerability was only exacerbated by her pregnancy, as her options were limited to either marrying the Applicant or returning to where her mother lived.

35. The Respondent continues:

> It is noteworthy that during the investigation the Applicant maintained that he was not the father of V01's child; in fact, the Applicant tried to cast doubts on V01's account, by claiming that it was rumoured in the local community that V01 had sexual relationships with other men. However, once faced with a disciplinary process, and presumably in an effort to disprove the case against him, the Applicant eventually accepted that he was the child's father.

36. The Respondent submits that the Applicant sexually exploited V in violation of staff rule 1.2(e), as specified in sections 1 and 3.2(c) of ST/SGB/2003/13.

37. In so doing, the Applicant failed to uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women, and he abused the

power vested in him as a United Nations staff member. He also failed to uphold the highest standards of integrity.

38. The sanction meted out was entirely proportionate to the offence(s) charged and proven.

39. Finally, there are no issues related to the procedural fairness. The Applicant's procedural rights were respected throughout the investigation and the disciplinary process.

Consideration

Whether facts are established.

40. Facts are not disputed between the parties, and they result from the records by clear and convincing evidence.

41. In sum, it emerges from the file that the Applicant, when his wife was in Khartoum, engaged in at least four acts of sexual intercourse with an economically disadvantaged girl (V), allegedly a minor; he impregnated her; she then gave birth to a son. The Applicant was arrested twice on charges of raping V and released on bail. The Applicant then married V, and the marriage agreement entailed the payment of 31 cows and five bulls as dowry to V's family. On 30 June 2021 the Aweil High Court decided to close the case, on the basis of the marriage agreement.

42. In particular, the Tribunal highlights the following details of the facts, resulting from the OIOS investigation report no. 197 of 19 August 2021.

43. V is a girl, who lived in poor conditions with her uncle in Aweil, in a house opposite the Applicant's house; where she occasionally went to help the Applicant when his wife was absent, performing small domestic tasks, cooking, cleaning the house, and washing clothes for very little money, if any.

44. In South Sudan, the legal age of consent is set at 18 years old. At the time of the facts, the age of V was not clear, as she herself doesn't know how old she was (para. 24 of the report) and she had no birth certificate. She moved from her village

in South Sudan (about three days' travel from Aweil) to her uncle's house after the death of her father and about 10 years before the facts at issue, when she was approximately seven years old (and V's uncles and other witnesses heard by the investigators, stated V was 17 years old at the time of the facts). She completed primary school only recently (she was recorded as 16 years old in 2018, with a date of birth of 31 March 2022: (para 84 of the Report)).

45. In any case, the certificate by the Aweil Town Public Prosecution Attorney on 1 July 2021 certifies that the case against the Applicant (there is no issue between the parties that the certificate refers to the Applicant, although the name indicated does not fully correspond to the Applicant's effective name) was dismissed "because there is no **Rape** and **no under Age**" (bold characters in the original).

46. Finally, it has to be noted that para. 129 of the investigation report stressed clearly that:

> OIOS cannot definitively state V's age, given the inconsistencies in the accounts and the lack of birth certificate or any other contemporary documentation OIOS notes that there are credible grounds to consider that V is a juvenile and that [the Applicant] could not have been certain of her being an adult when [he] had sex with her. OIOS could not confirm that V changed her account at the request of [the Applicant] but notes that she did so after his arrest and when discussions between the families to reach a settlement were ongoing.

and that in the disciplinary sanction letter from the ASG for Human Resources, the aspect of the allegations against [the Applicant] regarding [V] being under 18 years of age (see para. 30 above) was dropped.

47. Also, the age of the Applicant is not certain (see para. 130 of the investigation report), although he is recorded in the United Nations system as 53 years old. While the Applicant was a United Nations staff member, enjoying all the benefits related to his status for years, V had no job, came from an impoverished background in a remote village and was living in "austere" conditions in Aweil. The report therefore assessed a power differential between the Applicant and V (see page. 25 of the report):

> there was a notable power and status differential between [the Applicant] and V, emanating from their comparative ages, maturity, wealth and status, as well as [the Applicant's] United Nations position.

48. The Applicant and V had sexual intercourse on four different days and occasions, which were fully consensual (para. 27 and 69 of the report).

49. Following the said intercourse with the Applicant, V became pregnant.

50. It is undisputed that, after becoming pregnant, V had to either marry the Applicant or be taken back to their paternal village, in rural South Sudan, where she would have lived in even greater poverty, compared to her living conditions in Aweil.

51. It results from the records that, following a claim by V's uncle, the Applicant was arrested on suspicion of rape (accusation connected to the complainant's affirmation that V was 17 years old, therefore incapable of expressing a valid consent under the national laws).

52. The Applicant was released on bail, then again arrested and, after 21 days, released once more.

53. It also results from the records that (after some initial hesitations) the Applicant acknowledged the baby as his and named him Kofi, allegedly after the former United Nations Secretary-General Kofi Annan (annex 1 to the reply; see also para. 64 and 79 of the investigation report).

54. The Applicant and V married following the national rules, and the Applicant paid to V 's family 31 cattle and five bulls as dowry.

55. At the end the Applicant was discharged, and the criminal case was dismissed (see para. 27 of the report; see decree on 30.6.2021 by the High Court Northern Bahr El Ghazal State Aweil), in consideration of the matter being settled by agreement between the complainant and the Applicant, and also because there was no rape and V was not underage (see certificate by the Aweil Town Public Prosecution Attorney on 1 July 2021, above quoted).

Whether the facts amount to misconduct.

56. The Respondent recalls the investigation report and supporting documentation from which it results that the Applicant impregnated a local girl and that he was arrested by the local police on suspicion of rape. The Applicant was disciplined because he had sexual activity with a vulnerable female member of the local population, so abusing of the power vested in him as a United Nations staff member and failing to uphold the highest standards of integrity.

57. Section 1 of ST/SGB/2003/13 defines "sexual exploitation" as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, included, but not limited to, profiting monetarily, socially or politically from sexual exploitation of another". And "sexual abuse means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions".

58. The Tribunal concedes that the Respondent fulfilled his burden of proof that V was vulnerable and less powerful than the Applicant and that the Applicant's actions regarding V had a sexual connotation.

59. The Respondent assumes that only after his arrest the Applicant engaged in discussion about marriage, with the goal of being cleared of the accusations.

60. The Tribunal notes that the reasons behind human acts can be different, and that the concrete scope of them are not always relevant for the law.

61. As the facts emerged after the pregnancy being discovered, no one can say if the criminal complaint was filed to have the Applicant convicted or only to pressure him into marriage and in order to have a better settlement. Similarly, no one could say if V's inconsistent statements about her age were conditioned by the aim to have the Applicant face his paternal responsibility or, later, to have him discharged by criminal accusations, or both. And finally, no one could say if the Applicant agreed to the marriage to be cleared in the criminal trial or in order to give a future to his son.

62. For the point of view of the law, we simply have some consensual sexual intercourse, the fortuity of the pregnancy, the birth of a child, a marriage. We do not have any rape. In this context, any speculation on the real motives behind human actions is not relevant from a legal point of view.

63. The Respondent assumes that there was a monetary, social and political benefit to the Applicant from his actions in that the Applicant was not convicted or imprisoned for rape and did not lose his employment because of his arrest.

64. The Tribunal notes that these are not "benefits" from the prohibited conduct (the alleged sexual exploitation) and are related in no way with it, but rather they are a consequence of the assessment of the real age of the alleged victim and the marriage with her, which led to the prosecution being discontinued. In other terms, the sexual activity with V produced no "moral, social and political" benefits to the Applicant, and instead a lot of unpredicted disadvantages to him.

65. It is important to stress on this point that one conduct is the sexual intercourse, one different one is the marriage: it is definitively improper to consider, like the Respondent would do, the benefits the Applicant could have had from the marriage and to apply them to the previous sexual intercourse.

66. The same mistake is made by the Respondent in assessing the severity and proportionality factors, where is not clear at all if he refers to the sexual intercourse (and which one among the four), the pregnancy, the marriage, the arrest, the criminal discharge, and so on. Without specifying the single specific conduct relevant in the case, it is meaningless to consider that the Applicant acted alone, the action was deliberate, that no disclosure was made, and even that the Applicant deleted evidence from is phone during his OIOS interview; applying the proportionality factors to a fact rather than to another could even be an hilarious exercise.

67. In this situation, and considering the sexual intercourse alone (to which the accusations of sexual exploitation and abuse inevitably refer), there is no exploitation by the Applicant of his financially and socially stronger position, unless one would adventure him/herself in assuming that a consensual sexual

intercourse in the private life (with no connection with the working position of the person and his/her functions) with a poorer or less important person would entail sexual exploitation in itself (with no other benefit, given or promised, out of the sexual act).

68. The Tribunal notes indeed that neither the Applicant had a benefit from the sexual intercourse, nor V was offered or promised any advantage from her sexual activity, so we cannot see any exploitation, which requires undue advantages (even only the sexual act in itself).

69. In theory it would have been different (and staff rule 1.2(e) would have been applicable) if the victim was a minor, legally and naturally incapable of expressing a valid consent to the sexual intercourse: but this is not the case, and, apart what is said above about V's age, the Respondent himself said (at para. 37 of the reply) that the sanction imposed on the Applicant is not premised on V's age (and also the sanction letter dropped the correspondent accusations).

70. In the case at hand, the sexual intercourse was fully consensual, and the different social conditions of the persons would not entail any coercive condition, remaining the social and economic inequality out of the performed act. From what it results from the file, there are no elements which can support the allegation that the Applicant abused V in having the sexual intercourse or exploited the situation having undue advantages.

71. As already mentioned, in the Tribunal's view the case shows simply some consensual sexual intercourse, the fortuity of a pregnancy, the birth of a child, a marriage, all facts of private life with no connection with the status of the staff member concerned.

72. The Respondent in his closing submissions recalls *Erefa*, UNDT/2021/109, (paras. 53, 85, 93, 94, 96, Judgment not appealed before the UNAT and, thus, final). In that case, the UNDT found that striking an agreement to pay money to a victim and her mother to withdraw criminal complaints of rape before the local judiciary was an act that amounted to sexual exploitation and warranted the sanction of dismissal. The Respondent recalls also *AAA* 2022-UNAT-1280, para. 77, where the

UNAT upheld the separation from service with compensation *in lieu* of notice and without termination indemnity of a staff member who facilitated Mr. Erefa's engagement in sexual exploitation and abuse ("SEA"), by negotiating the settlement agreement to quash formal complaints against Mr. Erefa. The UNAT agreed with the Administration that AAA did not only fail to report Mr. Erefa's misconduct, but also failed to prevent SEA by negotiating the settlement agreement to cover it up.

73. The Tribunal is of the view that the present case is to be distinguished from those mentioned above, having an underlying factual situation which is completely different.

74. *Erefa* was a case of rape of a minor and the staff member contrasted the victim's version of the facts and denied he was involved in the sexually abusive activity towards her. In the present case, there is a consensual sexual activity between two persons, both to be considered as adults for the reasons above mentioned, the activity is fully acknowledged and followed by a marriage.

75. The differences between the two cases are huge also for other reasons. In *Erefa*, the national criminal case was allegedly closed by an agreement which specifically entailed the withdrawal of the complaint with the Congolese Public Prosecutor's Office in exchange for USD5,000; also, the applicant assumed to be victim of extortion, claiming that the motivation behind the accusations of child abuse were only monetary. In the present case, the complaint was never withdrawn, there was no claim whatsoever of extortion by anyone, and the case was closed only after the marriage of V and the Applicant. The situation is different also because marriage entails a wide system of rights and duties, personal more than patrimonial, and it cannot be considered similar to an agreement having -as its only objective- the withdrawal of a complaint in exchange for money.

76. The Respondent also accused the Applicant of having failed to uphold the highest standards of integrity required by a staff member. The assessment of this accusation, differently from the accusation of sexual exploitation and abuse, could entail an overall examination of the facts, including those not having a sexual connotation.

77. But even this assessment will not change the conclusion that the Applicant's behaviour was not a misconduct. Indeed, the quality of a United Nations staff member as the Applicant had no influence on the events and changed in no way what can happen to anybody else.

78. Moreover, in this case it has to be noted that the sexual intercourse was later tied to a son born by the couple and by a legal marriage, so, considering the whole picture and having in mind that we are dealing only with facts of private life with no connection with the position of the Applicant at the United Nations, we cannot say that there was a violation of the duty of integrity of the staff member.

79. In sum, the facts the Applicant is blamed of do not constitute sexual exploitation or abuse and do not amount to misconduct.

80. The contested decision must therefore be rescinded.

81. The Applicant is to be reinstated, with all his benefits and entitlement, from the date of separation.

82. In accordance with art. 10.5(a) of its Statute, the Tribunal shall also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission as the contested decision concerns termination.

83. It is clear from art. 10.5(a) of the Dispute Tribunal's Statute, as consistently interpreted by the Appeals Tribunal, that compensation *in lieu* is not compensatory damages based on economic loss, but only the amount the Administration may decide to pay as an alternative to rescinding the challenged decision or execution of the ordered specific performance (see, for instance, *Eissa* 2014-UNAT-469).

84. As to the amount of the compensation *in lieu*, the above recalled article of the Dispute Tribunal's Statute sets a general framework for its determination, stating that, apart from exceptional circumstances, it "shall normally not exceed the equivalent of two years' net base salary of the applicant" (see *Mushema* 2012-UNAT-247; *Liyanarachchige* 2010-UNAT-087; *Cohen* 2011-UNAT-131; *Harding* 2011-UNAT-188). The Appeals Tribunal found that the amount of *in lieu*

compensation will essentially depend on the circumstances of the case (*Mwamsaku* 2012-UNAT-246) and that "due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach" (*Ashour* 2019-UNAT-899, para. 21).

85. Having in mind the above-mentioned criteria and applying them to the specific case at hand (and so having considered the seniority of the Applicant, the type of contract held, and the facts), the Tribunal sets the amount of the compensation *in lieu* at two year's net-base salary based on the Applicant's salary on the date of his separation from service.

Conclusion

86. In light of the foregoing, the application succeeds.

87. The contested decision is therefore hereby rescinded. The Applicant is to be reinstated, with all his benefits and entitlement, from the date of separation.

88. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, the Applicant shall be paid a sum equivalent to two years' net base salary, based on his salary at the time of his separation.

89. The aforementioned sums shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)
Judge Francesco Buffa
Dated this 12th day of July 2023

Entered in the Register on this 12th day of July 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi