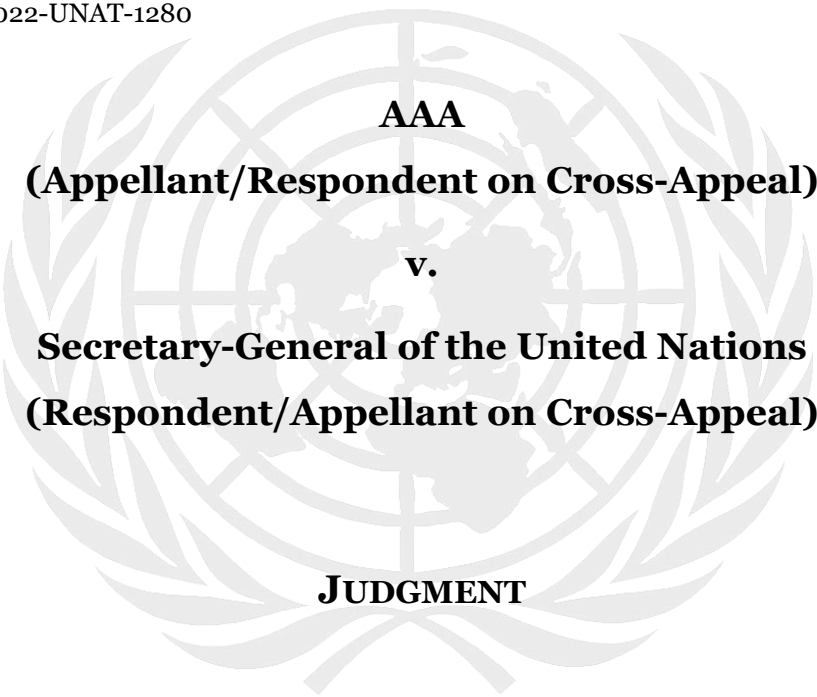




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1280



**AAA
(Appellant/Respondent on Cross-Appeal)**
v.
**Secretary-General of the United Nations
(Respondent/Appellant on Cross-Appeal)**

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2021-1608 & 2021-1612
Date of Decision:	28 October 2022
Date of Publication:	6 December 2022
Registrar:	Juliet Johnson

Counsel for AAA:	Víctor Rodríguez
Counsel for Secretary-General:	Angélique Trouche

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. AAA, a former staff member, was separated from service for failure to report alleged sexual abuse by a fellow worker and for refusal to participate, without justification, in an interview investigating his failure to report. AAA filed an application challenging the sanction decision before the United Nations Dispute Tribunal (Dispute Tribunal or UNDT).

2. In Judgment No. UNDT/2021/091 (the impugned Judgment), the Dispute Tribunal held there was not clear and convincing evidence of misconduct because 1) AAA only had hearsay information of the abuse allegation, 2) AAA did not have the details required for reporting under Section 4.5 of ST/AI/2017/1 (“Unsatisfactory conduct, investigations and the disciplinary process”), and 3) the Administration was already aware of the allegations. As for the alleged refusal to cooperate, the Dispute Tribunal held the Administration could have waited to interview AAA. As a result, the Dispute Tribunal rescinded the contested decision¹ to impose on AAA a sanction of separation from service with pay in lieu of notice and without termination indemnity for serious misconduct, and ordered that, in lieu of reinstatement, AAA should be paid compensation of 12 months’ net base salary. Both parties appeal the Judgment to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).

3. For the reasons set out below, we grant the Secretary-General’s appeal and dismiss AAA’s appeal.

Facts and Procedure

4. At the time of the contested decision, AAA held a continuing appointment at the FS-4 level at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO or Mission).

5. AAA was a member of a local prayer group in Goma, in the Democratic Republic of Congo (DRC), which comprised staff of MONUSCO and members of the local community. CE, a fellow staff member of MONUSCO and colleague of AAA, led the prayer group.

¹ Letter of the Assistant Secretary-General for Human Resources to AAA (10 February 2020).

6. CM filed a complaint in the local court against CE for rape and sexual abuse of her minor daughter (alleged victim). Both CM and her daughter were known to AAA as they were also members of the prayer group.

7. On 13 July 2017, CE was summoned to appear at the local court on 15 July 2017. No reason was provided in the summons.

8. On 14 July 2017, CE filed an incident report with the Security and Safety Section of the Mission. CE stated that he was filing the report because he had been threatened by CM with legal action for allegedly “having affairs” with her daughter, a minor.²

9. On 15 July 2017, CE attended court and was accompanied by three men, including his landlord and AAA. A lawyer was also there for CE. The lawyer reported to CE, the landlord, and AAA, that the court matter concerned an allegation of rape.³

10. CE then became ill and was hospitalized between 15 and 17 July 2017. While in the hospital, AAA participated in three meetings with CE, his lawyer, and others regarding the allegations.⁴ AAA was present at the meetings to assist with interpretation and because CE “wished to have an amicable agreement” with CM. The lawyer asked CE to pay USD 25,000 to “close” the matter; however, CE agreed to pay CM, the alleged victim’s mother, only USD 5,000. AAA brought CE’s checkbook to the hospital so that CE could make out the checks to CM.

11. In his interview in the investigation of CE, AAA recalled a meeting at the “Grand Lacs” hotel in Goma which he attended with CE’s lawyer, another friend of CE, and the victim’s family, during which the family agreed to the USD 5,000 settlement, which was memorialized in an agreement (amicable settlement) on 26 July 2017.⁵ Sometime in July and August 2017, CE signed two checks in the amount of USD 2,500 each, both in CM’s name. CE also paid the lawyer USD 2,000 for his legal services. AAA continued to be involved in the matter, including relaying payment instructions to the lawyer. A few weeks later, the lawyer paid a person, who appeared to be a Congolese official, USD 3,000. In an addendum to the agreement of 26 July 2017, dated 7 October 2017, CM confirmed having received another USD 2,500 to close the matter.

² OIOS Investigation Report, 11 June 2018, para. 118.

³ *Ibid.*, para. 112.

⁴ *Ibid.*

⁵ *Ibid.*, para. 76.

Under the terms of the addendum, CE was to pay the court fees. The lawyer confirmed to CE that CM had signed the amended agreement and received the monies.⁶

12. On 3 November 2017, the MONUSCO Conduct and Discipline Team (CDT) in Goma received CM's complaint against CE, alleging that CE had raped her daughter.

13. On 13 November 2017, the Office of Internal Oversight Services (OIOS) received the report of possible misconduct against CE and initiated an investigation. CE was placed on administrative leave without pay on 1 December 2017 until he was summarily dismissed on 29 January 2019.

14. In the course of the investigation concerning CE, OIOS discovered information indicating AAA's involvement and possible misconduct and initiated an investigation into AAA's conduct. AAA was on annual leave from 9 to 31 October 2018, and on certified sick leave between 16 October 2018 and 10 January 2019.

15. On 29 October 2018, OIOS invited AAA to an interview as the subject of an investigation to take place on 5 November 2019. AAA did not immediately respond to this message. Upon receiving a reminder, AAA responded on 6 November 2018 that he was on sick leave and that he did not see a reason for being interviewed again as he had already been interviewed in CE's investigation and had no further information to offer.

16. On 7 November 2018, OIOS contacted AAA again, reminding him that while he had been interviewed as a witness before, the current investigation involved him as a subject. OIOS also pointed out the relevant provisions of ST/AI/2017/1, which prescribes that if a staff member is on sick leave, the investigative process shall normally proceed, subject to consultation with the then Medical Services Division (MSD), now Division of Healthcare Management and Occupational Safety and Health (DHMOSH). They asked AAA to inform OIOS of his return date to the Mission area. Having received no response, OIOS sent reminder e-mails to AAA, on 26 November 2018 and 4 December 2018. AAA did not respond.

17. On 6 December 2018, OIOS wrote to MSD in New York, requesting clarification whether AAA could be interviewed while on sick leave. MSD responded that there were no medical impediments preventing AAA from being interviewed.

⁶ *Ibid.*, para 87.

18. On 26 December 2018, OIOS contacted AAA again informing him of MSD's advice and scheduling an interview for 3 January 2019. On 2 January 2019, AAA responded that he was unable to attend the interview due to his health condition.

19. An investigation report concerning AAA was concluded on 31 January 2019, which on the same date was referred to the Office of Human Resources (OHR) for appropriate action.

20. In an OHR memorandum dated 7 June 2019 (the Allegations Memorandum), delivered to AAA on 19 June 2019, he was informed of the formal allegations of misconduct, as follows:

a) While you were aware since around 15 July 2017 of the allegation that [CE], another UN staff member, had sexually abused a female Congolese teenager, you did not report that allegation to MONUSCO, for instance to CDT, to OIOS, or other official of the Organization.

b) You refused, without justification, to participate in an interview by OIOS.

21. On 30 July 2019, AAA presented his comments. On 20 August 2019, the Administration sent additional documents received from OIOS to AAA. On 28 August 2019, AAA provided further comments on these additional documents.

22. By letter dated 10 February 2020, the Assistant Secretary-General for Human Resources informed AAA of the decision by the Under-Secretary-General for Management Strategy, Policy and Compliance to impose upon him the disciplinary measure of separation from service of the Organization pursuant to Staff Rule 10.2(a)(viii)⁷ with compensation in lieu of notice, without termination indemnity, for serious misconduct in violation of Staff Regulation 1.2(b),⁸ Staff Rules 1.2(c) and 1.2(e),⁹ and Sections 3.2(e) and 3.2(f) of ST/SGB/2003/13 ("Special measures for protection from sexual exploitation and sexual abuse"). On 13 May 2020, AAA filed an application with the Dispute Tribunal to challenge this decision. The Dispute Tribunal did not conduct an oral hearing but made its determination on the parties' written submissions and evidence.

⁷ ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations), Rule 10.2 Disciplinary measures.

⁸ *Ibid.* Regulation 1.2 Basic rights and obligations of staff.

⁹ *Ibid.* Rule 1.2 Basic rights and obligations of staff.

23. In the Judgment, the Dispute Tribunal held that the evidence was not sufficiently convincing to establish AAA's misconduct. The Dispute Tribunal rescinded the decision to impose the disciplinary sanction of separation from service and ordered compensation *in lieu* of reinstatement in the amount of 12 months' net base salary.

Submissions

AAA's Appeal

24. As regards the alleged violation of the duty to report misconduct and his alleged refusal to cooperate with the OIOS investigation, AAA submits that the Dispute Tribunal did not err and agrees with its conclusions and findings. There was no evidence that he had any knowledge of the relevant details and all he knew was that CE had been charged. In addition, he agrees with the Dispute Tribunal's findings that Section 4.1 of ST/AI/2017/1 does not apply to an individual who merely hears second-hand about a case of misconduct since much of what such a person has to report would be hearsay.¹⁰ In addition, the MONUSCO Administration already knew from 14 July 2017 about the allegations against CE. AAA submits there was clear and convincing evidence that the inability of AAA to attend an interview was only due to his illness and his certified sick leave. Had OIOS sought clarification from the Mission or the MSD, they would have been aware that AAA was due to return to work on 10 January 2019 and could be interviewed then. Further, he says that OIOS violated his rights by closing the investigation report without interviewing him contrary to OIOS Investigation Manual (Section 5.2.2 Subject Interviews).

25. In view of the seriousness of the breaches of his rights, AAA submits that the Appeals Tribunal should grant him the more appropriate amount of compensation of three years' net base salary under Article 9.1(b) of UNAT Statute. In addition, he requests compensation in the amount equal to the contributions –the staff member's and the Organization's– that would have been paid to the United Nations Joint Staff Pension Fund (UNJSPF), for a three-year period.

26. He says he held a continuing contract which was abruptly and unjustly terminated after more than 15 years of good and faithful service to the United Nations. AAA claims he deserves just reparation for the damage caused by such abrupt separation, which must be more than the one

¹⁰ Impugned Judgment, paras. 50-52.

year's net base salary awarded by the Dispute Tribunal, given the seriousness and the exceptional circumstances of his case.

The Secretary-General's Answer

27. In response, the Secretary-General requests the Appeals Tribunal to reject AAA's appeal in its entirety and vacate the Judgment.

28. First, the Secretary-General argues that AAA's appeal is not receivable because he comments on Dispute Tribunal findings that were in his favor and asks for remedies which had not previously been requested before the Dispute Tribunal.

29. As regards compensation, the Secretary-General submits that AAA did not request three years' net base salary as compensation in lieu of rescission of the contested decision before the Dispute Tribunal, and neither did he request to be compensated for contributions to the UNJSPF. New claims are not admissible at the appeal stage. In his application to the Dispute Tribunal, AAA had requested the UNDT to award two years' net base salary as compensation in lieu of rescission of the contested decision and one year's net base salary as moral damages. He is now claiming something substantially different.

30. The Secretary-General contends that AAA, however, fails to establish any error of law or fact in the Dispute Tribunal's findings that would warrant the Appeals Tribunal's intervention. AAA also does not identify any exceptional circumstances warranting compensation in excess of the normal maximum of two years' net base salary; thus, this claim should be dismissed. AAA consequently fails to demonstrate any error on the part of the Dispute Tribunal in the determination of compensation, and therefore, his appeal must fail.

The Secretary-General's Cross-Appeal

31. In the cross-appeal, the Secretary-General contends that the Dispute Tribunal made a series of errors of law and fact in finding that the Administration had not established by clear and convincing evidence that AAA had failed to report misconduct.

32. First, the Dispute Tribunal effectively amended the legal framework for reporting misconduct and ignored undisputed evidence. Its findings set an unacceptable standard where a staff member can turn a blind eye to his or her knowledge of a colleague's alleged misconduct.

33. The Dispute Tribunal erred in law by finding that AAA could not be required to “report an allegation of rape which he heard from another person who attended court”.¹¹ It is an error of law to require first-hand knowledge of misconduct for the duty to report such misconduct to exist. By excluding hearsay knowledge from the obligation to report misconduct, the Dispute Tribunal incorrectly amended the United Nations legal framework, which it is not empowered to do. Section 4.2 of ST/AI/2017/1 makes it clear that “[i]nformation about unsatisfactory conduct may be received from staff members and any other source.”

34. Second, the Secretary-General claims that the Dispute Tribunal made another serious error of law when it held that a duty to report misconduct only exists when the information listed in Section 4.5 of ST/AI /2017/1 can be provided. In doing so, it misinterpreted Section 4.5 of ST/AI/2017/1 that enumerates examples of information that may be included in a report of misconduct. The listing is indicative and not exhaustive nor mandatory.

35. Nevertheless, the Secretary-General says that AAA was in possession of sufficient information to report misconduct as required by Section 3.2(e) of ST/SGB/2003/13. The Dispute Tribunal erroneously ignored his testimony and evidence (both in audio-recording and written summary), which indicates that AAA was directly apprised of the allegations as opposed to through “hearsay”.

36. Further, the Secretary-General contends the Dispute Tribunal erred both in law and fact in finding that the Organization had already been informed of the rape charges against CE and that this somehow alleviated AAA of his duty to report, particularly when the Tribunal also found that the documents available to the Mission (the court summons and CE’s security report) lacked essential information on the allegation.¹²

37. Regarding the duty to cooperate with the investigation, the Secretary-General submits the UNDT erred in law and exceeded its competence when it rejected “the word of MSD on whether [AAA] was well enough to be interviewed”¹³, in direct contradiction with the applicable legal framework. Section 6.20 of ST/AI/2017/1 provides that “if a staff member is on certified sick leave, the investigative and disciplinary processes shall normally proceed [...], subject to

¹¹ *Ibid.*, para. 43.

¹² *Ibid.*, para. 49.

¹³ *Ibid.*, para. 56.

consultation with the Medical Services Division”. The Dispute Tribunal created a new requirement, namely that the MSD should have examined or spoken to AAA.¹⁴

38. After OIOS’ documented efforts, it was within the Administration’s discretion to close the investigation on 31 January 2019 and AAA had no right to be interviewed before doing so. AAA was able to comment on the allegations against him in the course of the disciplinary process, and such comments were duly taken into account, as extensively reflected in the contested sanction decision. Also, OIOS waited for AAA for over two months and reasonably exercised its discretion to close the investigation under the circumstances.

39. The Secretary-General requests the Judgment be vacated and the disciplinary sanction decision be upheld.

Considerations

40. The issue before us is whether the Dispute Tribunal erred in its determination that there was not clear and convincing evidence that AAA violated the duty to report the allegations against CE because AAA had hearsay and incomplete information and/or that AAA failed to cooperate in a duly authorized investigation without justification.

Standard of Review in Disciplinary Cases

41. In an application concerning disciplinary cases, the Dispute Tribunal must establish: i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, and iii) whether the sanction is proportionate to the offence.¹⁵

42. However, the Appeals Tribunal has also held that the Administration has broad discretion in disciplinary matters which will not be lightly interfered with on judicial review.¹⁶ This discretion is not unfettered and can be judicially reviewed to determine whether the exercise of the discretion is lawful, rational, procedurally correct, and proportionate. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the

¹⁴ *Ibid.*

¹⁵ *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, para. 21.

¹⁶ *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 40.

Administration amongst the various courses of action open to it or to substitute its own decision for that of the Administration.¹⁷

43. In the present case, we find that the Dispute Tribunal erred in fact and in its misinterpretation of the legal framework regarding a staff member's duty to report and cooperate with an investigation. As a result, we find the Judgment should be vacated on the basis that there was clear and convincing evidence of misconduct that warrants discipline.

Is there clear and convincing evidence that the undisputed facts amount to misconduct under the Staff Regulations and Rules?

44. The "Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred".¹⁸ "[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".¹⁹

45. There is no factual dispute that AAA did not report the rape allegations against CE and did not attend an investigative interview with OIOS during the investigation of this misconduct. The issue is whether this amounts to misconduct under the regulatory framework.

Failure to report

46. Rule 1.2 of the Staff Rules and Regulations of the United Nations sets out the basic rights and obligations of staff, in particular that "(c) Staff members have the duty to report any breach of the Organization's regulations and rules to the official whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations".

47. The duty to report is confirmed and repeated in administrative issuances. Section 3.2 of ST/SGB/2003/13 provides that "[w]here a United Nations staff member develops concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker, whether in the

¹⁷ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

¹⁸ *Ladu* Judgment, *op. cit.*, para. 15, quoting *inter alia Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.

¹⁹ *Mizyed* Judgment, *op. cit.*, para. 18, citing *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29.

same agency or not and whether or not within the United Nations system, he or she must report such concerns via established reporting mechanisms”.

48. Again, Section 4.1 of ST/AI/2017/1 provides that “[p]ursuant to Staff Rule 1.2(c), 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”.

49. As indicated, it is not disputed that AAA did not report the rape allegations against CE, his fellow worker. On 15 July 2017 when AAA attended the local court in Goma with CE, AAA knew of the allegations when CE’s lawyer advised both AAA and CE of the allegations of rape of CM’s daughter, a minor.

50. The Dispute Tribunal held that AAA could not be required to report the allegation “which he heard from another person who attended court” and that Section 4.1 of ST/AI/2017/1 “does not apply to an individual who merely hears second-hand about a case of misconduct since much of what such a person has to report would be hearsay and possibly misleading and devoid of the kind of detail the rule is seeking to elicit from the staff member”.²⁰

51. This erroneously imposes a requirement that the staff member must have certain type of evidence, namely “first hand” or direct knowledge of misconduct, for a staff member to be obligated to report. There is no such requirement in Staff Rule 1.2(c), Section 4.1 of ST/AI/2017/1, or Section 3.2(e) of ST/SGB/2003/13. The latter requires that any “concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker” must be reported.

52. The Dispute Tribunal found that Section 3.2(e) of ST/SG/2003/13 relies on a “totally subjective view” of the applicable facts. It is unclear how or on what basis the Tribunal reached this conclusion. There is nothing in the relevant section that requires that staff members ensure that they have objective evidence or sufficient evidence to support a concern or suspicion in order to be obligated or have a duty to report.

²⁰ Impugned Judgment, para. 51.

53. Further, the Dispute Tribunal held that it should not be “presumed” that AAA had a “concern or suspicion” about the alleged abuse because the only information AAA would have become aware of on 15 July 2017 (the date of the court summons) is that CE had been charged with rape by the domestic authorities.

54. It is unclear on what basis the Tribunal held that AAA could not have “concerns or suspicions regarding sexual exploitation or abuse by a fellow worker”. AAA did not testify before the Dispute Tribunal. Also, as of 15 July 2017, AAA had more than mere “suspicions” or “concerns” but confirmation from CE’s lawyer that CE was being charged by the local authorities with rape of a minor. A more likely but unsatisfactory explanation for the failure to report is AAA’s written statement in response to the Allegations Memorandum, wherein he said that he did not report the allegations against CE because he knew and trusted CE and believed him to be a “prophet”.²¹

55. In the Judgment, the Dispute Tribunal then held that in order for AAA to assist the investigation and be in full compliance of Section 4.5 of ST/AI/2017/1, he would have to report five types of information: “a) a detailed description of the unsatisfactory conduct; b) the names of the staff members involved; c) where and when the unsatisfactory conduct occurred; and d) the names of potential witnesses of the unsatisfactory conduct and provide supporting documents.”²² It then found that the facts show that AAA could not have supplied four out of the five items of information required by Section 4.5 to “enable the report to be of substance”.²³

56. However, a plain reading of Section 4.5 does not support this interpretation. Section 4.5 states that “Information received from either a staff member or non-staff member alleging unsatisfactory conduct *should contain sufficient details for it to be assessed under the present instruction, such as:* (a) A detailed description of the unsatisfactory conduct, (b) The names of the implicated staff member(s).....”²⁴. The section clearly outlines that the information “should contain sufficient details” for it to be assessed and then provides examples of information that would assist in assessing the conduct; it does not mandate that all or some of the enumerated information is required, only a requirement of “sufficient details” to assess the conduct, and then lists the type of details that could be provided.

²¹ Contested decision, Annex, page 11.

²² Impugned Judgment, para. 45.

²³ *Ibid.*, para 50.

²⁴ Emphasis added.

57. As a result, the Dispute Tribunal erred in law in its interpretation of Section 4.1 and 4.5 of ST/AI/2017/1.

58. Further, the Dispute Tribunal ignored relevant evidence that AAA participated in a number of meetings not only with CE but also with the alleged victim and her family where the rape charges were discussed and where negotiations for dismissal of the charges occurred. AAA not only acknowledged this in his interview in the original investigation into CE, but CE and other witnesses corroborated this in their interviews. This amounts to more than “second hand”, hearsay information. However, despite these meetings and discussions, AAA did not report the allegations as required.

59. The Dispute Tribunal erroneously held that AAA’s “attendance at a meeting cannot be directly linked to his knowledge of CE’s alleged breach of the Staff Rules or Staff Regulations or special measures...”. It is unclear how the Tribunal reached this conclusion and on what evidence. The uncontroverted evidence is that AAA attended multiple meetings with CE, his lawyer, and others, including the victim and her family, for the express purpose of discussing the allegations and negotiating a settlement.²⁵

60. Finally, the Dispute Tribunal found that the fact that CE’s report to the Security and Safety Section of the Mission on 14 July 2017 (the day before his court appearance) “did not contain ‘the precise nature of the allegations’ against him cannot be held against [AAA]”. If so, then it cannot be argued by AAA that the Mission already knew about the rape allegations and therefore, there was no need for AAA to report it. CE’s report only states that CM “threatened to take legal action” for not meeting her financial demands and to summon CE to court “under the pretext that [CE was] having an affair with her daughter”. There is no allegation of rape or confirmation as to the age of the daughter. As for the summons, it simply states that CE is invited to attend the general court on 15 July 2017 at 10:00 am.²⁶ No other information is provided in the summons. Therefore, the Mission could not have known that there was a rape allegation against CE and that it involved a minor; as a result, AAA cannot rely upon this to excuse his failure to report these allegations.

²⁵ OIOS Investigation Report, 11 June 2018.

²⁶ Contested decision, Annex, page 10.

61. In conclusion, the Dispute Tribunal erred in fact and in law when it held that there was not clear and convincing evidence of AAA's failure to report the rape allegations against CE. There is no dispute that AAA did not report the allegations despite having information about the charges against CE not only from the local court but also from CE, the victim, and her family from his meetings with them.

Failure to cooperate

62. Staff Rule 6.2 provides that "staff members are required to fully cooperate with all duly authorized investigations and to provide any records, documents, information and communications technology equipment or other information under the control of the Organization or under the staff member's control, as requested. Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct."

63. As previously stated, there is no dispute that AAA did not attend an interview with OIOS despite repeated requests to do so and failed to respond to multiple interview requests.

64. In the Judgment, the Dispute Tribunal appears to accept AAA's explanation that he was on sick leave, and that the OIOS investigator could have given him time to recover and go back to work to continue the investigation.

65. However, although AAA was on annual leave from 9 to 31 October 2018, and on certified sick leave between 16 October 2018 and 10 January 2019, he did respond on 6 November 2018 that not only was he on sick leave, but he already had his interview and saw no reason for the interview request and had no further information to give. His excuse for not attending was not only that he was on sick leave but also that he saw no reason for the interview.

66. In the Judgment, the Dispute Tribunal did not "accept that the word of MSD on whether the Applicant was well enough to be interviewed was conclusive" because the MSD did not interview AAA about the nature of his illness. However, Section 6.2 of ST/AI/2017/1 provides that "if a staff member is on certified sick leave, the investigative and disciplinary processes shall normally proceed as envisaged in the present instruction, subject to consultation with the Medical Services Division". There is no basis for the Dispute Tribunal to require MSD to interview or consult the staff member before providing its consultation and opinion. This is a misinterpretation of Section 6.2.

67. Further, the Tribunal asked what difference it would have made to have waited until January 2019 to interview AAA. In a 26 December 2018 e-mail, the investigator advised AAA of MSD's finding that there was no medical impediment to proceed to an interview, but AAA still declined on 2 January 2019 to be interviewed. Also, in previous e-mails, the investigator asked when he would return to MONUSCO. He did not respond to that question, nor did he provide his availability to attend an interview.

68. It is clear from his conduct that AAA was not cooperating and therefore, the Administration exercised its discretion in the circumstances to proceed with allegations of misconduct on this basis. It is not up to the Dispute Tribunal to determine the correct action in these circumstances which it attempted to do in the Judgment.

Was due process respected in the course of the disciplinary proceedings?

69. Regarding due process, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.²⁷

70. In this instance, the investigator made several attempts to arrange an interview with AAA who did not respond or stated he was ill and/or had already been interviewed. AAA was provided with several invitations to be interviewed in the disciplinary investigation against him but refused to accept any of them. As a result, he cannot claim before the Tribunals that the Administration violated his due process rights because they did not interview him.

71. AAA argues that OIOS violated his rights by closing the investigation report without interviewing him contrary to the OIOS Investigation Manual, Section 5.2.2, Subject Interviews. The Dispute Tribunal did not consider or decide this in the Judgment. It appears to be a new argument.

72. The OIOS Manual is not an administrative issuance and does not provide subjects of an investigation with the right to be interviewed. Due process rights fully apply only to the disciplinary stage of the process. During the disciplinary process, AAA was provided with the allegations against him, with specifics, and was given an opportunity to comment, which he in fact did. Such comments were duly taken into account and considered, as extensively reflected

²⁷ *Nadasan v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-918, para. 43.

in the contested decision. In addition, AAA as well as several witnesses were interviewed in the investigation of CE, and these interviews and transcripts were available to the investigators.

73. Therefore, we find that there were no substantial procedural irregularities that vitiated the disciplinary sanctions such that the contested decision was irrational, unreasonable, and unlawful.

Were the disciplinary sanctions proportionate?

74. It is a well established principle that the Secretary General has wide discretion in applying disciplinary sanctions for misconduct, but the disciplinary measure must be proportionate to the misconduct. “[D]ue deference must be shown to the Secretary-General’s decision on sanction because Article 101(3) of the United Nations Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard.”²⁸

75. Therefore, “(t)he ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline.”²⁹

76. In *Rajan*,³⁰ the Appeals Tribunal held that “(t)he most important factors to be taken into account in assessing proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.”

77. In the present case, the Assistant Secretary-General for Human Resources provided detailed reasons for the finding of misconduct and for the sanctions imposed. She considered AAA’s personal circumstances, and the practice of the Organization in matters of comparable misconduct. She considered aggravating and mitigating factors. The aggravating factor being AAA’s involvement in efforts to suppress the matter coming to light and participation in meetings to negotiate dismissal of charges in exchange for money. The relevant potential

²⁸ *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-890 (Revision), paras. 15 – 16.

²⁹ *Samandarov* Judgment, *op. cit.*, para. 25.

³⁰ *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 48.

mitigating factor to consider included AAA's length of service. This was appropriate. As per his discretion, the Secretary General considered the performance record and personal circumstances but ultimately found these were not mitigating circumstances.

78. Consequently, we cannot find that the initial disciplinary sanctions imposed were unlawful or "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity".³¹

79. In conclusion, we find the Secretary General's imposition of the disciplinary sanction of separation of service was a reasonable exercise of his discretion in imposing sanctions for misconduct. The Dispute Tribunal erred in law and fact that resulted in a manifestly unreasonable decision when it ordered rescission of the contested decision.

80. As a result, we vacate the Judgment, and the disciplinary sanction is upheld.

Is AAA entitled to Compensation?

81. We reject AAA's request for compensation. As the contested disciplinary decision is upheld (see above) and is not illegal, AAA is not entitled to receive compensation *in lieu* of reinstatement.

82. As for compensation for harm, there must be evidence to support the existence of harm, an illegality, and a nexus between the two.³² As per our findings above, there is no illegality here, and therefore, there can be no nexus between an illegality and harm to support an award for compensation for moral damages or harm.

³¹ *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, para. 21.

³² *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, para. 20.

Judgment

83. The Secretary General's appeal is granted while AAA's appeal is dismissed. The Dispute Tribunal's Judgment No. UNDT/2021/091 is hereby reversed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Knierim

Judgment published and entered into the Register on this 6th day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar