Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

EREFA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Jacob van de Velden, AAS/ALD/OHR

Background

1. This is an application filed by the Applicant contesting the Under-Secretary-General for Management, Strategy, Policy and Compliance's ("USG/DMPSC") decision to impose on him the disciplinary sanction of dismissal from service and a fine equivalent to one month's net base salary for serious misconduct in accordance with staff rule 10.2(a)(v) and (ix) ("the contested decision"). In his reply, the Respondent argues that the Applicant's actions amounted to serious misconduct justifying the imposed sanction and that his application should be dismissed. The Tribunal dismisses the application in its entirety.

Facts and Procedure

2. At the time of the contested decision, the Applicant held a fixed-term appointment at the FS-4 level, as a Procurement Assistant with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO").

3. The Applicant commenced service with the Organization on 4 March 2009 and, prior to his dismissal, held a fixed-term appointment, as a Procurement Assistant at the FS-4 level with MONUSCO. His duty station was Goma, Democratic Republic of the Congo ("DRC").[1]

4. He was dismissed from service on 25 January 2019. According to the sanction letter[2], the decision was arrived at after the Applicant was informed through a memorandum, dated 19 October 2018, from the Office of Human Resources Management, setting out allegations of misconduct against him, in particular that on one or more occasions in 2016 and 2017, he had sexual relations with a Congolese girl who was under 18 years of age.

[1] Amended reply, annex R/1, Personnel Action Form, 5 June 2018.
[2] Amended application, annex 2.

5. In the said memorandum he was informed that if the above allegations were established, his conduct would constitute a violation of staff regulations 1.2(b), 1.2(f) and 1.2(q), staff rule 1.2(e), and sections 3.1, 3.2(b) and 3.2(c) of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse).

6. He was also asked to provide, within two weeks of his receipt of the memorandum containing the allegations, any written statement or explanation that he wished to provide in response to the allegations. He was advised that he was free to request at the earliest time possible for any extension of time to submit his response if he needed more time.

7. The Applicant was also advised that he could avail himself of the assistance of the Office of Staff Legal Assistance and that he could seek the assistance of any counsel at his own expense to assist him to prepare his case in response.

8. After a thorough review of the entire dossier, including his comments, the USG/DMPSC concluded that the allegations against the Applicant were established, by clear and convincing evidence, hence the dismissal.

9. On 12 April 2019 and 18 September 2020, the Applicant filed an application and amended application, respectively, challenging the contested decision.

10. At a case management discussion held on 15 July 2021, the parties agreed that the case may be decided based on the documents on record. The Applicant filed his closing submissions on 26 July 2021.

Submissions

The Applicant

11. The Applicant states that the dismissal is illegal. He argues that the Respondent has failed to prove the allegations of misconduct with clear and convincing evidence and in particular that the investigative report on which the conclusions were drawn, omitted or ignored pertinent information leading to an

improper conclusion that the Applicant engaged in conduct that violated his obligations, including the prohibition of sexual exploitation and abuse.

12. He argues that there is no rationale for why the investigator repeatedly chose to believe the complainant, V0l, over the Applicant in the absence of concrete evidence. V01 claimed the Applicant first exploited her five times at his two residences although no one could be identified to corroborate this. She also testified they went to the Tony Guesthouse seven times, but there is no evidence for this. MS, the attendant referred to numerous visits with four other women who were never identified. Moreover, the manager of the Guesthouse never saw the Applicant at any time. No one contacted the local police about these alleged activities. V01's story does not ring true.

13. The summary of the case cited in the reply is based on questionable testimony and circumstantial evidence. It does not meet the standard for clear and convincing evidence.

14. The Applicant maintains that the accusations made against him had to be seen in the context of the local environment in order to be understood. The background to the issue is cited by some of the Church members who were acquainted with V01 and V01's mother "W01" and were aware of similar cases which had arisen. These witnesses confirm that the motivation behind the allegations of child abuse were monetary. The Church, of which the Applicant was a leader, engaged in providing assistance to the local population and in particular women and girls, in the form of financial support for schooling and promoting local businesses that provide financial independence for women. Unfortunately, wherever there are good intentions, there are those who seek to exploit them.

15. The Applicant submits that it is unclear why the Office of Internal Oversight Services' ("OIOS") Report dismissed as irrelevant most of the testimony that did not support the central thesis of the case. This included the landlord of the Applicant's residence, the security guards and the Church membership. The investigation also

ignored important testimony of NM and that of GK, a staff member who was a local Congolese woman and Church member and who knew the Applicant as well as V01 and W01. Both these witnesses are credible. Their testimonies call into question the motivation and truthfulness behind the allegations of V01 and W01.

16. Both NM and GK cited the fact that W01 had been known as a prostitute before getting a job as a cleaner for the United Nations. GK's testimony was very specific. She knew W01 since 2008. Both she and other members of the Church said that V01 had complained of being exploited by her mother. Another witness, BO, who had previously employed W01 as a cleaner, testified that she had been terminated for theft. She also confirmed that W01 had asked for money to start a business.

17. He submits that NM, contrary to the assertions of the Respondent, had direct knowledge of the case. She particularly objected to the way the investigation had been handled. She was not only ignored; she was threatened for raising questions about what she perceived as an injustice. The same was true of JS who was threatened with disciplinary action for defending the Applicant.

18. The Applicant states that OIOS asked no questions of the two complainants about their backgrounds, their involvement with the Church or what they did with the money they received from it. The investigators never checked to see if there were any police records or if they had brought similar complaints in the past as reported by some witnesses. It is not clear why OIOS chose not to pursue these issues which may have had an impact of the question of credibility. Instead, they chose to concentrate on the story crafted by the Complainants.

19. He argues that there is no direct evidence of the act or acts for which he was charged. Neither V01 or W01 could be specific about dates of the alleged occurrences. This did not permit any verification. Contrary to what is stated in the OIOS report, he clarified and continues to clarify that his bedroom was on the right side of the apartment, not the left as alleged by V01. This was never verified by

OIOS. No one, not neighbours or any of the security guards outside the residence confirmed the presence of V01 at any time or any suspicious activity. Her mother (W01) upon learning of the initial claim of rape, apparently did nothing to report it and according to her story, allowed her daughter to continue seeing the Applicant.

20. The Applicant argues further that the one witness who corroborated the account of V01 was the Tony Guesthouse attendant, MS. While the Applicant's name was only reflected once in the register (as of 11 February 2017, later than the alleged events) and could easily have been placed there, MS expanded his accusation to say there were multiple visits with many women. There was no evidence for this and the manager of the property, who was a more credible source, denied ever seeing the Applicant there. It would have been easy to coordinate stories and identify the Applicant from a photo.

21. He asserts that the payments for school, housing or medical bills were never made in private and none were ever made by the Applicant to V01 herself. It was a confirmed practice of the Church to provide this kind of assistance. The Respondent has cited the later payment of USD5,000 to W01 in return for dropping all her claims. It is revealing that the unspecified complaint brought by W01 was long after the alleged incident and was brought only when payment of a promised gift of money to start up a business had been delayed. That original offer was confirmed by other members of the Church. W01 did not have the authority over local police officials to drop their charges, had there been any. The agreement, which was brokered after the Applicant's hospitalization, used generic language and never referenced the original accusations of W01, which were not pursued by the local authorities and which the Applicant consistently denied.

22. In conclusion, the Applicant argues that despite the fact that he willingly gave a Deoxyribonucleic Acid ("DNA") sample to OIOS, this apparently was never used to verify the facts or substantiate his good faith. As a result of the rush to judgment, his professional reputation in the international community has been harmed and his well-being has been affected.

23. Consequently, the Applicant seeks rescission of the contested decision, reinstatement, compensation for the wrongful termination and moral damages in the amount of three years' net pay.

The Respondent

24. The Respondent urges the Tribunal to reject the application because there is clear and convincing evidence that, on one or more occasions in 2016 and 2017, the Applicant had sexual relations with a Congolese girl who was under 18 years of age, V01. The Applicant admits that in 2016 and 2017, V01 was a minor.

25. The Respondent submits that in two separate interviews with OIOS, V01 gave detailed, coherent and consistent sworn statements regarding the Applicant's sexual relations with her. In December 2016, V01 went to the Applicant's house to collect money for her school fees. When V01 arrived, there was no one present, except the Applicant. The security guards were outside the house. The Applicant told V01 that he left the money in an envelope in his bedroom and asked her to collect it from there. V01 went to the Applicant's bedroom and looked for the money but could not find it. When V01 wanted to leave the bedroom, the Applicant entered and pushed her inside. The Applicant then raped V01.

26. The Respondent further submits that V01's statements are detailed, describing how the Applicant bent her arms behind her so that she could barely move, how he opened her legs, took off his shorts and her underwear and then forcefully penetrated her vagina as she cried for help. V01 stated that the Applicant did not wear a condom during the interaction. V01 stated that the encounter left her in pain and bleeding. Thereafter, V01 and the Applicant had sex multiple times.

27. The Respondent states that W01, V01's mother, gave a sworn statement to OIOS that the day she sent V01 to go to the Applicant's house to collect school fees, V01 came home with blood on her skirt. When W01 inquired about the blood, V01 told her that the Applicant had raped her. V01 gave a precise description of the apartment where the Applicant lived in December 2016. She explained that the

entrance of the house led directly into the living room and that the Applicant's bedroom was on the left of the entrance. She described the Applicant's bedroom and the furniture in the living room. V01 also gave a precise description of the most recent house the Applicant rented. She described the living room and its furniture. She also described the bedroom where the Applicant had sex with her, specifying that it did not have a washroom.

28. Though the Applicant now asserts, without any evidence, that his bedrooms in both of his DRC apartments were on the right, during his OIOS interview, he confirmed that the bedroom in his December 2016 apartment was on the left side of the entrance. Furthermore, OIOS confirmed V01's descriptions of the Applicant's December 2016 apartment, as well as her description of his latest apartment, with sketches they drew during their site visits. Notably, the Applicant's assertion that V01 could have known the details of his house because he hosted social events there contradicts his assertion elsewhere that V01 had never been inside his residence.

29. V01 described other incidents when the Applicant had sexual relations with her, stating he would sometimes take her to a hotel close to the MONUSCO Hospital. V01 was able to direct OIOS to this hotel, the Tony Guesthouse, which is located in close proximity to the hospital. V01 was able to describe the hotel, the bedroom and the presence of security. V01 recalled one time when the Applicant came to her house, gave her younger siblings biscuits and then had sex with her in her mother's bedroom. W01 corroborated this evidence, informing OIOS investigators that her two other children told her that the Applicant came to W01's house, in her absence, to see V01 and gave them biscuits.

30. Despite the Applicant's assertion that OIOS never asked V01 why she continued to have sex with the Applicant after he had raped her, OIOS did ask V01 that specific question, twice. Both times, V01 responded that she continued to have sex with the Applicant because he gave her gifts and made promises to her. The Applicant's assertion that if he had in fact raped V01, she would not have continued to have sex with him ignores the power imbalance between the Applicant, an

international civil servant with considerable financial means, 59 and 60 years old in 2016 and 2017, and V01, a teenager from a poor family background in the DRC. This power imbalance was exacerbated by the fact that the Applicant held a position of prominence and power, as a "pastor" with the "gift of prophesy," in a prayer group V01 and her mother attended.

31. According to the Respondent, the evidence contradicts the Applicant's assertions that V01 never went to his apartment:

a. The Applicant stated in his incident report of 14 July 2017 that V01 was not barred from entering his premises and was only allowed to visit for school related issues.

b. V01 gave precise descriptions of the Applicant's residences which were confirmed by the OIOS investigators.

c. YB, another member of the prayer group, stated that the Applicant would provide her with money for her school fees and that she would collect the money from the Applicant inside the Applicant's apartment; this supports V01's statement that the Applicant would ask her to come to his apartment.

d. BK, whose statement the Applicant referenced during the disciplinary process, also stated that V01 would go to the Applicant's house to ask for school money.

e. The Applicant's own assertion in the application that V01 would have attended his apartment for church functions.

32. The Respondent submits that evidence contradicts the Applicant's assertions that he never visited the Tony Guesthouse, and that the entry of 11 February 2017 does not refer to him and has no relevance:

a. In a photo array, MS, the night receptionist at the Tony Guesthouse, identified the Applicant as a man who frequently visited the Guesthouse. MS

confirmed that he saw the Applicant with several women with whom the Applicant would have sexual relations. The information provided by him in his interview is straightforward and coherent. MS described in detail what he had observed. He expressed his shock that the Applicant would invite him to his prayer group even though MS knew that the Applicant would have sexual relations with different women at the Guesthouse.

b. There is no reason why MS would have fabricated this information or arranged it with W01 and V01. On the contrary, during the interview MS expressed concerns about the confidentiality of his statements, since the Applicant had told him the Applicant's visits to the Tony Guesthouse with various women were "secret," in light of his position as a "pastor." The Applicant's claim that MS's statement was engineered by W01 is speculative and unsupported by evidence.

c. The entry in the Tony Guesthouse reception registry book recorded a stay of a person named "Erefa" for 11 February 2017, listing the nationality of this person as "Nigeria." The Applicant is a dual citizen of the United Kingdom and of Nigeria. The Applicant's assertion that this entry "could have easily been put there" is speculative and does not explain its existence amidst many other guest entries.

33. The Respondent submits that there is no evidence to support the Applicant's assertion, raised for the first time in his application, that he paid USD5,000 to W01 "to provide income with a view to combatting the local exploitation of local young women." During the investigation and disciplinary process, the Applicant maintained that he had given the money out of "charitable concern" for W01 and that he and BO, another staff member for whom W01 worked as a housekeeper, had promised money to W01 to establish a business. However, those assertions are contradicted by the following:

a. BO maintains that she never promised to give money to W01.

b. On 3 July 2017, W01 filed a complaint with the Agence National de Renseignement, the Congolese National Intelligence Agency, reporting that the Applicant had raped her daughter. In the following days, W01 filed another complaint with the Parquet General de Goma, the Public Prosecutor's Office. On or around 13 July 2017, the Applicant was summoned to the local court.

c. On 26 July 2017, AA, the Applicant's then-counsel, and W01 signed an agreement aimed at settling the dispute arising from the Applicant's sexual relationship with V01. The agreement specifically entailed the withdrawal of W01's complaint with the Congolese Public Prosecutor's Office in exchange for USD5,000. A first payment was made at the signature of the agreement. In an addendum to the agreement of 26 July 2017, dated 9 October 2017, W01 confirmed having received a second payment of USD2,500 to close the matter. Under the terms of the addendum, the Applicant was to pay the court fees. AA told the Applicant that W01 had signed the agreement and received the money.

d. By his own account, the Applicant would give up to USD1,500 a month to individuals in need for school fees or rent. The sum of USD5,000, given to one individual, far exceeds this amount.

e. The Applicant asserts that he was blackmailed by W01. However, there is no evidence of blackmail or extortion.

34. The Respondent further submits that the Applicant's assertions do not undermine the evidence against him in any material respect. The Applicant's argument that security guards outside the Applicant's house would have heard if anything happened to V01 is speculative and unsubstantiated. Likewise, while FMD, a security guard at the Applicant's last residence, stated that he did not see V01 coming alone to the Applicant's apartment, he also stated that he worked in shifts. Accordingly, he may not have seen V01 at the particular times of her visits.

Furthermore, the first incident, in December 2016, took place in the Applicant's previous residence.

35. During the investigation and disciplinary process, the Applicant asserted, without support and based on hearsay and rumours, that W01 was prostituting her daughter. Even if accepted, it is irrelevant to the question of whether the Applicant had sexual relations with V01, a minor.

36. V01's medical records are inconclusive and irrelevant in establishing the sexual assault. Her examinations at the local hospital were conducted in relation to a case of appendicitis and not in response to a complaint of sexual assault. They were also not conducted immediately following the first incident in December 2016. The examinations are therefore of limited value to determine whether the Applicant raped her. The fact that, according to the Applicant, OIOS obtained a DNA sample from him does not mean that there was physical evidence against which the sample could be tested. The existence of such physical evidence is not required.

37. Officials in the Public Prosecutor's Office were careful not to give information to OIOS in the interests of protecting the integrity of an ongoing investigation. The fact that the Congolese investigation was unresolved did not prevent the Organization from proceeding with the disciplinary process. The document produced by the Applicant, which he purports to be a sworn statement by his local attorney in the DRC is biased and has no probative value.

38. The Applicant's actions amounted to serious misconduct in violation of the Staff Regulations and Rules and ST/SGB/2003/13, warranting his dismissal. The prohibition of sexual exploitation and abuse is a core provision regulating the behaviour of all United Nations personnel. The Applicant's unspecified assertion that his conduct is not a violation of Sexual Exploitation and Abuse ("SEA") rules is baseless.

39. The Respondent argues further that given the seriousness of the misconduct and the Organization's zero tolerance policy towards sexual exploitation and abuse,

which aims to safeguard local populations that the United Nations serves, the imposed sanction of dismissal from service was proportionate to the Applicant's misconduct.

40. The Respondent argues further that all relevant circumstances were considered in making the decision and that the Applicant's due process rights were respected throughout the investigation and disciplinary process.

41. He submits that the reliefs sought by the Applicant should be dismissed.

Considerations

Preliminary issue: Motion for confidentiality

42. In his amended reply[3], the Respondent requested the Tribunal to redact the names of the victim and her family from any public filings in this case. Vide Order No. 140 (NBI/2021), issued on 15 July 2021, the Respondent's motion for redaction of the names of the victim and her family from any public filings in this case was granted.

Merits

43. This is a disciplinary case involving a violation of staff regulations and rules on prohibition of sexual exploitation and abuse. The Applicant has urged the Tribunal to find that the facts on which the disciplinary measure was based are not established. This is because the investigation was flawed in that relevant pieces of evidence were ignored while reliance was placed on evidence that was not credible and not corroborated. The Applicant's main points of contention are outlined below:

> i. (a) The investigator repeatedly chose to believe the complainant, V0l, over the Applicant in the absence of concrete evidence.

[3] Amended reply, para. 30.

b. There was no witness to corroborate the victim's accusation that the Applicant exploited her five times at his two residences.

c. No witness corroborated the victim's testimony that the Applicant took her to Tony Guesthouse seven times.

ii. The investigative report on which the conclusions were drawn, omitted or ignored pertinent information leading to an improper conclusion.

iii. The Applicant had good intentions.

iv. Credible witnesses were threatened for defending the Applicant.

v. Extortion; the motivation behind the allegations of child abuse were monetary.

vi. The report of sexual abuse was not made promptly/contemporaneously.

vii. His Deoxyribonucleic Acid ("DNA") sample given to OIOS was never used to verify the facts or substantiate his good faith.

viii. No one contacted the local police about the activities at the Guesthouse and the local prosecution investigation was unresolved.

44. The Tribunal reminds itself that:

> In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over

> the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.[4]

45. In accordance with this well-established principle that the role of this Tribunal is to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration[5], the Tribunal heard the parties' case through their documentation and oral clarification of both legal and factual issues submitted at the case management discussion that was held earlier in the proceedings.

46. There are four essential elements that the Tribunal must evaluate during the judicial review of a disciplinary case. These are: (i) whether the facts on which the disciplinary measure is based have been established (where termination is the sanction imposed, the facts must be established by clear and convincing evidence; in all other cases preponderance of the evidence is sufficient); (ii) whether the established facts amount to misconduct; (iii) whether the sanction is proportionate to the offence; and (iv) whether the staff member's due process rights were respected.[6]

47. In the instant case, the Applicant challenges the investigation process, that OIOS did not properly analyse the evidence before it hence the factual conclusions are wrong leading to an illegal termination of employment. Based on the law and jurisprudence, the Applicant is claiming that the Respondent has not established the case through clear and convincing evidence because the facts are not established.

48. Section 9.1 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) provides that the applicable standard of proof as clear and convincing evidence, for imposing separation or dismissal of the subject staff members. This standard of proof is lower than the criminal standard of "beyond a reasonable doubt". The Administration bears the burden of establishing that the

[4] *Sanwidi* 2010-UNAT-084, para. 42.
[5] *Applicant* 2013-UNAT-302, para. 29.
[6] *Suleiman* 2020-UNAT-1006, para. 10, citing *Nadasan* 2019-UNAT-917, para.38; *Siddiqi* 2019-UNAT-913, para. 28.

alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable.[7]

49. In the case at bar, the Respondent charged the Applicant with having sexual relations with V01, a Congolese girl under the age of 18 in violation of staff regulations 1.2(b) and 1.2(f), staff rule 1.2(e), and sections 3.1, 3.2(b) and 3.2(c) of ST/SGB/2003/13. The specific counts are as follows:

> a. The Applicant failed to uphold the highest standards of integrity expected from an international civil servant, in violation of staff regulation 1.2(b) and failed to conduct himself in a manner befitting an international civil servant in violation of staff regulation 1.2(f).
>
> b. The Applicant engaged in sexual exploitation and abuse of a person under the age of 18 in violation of staff rule 1.2(e) and sections 3.1, and 3.2(b) and 3.2(c) of ST/SGB/2003/13.

50. Other applicable laws are; staff regulation 10.1(b) which provides that, sexual exploitation and sexual abuse constitute serious misconduct and section 3.1 of ST/SGB/2003/13 which states that:

> Sexual exploitation and sexual abuse violate universally recognized international legal norms and standards and have always been unacceptable behaviour and prohibited conduct for United Nations staff. Such conduct is prohibited by the United Nations Staff Regulations and Rules.

51. Specifically, staff rule 1.2(e) expressly provides that:

> Sexual exploitation and abuse is prohibited. Sexual activity with

[7] *Bagot* 2017-UNAT-718 at para. 46 citing *Mizyed* 2015-UNAT-550, para. 18, *Applicant* 2013-UNAT-302, para. 29; *Diabagate* 2014-UNAT-403, paras. 29 and 30; *Molari* 2011-UNAT-164, paras. 29 and 30.

> children (persons under the age of 18) is prohibited regardless of the age of majority or the age of consent locally, except where a staff member is legally married to a person who is under the age of 18 but over the age of majority or consent in his or her country of citizenship. Mistaken belief in the age of a child is not a defence. The exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. United Nations staff members are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse.

Zero tolerance to sexual exploitation and abuse

52. The United Nations has a zero-tolerance policy to sexual exploitation and abuse by its personnel. In order to ensure that staff members comply with the zero-tolerance policy, the United Nations offers mandatory training to equip the staff members with skills on how to implement the policy. The specific mandatory training the Applicant attended on SEA awareness was offered by the MONUSCO Conduct and Discipline Unit on 27 June 2014.[8]

53. Due to the serious nature of the misconduct and the policy against it, it follows that a finding by the Tribunal that a staff member engaged in sexual exploitation and abuse automatically leads to a finding that he or she failed to uphold the highest standards of integrity expected from an international civil servant, in violation of staff regulation 1.2(b) and failed to conduct himself in a matter befitting an international civil servant in violation of staff regulation 1.2(f).

Evidence in Sexual Related Allegations

54. The general understanding regarding evidence in sexual related acts of misconduct was recently reiterated in *Haidar* 2021-UNAT-1076, that;

> … it is typical in disputes concerning sexual harassment that the alleged conduct takes place in private, without direct evidence other than from the complainant and that the evidentiary questions in such

[8] Annex R/3, paragraph 14 of the Investigation Report.

cases centre on the credibility of the complainant's testimony.[9]

55. In the *Haidar* case just like in the present case, the Appellant had challenged the UNDT's findings of fact, arguing that the Tribunal erred for, "basing its considerations principally on the testimony of the Complainant". He further averred that the UNDT did not establish a clear case of sexual harassment against him save for the complaint made by the Complainant which was not corroborated by any witness. In the absence of any direct evidence, "it is unjust on the part of the Tribunal to decide on the mere assumption that the Complainant could not have made up her evidence because she sounded more believable than [him]"[10].

56. UNAT dismissed the Appellant's [Haidar] arguments finding that the UNDT was correct in holding that the Complainant's testimony was "a coherent, detailed and consistent account of the events" and that her testimony was consistent with her statements given to investigators. The UNDT found that the Complainant never wavered in the "description of the incident and her actions at the time, providing many details and specific recollections". UNAT affirmed the UNDT's conclusions that "the quality of her [Complainant's] testimony was very high, and her version of events was corroborated through indirect evidence from several witnesses"[11].

57. It follows that the Tribunal must assess the credibility of a complainant as a witness by considering, whether the testimony is coherent, detailed and consistent. There is no legal requirement for direct evidence to corroborate a complainant's version of events in sexual related misconduct. The complainant's testimony alone may be sufficient evidence to reach a decision depending on the circumstances. The question of credibility therefore is determined on a case-by-case basis, each case being decided on its own merits, taking into account its peculiar circumstances.[12]

[9] At para. 43.
[10] At para. 21.
[11] At para. 22.
[12] See, generally *Aqel* 2010-UNAT-040, *Diabagate* 2014-UNAT-403 and in *Al Othman* 2019-UNAT-972 where UNAT directed that the credibility of the complainant and her mother be established at an oral hearing and remanded the case for that purpose. It is only in cases of claims for moral damages

Applicant's case

58. The Tribunal reminds itself that the Respondent has the burden of proof to show that the facts on which the sanction was based are established by clear and convincing evidence. In the instant case the Respondent has in his submissions summarised the case providing specific incidents that constituted misconduct leading to the sanction. The Applicant has argued that the Respondent has not met the requisite standard of proof and has cited the following instances for consideration:

i.(a) The investigator repeatedly chose to believe the complainant, V0l, over the Applicant in the absence of concrete evidence. There was no witness to corroborate the victim's accusation that the Applicant exploited her five times at his two residences. No witness corroborated the victim's testimony that the Applicant took her to Tony Guesthouse seven times.

59. The Applicant argues that that there is no rationale for why the investigator repeatedly chose to believe V01 over him in the absence of concrete evidence. He states that V01 claimed he first exploited her five times at his two residences although no one could be identified to corroborate this and that V01 also testified they went to the Tony Guesthouse seven times, but there is no evidence for this. MS, the attendant at Tony Guesthouse referred to numerous visits with four other women who were never identified. Moreover, the manager of the Guesthouse never saw the Applicant at any time.

60. The Tribunal finds that Respondent's decision to believe V01 was based primarily on interviews with OIOS during which V01 gave detailed, coherent, substantiated and consistent sworn statements regarding the Applicant's sexual relations with her from 2016 until when W01, V01's mother intervened. The Tribunal

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that the law and jurisprudence clearly demand that the claimant's evidence be corroborated by independent evidence.

has gone through the record of interviews with V01 and agrees with the Respondent that she is a credible witness. Her interviews conducted over five sessions in two days were detailed and even graphic in their description of her encounters with the Applicant. The Applicant bought V01 a cell-phone for communication. The Applicant ensured that his meetings with V01 were kept a secret as alleged by V01. It is immaterial that the Manager of Tony Guesthouse or that security guards did not see the Applicant with V01. The victim did not testify that she ever met the Manager of Tony Guesthouse or dealt with security guards during her visits. In her testimony, the Applicant made all the check-in arrangements while she waited in his car and she would just walk past reception into the arranged room "without paying much attention to the hotel"[13]. The Tribunal notes that MS did not specify that he saw the Applicant with V01 at Tony Guesthouse, but he saw him with four women. Therefore, MS's testimony is not relevant to the charge that the Applicant sexually exploited and abused V01.

61. The record shows that V01's interview detailing her first encounter with the Applicant was corroborated by W01 who gave a sworn statement to OIOS that she saw blood on V01's skirt and V01 confessed that the blood was not menstrual-related but resulted from rape by the Applicant. The record shows consistent statements that W01 and V01 confronted the Applicant on the same evening about this incident. He allegedly admitted defiling the minor and undertook to remedy the situation by taking charge of the minor's educational needs until she finished college and begged W01 and V01 not to pursue the matter and not tell anyone about it. That the Applicant took personal charge of V01 is further corroborated by prayer group members who testified that the 'sponsorship committee' of the prayer group was never involved in the financial arrangement between V01 and the Applicant, that he was assisting V01 in his personal capacity.

[13] Interview with V01, Part 4[audio-recorded] (28 November 2017) lines 1108-1114.

62. The details of V01's encounters with the Applicant, in particular, the locations where they met for sex were confirmed by OIOS who physically located the Applicant's houses and verified their furnishings and the guesthouse mentioned in V01's testimony. The Applicant subsequently confirmed that V01 visited him at his house on 'school related' matters only. One security guard confirmed that V01 had been to the Applicant's house on her own on two occasions. Other security guards never saw V01 at the Applicant's house, but according to the record, this was because these guards worked in shifts and may have missed V01's visits. V01's siblings told investigators that the Applicant visited their house, gave them biscuits and proceeded to their mother's bedroom with V01. W01 corroborated their testimony. It is therefore not correct that V01's testimony that the Applicant had sexual relations with her was not corroborated.

63. The Tribunal has no cause to believe that V01 fabricated the allegations against the Applicant. The Applicant has not discredited the meticulous, detailed, and precise narration of the events from the first encounter in December 2016. V01 did not waver in her narrations. She was confident and consistent in her interviews with OIOS. There is nothing in her oral interview to OIOS or its summary to suggest that V01 was being dishonest or had been coached to implicate the Applicant. The Applicant has not adduced any evidence of any ulterior motive on the part of V01 or OIOS. On the contrary, V01 seemed to have a soft spot for the Applicant who she still believed would make her a 'big lady'. V01 explained to OIOS that she continued to have sexual relations with the Applicant because he enticed her with promises of a good life, for instance, he promised and she believed that the Applicant would make her a big lady[14], would purchase a compound for her[15] and would open a bank account for her[16]. He gave her gifts of money and other material things like cell-phone, perfumes and oils. It is therefore not correct that OIOS did not probe V01 why she continued to have sex with the Applicant after the first encounter in December

[14] Interview with V01, [audio recorded], (28 November 2017) lines 982-997 and 1208.
[15] Ibid., line 1211.
[16] Ibid., line 1214.

2016. She kept her affair a secret from her mother as instructed to her by the Applicant. The Applicant was a very senior member of V01's prayer group, she referred to him as "pastor" and her mother's "father", he held a position of trust in that regard among his believers; he was more senior in age (60 years) and experienced in life than the victim (16 years); and he exploited her financial vulnerability and a child's material needs like money for hair treatment, perfumes and oils. The Applicant also personally drove V01 to the hospital when she fell ill and paid her medical bills[17]. There is no evidence that he extended similar care to other members of the prayer group.

64. The Tribunal finds that V01 was a credible witness. Her testimony taken independently, bearing in mind all the circumstances, establishes the facts that sexual exploitation and abuse did take place.

W01 as a Witness

65. W01, the victim's mother, knew about the rape in December 2016 after noticing blood spots on V01's skirt. Subsequently, she bumped into a middleman, BK, who was used by the Applicant to deliver money to V01. It was after W01 caught the middleman trying to give money to V01 from the Applicant that she confronted the Applicant and reported him to the local state enforcement authorities that he had raped her child. W01 was dissatisfied with the way the local authorities handled the matter. This prompted her to report the matter to MONUSCO because she thought the court officials were corrupt. She wanted to put a stop to the abuse by informing MONUSCO what its staff member was doing to her child. Her evidence to OIOS was consistent with the statements of V01 and her two siblings and to some extent consistent with the middleman's evidence and that of the Applicant.

66. The allegation that W01 was prostituting her daughter is not supported by any

[17] Ibid., lines 641-666. In his audio recording with OIOS he said when he heard the news that V01 was hospitalized he said, "let me speak to the doctor". He spoke to the doctor, went to the hospital and paid the medical bill in the sum of around USD600. He confirmed that he went to the hospital himself and met the doctor and paid the bill (16 March 2018, recorded interview with Applicant, lines 1276-1296).

evidence. The only witness during the investigation with OIOS that alluded to prostitution was NM, however, according to the summary of the interview with NM, she heard this from the Applicant. She was told this story in the context of the local authorities' summons for the Applicant to answer rape charges. NM did not have any fact to support this allegation other than the Applicant's word. The Tribunal places no weight on this piece of evidence because it is hearsay and from a source that was obviously conflicted as having been a subject of criminal investigations.

67. The Tribunal finds W01 a credible witness, her testimony relating to the first incident which she resolved informally with the Applicant is consistent with and corroborates V01's testimony. The Applicant has not successfully discredited this testimony. His attack of W01 as a thief and a prostitute can only be described as malicious and immaterial to the allegation.

Inconsistencies in V01 and W01's Statements

68. It is the Applicant's case that the Administration did not consider inconsistencies in the statements of V01 and W01. The Tribunal finds that the only inconsistency that the Applicant has cited relates to the date and month of birth of V01. During her first interview in November 2017, V01 said she was born on 20 July 2000. In March 2018 when she was interviewed again she believed she was born on 12 May 2000 because she was told so and yet her identity card showed that she was born on 20 February 2000. In this Tribunal's view, this inconsistency relating to date and month of birth is not material to the substance of this case. The Applicant has not denied that V01 was a minor when he became acquainted with her in 2016. As a matter of fact, he believed she was around 14-15 years old. Therefore, the inconsistence as to the actual date and month of birth is immaterial as long as the Respondent is able to prove that the child was under 18 years old at the time. The Tribunal's assessment of the investigation audio recordings of V01 show that questions were craftily presented in some cases different questions were asked on the same issue but V01 gave consistent responses which were substantiated by W01.

69. The investigation report disclosed the names of the witnesses, the Applicant was not prevented from confronting them. This rebuts the Applicant's assertion citing, *Liyanarachchige*[18] that the investigation violated his due process rights. In *Liyanarachchige*, the staff member complained that his due process rights were violated because the Administration based its decision on anonymous statements. He never had a chance to confront his accusers as is required in an adversarial system of justice. UNAT allowed the appeal holding that:

> …a disciplinary measure may not be founded solely on anonymous statements. In disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defence and the requirements of adversary procedure. In this case, the charges are based solely on statements made to the OIOS investigator by anonymous witnesses.
>
> It follows from the above that the UNDT erred in law by finding that the Secretary-General had not violated the requirements of adversarial proceedings and the rights of the defence in taking the decision to summarily dismiss Mr. Liyanarachchige solely on the basis of the statements of anonymous witnesses.

Therefore, although the principle enunciated in *Liyanarachchige* is universal, it is not applicable in the present case as the facts are different.

70. On the contrary, the Applicant's testimony to investigators had a litany of contradictions casting doubt on his credibility. For instance, his assertions about BO's involvement in his monetary arrangement with W01; that V01 and other members of his prayer group did not enter inside his house; that he never personally drove to a hospital and paid medical bills when V01 was hospitalised and about the purpose of the USD5,000 which he paid out to W01 through his lawyer, were all contradicted by either himself and/or other witnesses. These contradictions are not consistent with credibility.

71. Furthermore, the Applicant attacks OIOS for not probing the two Complainants' backgrounds, their involvement with the Church or what they did with

[18] 2010-UNAT-087, paras. 20-21.

the money they received from it. He avers that the investigators should have checked to see if there were any police records or if the Complainants had brought similar complaints in the past as reported by some witnesses. In his view, the OIOS should have pursued these issues which may have had an impact on the question of credibility.

72. The Tribunal notes that OIOS conducted interviews with the Church members. The record shows that it was the Applicant himself who invited W01 to join his prayer group after he became acquainted with her while she was working for BO with whom the Applicant shared a residence. It is ironic that the Applicant may now start questioning and disparaging a member of his own prayer group, his "daughter". It is also not proper for the Applicant to begin now to question how his financial donations were utilised. The Applicant has not shown how knowing how the money was spent is a relevant factor in ascertaining witness credibility regarding the charge of having sexual relations with a minor.

ii. The investigative report on which the conclusions were drawn, omitted or ignored pertinent information leading to an improper conclusion

73. The record shows that the Applicant was availed the investigation report and its annexes. The report is comprehensively summarised, with annexes that are straightforward documents that guided the Applicant in his response to the allegations. The Applicant was assisted by Counsel in drafting his response to the allegations. He is assumed to have understood the allegations. He was at liberty to seek clarification on any specific matter relating to witnesses and the investigation report. In response to the allegations of sexual exploitation and abuse of a minor the Applicant stated in relevant parts:

> The facts outlined in the allegation letter, as in the OIOS report, are based almost entirely on the interviews with two accusing parties. There is little to no corroboration of their statements and no proof that any sexual relations took place…I note that your account of what transpired in December 2016 and thereafter is taken from the interviews with V01 and W01. Apart from offering to pay some

money for rent and school fees, and covering some medical expenses on one occasion, the entire version of their story is fabricated"[19].

74. The Applicant then proceeded to explain as follows:

> … there is no evidence that I engaged in the sexual exploitation of a minor as it has been alleged. The only basis for the conclusion of OIOS that it occurred was the circumstantial evidence of the payments made by me. There is a great deal of conflicting testimony in the OIOS report about how this came about. The most credible witnesses, who were largely ignored by OIOS, confirmed that V01 was one among several Congolese youth who benefitted from **financial assistance from members of the prayer group** and that out of concern for V01's vulnerability to abuse, I agreed to help set them up in a respectable business. Her mother, W01 evidently saw this as an **opportunity and demanded more and more money. When she was refused, she concocted the story of sexual exploitation to essentially blackmail me**. She used her local contacts to pursue her claims. Unfortunately, my counsel at the time and the Magistrate pressured me into making a payment against my better judgment.[20]
>
> […]
>
> I also fail to understand why the OIOS report **overlooks the witnesses testimony of the members of the prayer group who witnessed events first hand…they confirmed that V01 never came to my apartment alone,** that **W01 had a reputation for dishonesty and stealing and suspected she was forcing her daughter into prostitution"**.[21] (Emphasis added).

75. In the above quoted response, the Applicant has not pointed to any specific and pertinent information that was relevant but was ignored or overlooked by OIOS or the Administration. Before this Tribunal, the Applicant alluded to the testimony of his prayer group members as pertinent. As noted in this judgment, sexual acts usually happen in private and have no witnesses. Religious leaders like the Applicant are not immune from committing these heinous acts of misconduct by the mere fact of their positions in their religious communities. The testimonies of prayer group members

[19] Response to allegations of misconduct, 16 November 2018, para. 16.
[20] Amended application, annex 4, Applicant's response to the allegations of misconduct, para. 23.
[21] Ibid., para. 26.

were not ignored or omitted but was considered for what it was worth in resolving the charge.

76. OIOS interviewed 10 members of the prayer group. The Tribunal has reviewed the summaries of the interviews and agrees with the Respondent that their interview statements were not relevant to either establish that the Applicant had sexual relations with a minor or not because the Applicant led a double life. None of the prayer group members except for one young woman YB and V01 informed the investigators that they had been inside his house. The other members were not invited inside the house. None of them testified as to the Applicant's private life outside the prayer group. In case of YB, the Tribunal notes that she was interviewed by OIOS at the instance of the Applicant. Her interview summary that she had been in the Applicant's house to collect school fees corroborates V01's testimony that she was privately invited by the Applicant to enter his house. The Tribunal therefore finds that the Applicant's allegation, that the investigation did not consider exculpatory evidence is not substantiated. Exculpatory evidence was considered but found immaterial to the issue at hand.

77. By interviewing all these witnesses, some referenced by the Applicant, and meticulously recording, analysing and summarising the testimonies then sharing these with the Applicant for his response, the investigators complied with their obligation and the Applicant's right to a presumption of innocence throughout the investigation process. The Applicant has not cited any specific material defect in the investigation report that affects the case.

iii. The Applicant had good intentions.

78. The Applicant wants this Tribunal to find that his intention was noble. That he was in association with the child for her own benefit, to wit, advancing her educational needs. The Applicant has not cited any provision that allows for this Tribunal to consider good intention as an exculpatory factor in cases of sexual abuse and exploitation. It is an irrelevant factor.

79. The prayer group members informed the investigators that they had a committee that considered monetary requests from poorer members of the group. The committee did not consider a financial request from V01 and was never involved in the monetary transactions between the Applicant and V01. The Applicant's assertions that the prayer group members were aware that V01 never visited his house alone is therefore contradicted.

80. None of the prayer group members, apart from NM, informed the investigators that the Applicant had complained to them about V01 or W01 demanding money from him and harassing him. NM said the Applicant told him that W01 was harassing him but only after W01 had reported a case of rape to local authorities. This piece of evidence is therefore not reliable as it came after the fact and from an unreliable source.

iv. Credible witnesses were threatened for defending the Applicant.

81. NM wrote to one LZ alleging that "gross injustice has or will be committed if no action is taken to ensure that proper, unbiased, ethical and professional procedures have been followed in the Reporting, Investigating and in the final Reporting of recommendations by the OIOS office in Goma concerning this case according to the "Code of Conduct which all UN staff have sworn to uphold"[22]. As noted by the Respondent, NM did not cite a single section of the Conduct of Conduct that was not upheld by OIOS. She did not point out to any single statement that was either wrongly attributed to her or to the Applicant by OIOS. Her fears were therefore not substantiated. The Applicant did have access to the investigation report and he has not pointed to any statement in the report including its annexes that was wrongly attributed to either NM or to himself.

82. In relation to the promised financial support that NM alluded to as the instigator of the harassment against the Applicant, the Tribunal notes from the record,

[22] Application, Annex 4, (email of 25 September 2018 from NM).

that BO, another witness, was not aware of this promise to W01 and she distanced herself from the assertion. What NM spoke of was mere hearsay of what the Applicant told her.

v. Extortion; *the motivation behind the allegations of child abuse were monetary.*

83. It is trite that he who alleges improper motive must prove and in the instant case the Applicant has failed to prove his assertions that the motive behind the Complainants' allegation was to blackmail him[23].

84. It does not seem to the Tribunal that the victim and her mother were sophisticated enough to fabricate the story for illegal purposes as alleged by the Applicant. In the first place, the evidence is clear from V01's recordings that she had tried to keep her liaisons with the Applicant private, particularly she did not want her mother to know; secondly, the mother came to know about the sexual encounters by chance and confronted the daughter who confessed to them; thirdly, after the mother confronted the Applicant during the first encounter, she believed that the Applicant would not continue to exploit the child until she caught the daughter quite by chance attempting to receive money from the Applicant through a middleman, BK; and finally, the Applicant has not in his evidence cited a single incident where he had paid money to either W01 or V01 under duress. None of the security guards at his house corroborated the Applicant's story that W01 frequently came to his gate to shout and harass him for money. His incident report to MONUSCO that he was being harassed by W01 was made after the fact and in this Tribunal's view not relevant to these proceedings.

85. The Applicant has failed to show that he paid USD5,000 to the Complainants under misguided advice from his Counsel in the criminal proceedings against him. In his interview with OIOS he said he paid the money because he had made a promise to

[23] *Oh* 2014-UNAT-480, para. 50, citing *Asaad* 2010-UNAT-021, para. 10.

W01 to set her up in business and that he was fulfilling that promise[24]. He also said he paid the money to make the case go away "to get it off his neck". The case was indeed withdrawn only that W01 was not satisfied with the manner in which the matter was handled, she thought the court officials were corrupt hence the report to MONUSCO.

86. One witness from the prayer group, BO, distanced herself from the Applicant's assertion that she together with the Applicant promised W01 any money. In her interview statement with OIOS, she stated that she had loaned W01 some money and she was deducting USD50 every month from her wages as a domestic help. The Applicant has not contradicted BO's testimony on this point. All in all, there were 80-100 members of the Applicant's prayer group,[25] he has not adduced any evidence as to why V01 and W01 would of all these members, single him out as the perpetrator of sexual exploitation and abuse.

87. This case is distinguishable from *Diabagate* where unlike in this case, a named person was identified as having coached the minor to lie about Mr. Diabagate with intent to extort money from him. It also transpired during oral hearing in that case unlike in this case which had no oral hearing, that the minor denied having engaged in sex with Mr. Diabagate.[26] UNAT found further that unlike in this case, the minor was not placed under oath before giving her interview statement to investigators. As such, the minor's transcribed statement, in which she said that Mr. Diabagate had raped her and engaged in sex with her, was neither reliable nor trustworthy; it was solely hearsay and insufficient, by itself, to prove the charge that Mr. Diabagate engaged in sexual activity with a minor. In that case unlike in this case, UNAT also found that "the other written documents were replete with hearsay and multiple hearsay and were neither trustworthy nor sufficient to prove that Mr

[24] Lines 1249-1257 audio recording, part 3-4 (16 March 2018).
[25] Annex R/3 to the Investigation Report, BO's interview synopsis, at line 5.
[26] 2014-UNAT-403.

Diabagate had sex with a minor"[27].

vi. Report of sexual abuse not made promptly/contemporaneously.

88. The Applicant argues that the case against him was fabricated by the Complainants because if he had sexually exploited the child, they would have reported the matter promptly. He asserts that, the Complainants only reported him after he had refused to bow down to their monetary demands. This assertion is contradicted by the record which shows that after the first incident, the parties agreed to resolve the matter among themselves on the understanding that the Applicant would take the victim under his charge by paying her school fees until she finished college. However, after W01 discovered that the Applicant was still sexually abusing the child, she reported the matter to the local authorities on the following day. This, in the Tribunal's view, is a prompt report made at first reasonable opportunity after becoming aware of the incident[28]. In any event, failure to report promptly cannot serve to undermine the credibility of an allegation, particularly in sexual abuse cases involving children[29]. There is no reason why the Tribunal in the instant case should draw any adverse inference about V01's credibility, especially in view of her account as to why she kept quiet about the abuse, to wit, the Applicant told her so and showered her with promises and gifts.

vii. Deoxyribonucleic Acid ("DNA") sample to OIOS, never used to verify the facts or substantiate his good faith.

89. The Applicant wished to introduce DNA test to prove his innocence. The Tribunal finds no fault in the Administration for considering DNA test as an irrelevant factor at the time of investigation in 2018 because V01 in her own words had either thrown away or washed off any physical particles of sex from her person, undergarments and clothes.

[27] Ibid., at para 34 citing *Applicant* 2013-UNAT-302; *Nyambuza*, 2013-UNAT-364; *Azzouni* 2010-UNAT-081.
[28] *Mbaigolmem* 2018-UNAT-819 para 31.
[29] *Al Othman*- 2019- UNAT-972 para. 75.

viii. No one contacted the local police about the activities at the Guesthouse and the local prosecution investigation was unresolved.

90. The Applicant introduced the issue of the local police involvement in the matter. In particular, (a) that the Guesthouse did not report his alleged sexual activities with a minor to the police. The Applicant has not, however, shown where in the relevant staff provisions, the Administration is required that such acts first be reported to police in order to be credible. This argument is unsustainable; and (b) he alleges that the local Congolese investigation with the prosecution office was unresolved and hence the Administration should have taken into account this fact to find that he had not committed any act of misconduct. As rightly pointed out by the Respondent, the inconclusive nature of local criminal investigation into the matter did not prevent the Organization from proceeding with the disciplinary process. Criminal matters are distinct from disciplinary matters, in this case the only relevance of the existence of the criminal matter was that it prompted the mother, W01 to seek assistance from MONUSCO after her futile attempts to stop the sexual exploitation and abuse of her daughter by the Applicant[30]. In *Toukoulon*[31], UNAT held that the United Nations is empowered by its written law to take disciplinary measures against its staff members in cases of misconduct, irrespective of whether the misconduct is referred to a local court or the accused person is convicted in such proceedings.

91. In view of the findings of facts above, the Respondent has established through clear and convincing evidence that the Applicant sexually exploited and abused a minor by having sexual relations with her. This finding is not based on office gossip or on mere suspicions but on direct evidence from the victim and members of her family. The Applicant has failed to discredit the findings of the OIOS which were thoroughly and comprehensively recorded upon which the impugned decision was grounded.

[30] It seems from the record of interview with V01 that even after the matter was resolved at the prosecution office, the Applicant continued to see V01.
[31] 2014-UNAT-407, para. 23.

92. In conclusion, on the question whether facts upon which the sanction was based are established, the Tribunal has found (a) that the Applicant had no objection to any specific testimony given to the investigators, he was not denied the opportunity to cross examine any of the witness to test the veracity of their testimonies, he agreed at the CMD that he was satisfied that the documents on record which included the investigation report were sufficient to determine the case without a need to call or cross examine any witness and (b) the investigation was conducted in an appropriate, careful, serious and objective manner, affording the Applicant his due process rights. The interviews, in particular with the victim, V01 were detailed and substantiated by other direct evidence. OIOS summaries of the investigation were objective and dispassionate ruling out any bias[32].

Whether the established facts qualify as misconduct under the Staff Regulations and Rules

93. The established facts qualify as misconduct under the Staff Regulations and Rules. The Tribunal finds that the Applicant engaged in sexual exploitation and abuse of a minor contrary to staff rule 1.2(e). His conduct clearly violated staff regulation 1.2(b) which stipulates that, staff members shall uphold the highest standards of efficiency, competence and integrity. The Tribunal agrees with the Respondent that the Applicant also violated staff regulation 1.2(f), which stipulates, *inter alia*, that staff members shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations.

Whether the sanction is proportionate to the acts of misconduct.

94. Any disciplinary measure imposed on a staff member has to be proportionate to the nature and gravity of his or her misconduct.[33] Factors other than the impugned behaviour to be considered in assessing the proportionality of a sanction include the

[32] See generally, *Aqel* 2010-UNAT-040.
[33] Staff rule 10.3(b).

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.[34] There is ample evidence through UNAT jurisprudence to show that staff members are dismissed from service for violating SEA Rules.[35] The sanction is proportionate because it was based on a clear and convincing case of serious misconduct and not on mere suspicion as argued by the Applicant citing *Samandarov*[36]. The Tribunal may not interfere with this sanction because it does not seem to be absurd or flagrantly arbitrary[37].

Whether due process rights were observed

95. The Applicant has not shown that his due process rights were violated at any stage of the disciplinary proceedings. The record shows that he was aware of the allegations against him, he knew his accusers, he had ample opportunity to present his defence and attack his accusers' testimony. The fact that his defence was weak and that his attempts at introducing exculpatory evidence were unsuccessful do not render the investigation and Administration's findings procedurally flawed. The Tribunal finds that the Applicant's due process rights were respected.

JUDGMENT

96. This Tribunal may interfere with the Administration's exercise of discretionary powers where the Administration has acted in violation of the staff member's terms of contract or employment. The Respondent has proved through clear and convincing evidence that the Applicant breached his terms of contract and appointment by engaging in serious acts of misconduct. The application is dismissed in its entirety.

[34] Compendium of disciplinary measures (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2019) available at https://hr.un.org/sites/hr.un.org/files/Compendium%20of%20disciplinary%20measures%20July%202009-%20December%202019.Final_.10.08.2020_0.xlsx and see also *Rajan* 2017-UNAT-781 at para. 48.
[35] See for example *Haidar, Oh* 2014-UNAT-480.
[36] 2018-UNAT-859.
[37] *Samandarov* citing *Aqel* para. 35.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 21st day of September 2021

Entered in the Register on this 21st day of September 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi