



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SHUMBA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Oscar Asima Taulo

Counsel for the Respondent:

Wambui Mwangi, UNFPA

Introduction

1. The Applicant, who was a Programme Specialist with the HIV Prevention portfolio and the focal point on HIV Prevention programmes for the United Nations Population Fund (“UNFPA”) in the Malawi Country Office (“CO”), challenges the Respondent’s decision to summarily dismiss him from the Organization for serious misconduct pursuant to staff rule 10.2(a)(ix).

Facts and procedural background

2. The Applicant began service with UNFPA in 2008, as a National Program Officer (“NPO”) for HIV Prevention. At the time of his separation from the Organization, he was a Programme Specialist within the same portfolio.

3. UNFPA’s Office of Audit and Investigation Services (“OAI”) investigated allegations that the Applicant engaged in sexual misconduct towards a youth volunteer who worked with one of the Organization’s implementing partners.

4. On 27 January 2019, the UNFPA Country Office forwarded a report of complaint to UNFPA Headquarters. This triggered the investigation.

5. OAI issued its report on 29 October 2020.

6. On 3 December 2020, the Applicant was provided with a copy of the investigation report.

7. The Applicant provided his comments on the report on 26 December 2020.

8. Following review of his comments, on 6 April 2021, the Organization notified the Applicant that he was being charged with serious misconduct. He was simultaneously placed on administrative leave without pay (“ALWOP”) for the remainder of the disciplinary process.

9. The Applicant responded to the charges on 18 April 2021.

10. On 20 May 2021, UNFPA issued its decision to summarily dismiss the Applicant for serious misconduct.

11. On 26 July 2021, the Applicant filed an application with the United Nations Dispute Tribunal sitting in Nairobi to impugn the decision mentioned in para. 10.

12. The Respondent filed his reply on 10 September 2021. The Respondent takes the position that the impugned decision is lawful.

13. On 3 August 2022, the Tribunal issued Order No. 105 (NBI/2022) to inform the parties of its decision to adjudicate this matter on the basis of their written submissions. To that end, the parties were invited to file their closing submissions simultaneously on 16 August 2022. The Applicant and Respondent filed their respective closing submissions as directed.

Parties' submissions

14. It is the Applicant's case that the investigation against him was biased and unfair. He was not afforded a fair hearing and the outcome of the investigation was predetermined.

15. The decision of the Executive Director of UNFPA is not supported by evidence. The Applicant strongly denies the conduct alleged against him, and vehemently argues that the Organization relied on incredible hearsay evidence to arrive at the conclusions it made.

16. The investigative and disciplinary processes were biased from the onset. Irrelevant matters were considered, and relevant factors dismissed. For example, the Applicant argues, the Organization should have consulted CCTV footage within the Office for observations of the state of the Complainant when she entered and exited his office.

17. The Applicant submits that the Organization "tampered with" his emails, and this was detrimental to preparation of his defence. Critically, correspondence between him and the Complainant "mysteriously disappeared."

18. The Complainant was asked leading questions which greatly influenced the findings in the investigation.

19. The Applicant also submits that the disciplinary measure imposed on him was entirely disproportionate.

20. The Applicant contends that he requested a formal hearing of his defence with his witnesses, which request was denied.

21. The Respondent urges the Tribunal to dismiss the application in its entirety.

22. The Respondent submits that the impugned decision was legally and procedurally sound. There was clear and convincing evidence of the Applicant's conduct, which UNFPA correctly found is tantamount to serious misconduct.

23. The evidence reveals that the Applicant sexually exploited, assaulted, harassed and abused the Complainant at the 2015 International Conference on AIDS and Sexually Transmitted Infections in Africa ("ICASA") in Harare, Zimbabwe. This conduct was repeated at the UNFPA Country Office between 2016 and 2017; and again, in his vehicle in 2016. The Complainant's testimony in respect of these incidents was detailed, specific and credible.

24. The Applicant's due process rights were fully respected throughout the course of the investigative and disciplinary processes. The Applicant has failed to show the bias and prejudice that he alleges against the Organization. The Respondent argues that absent a showing of extraneous factors, the presumption of regularity must follow.

25. The sanction imposed on the Applicant is consistent with past practice of UNFPA and is entirely proportionate to the Organization's findings and conclusions.

Considerations

26. The Tribunal preliminarily observes that the Respondent's motion to declare the Applicant's closing submissions time-barred is to be dismissed. It is fair that the person accused has the last word to defend himself, especially when he did not have a chance to be heard; moreover, there is no prejudice to the Respondent by this admission of closing submissions.

Scope of the review

27. The general standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain: (a) whether the facts on which the disciplinary measure was based have been established; (b) whether the established facts legally amount to misconduct; (c) whether the disciplinary measure applied was proportionate to the offence; and (d) whether the accused staff member was accorded due process in the disciplinary proceedings (see, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT523, *Wishah* 2015-UNAT-537).

28. The Tribunal will follow this standard in its review of this present case.

The Legal Framework

29. Staff regulation 1.2(b) provides:

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

30. Staff rule 1.2(f) provides:

Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

31. Staff rule 10.1(a) provides:

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

32. Staff regulation 10.1(b) provides: “Sexual exploitation and sexual abuse constitute serious misconduct.”

33. Relevant provisions of ST/SGB/2003/13 (Special Measures for Protection from Sexual Exploitation) are as follows:

Section 1 (Definitions) provides: "...the term "sexual abuse" means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions

34. Paragraph 3.2 of ST/SGB/2003/13 provides:

In order to further protect the most vulnerable populations, especially women and children, the following specific standards which reiterate existing general obligations under the United Nations Staff Regulations and Rules are promulgated:

Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal.

35. Relevant provision of the UNFPA Policies and Procedures Manual ("PPM") on the Prohibition of Harassment, Sexual Harassment and Abuse of Authority (2013) are as follows:

Paragraph 1.1 provides: "UNFPA is committed to providing a work environment free from harassment, sexual harassment and abuse of authority. Any type of harassment, including sexual harassment, and abuse of authority are strictly prohibited."

Paragraph 4.2.1 provides: "Any unwelcome sexual advance, request for sexual favor, verbal or physical conduct or gesture of a sexual nature, or any other behavior of a sexual nature that might reasonably be expected or be perceived to cause offense or humiliation to another person. Sexual harassment may occur when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. It can include a one-time incident or a series of incidents. Sexual harassment may be deliberate, unsolicited, and coercive."

36. Relevant provisions of UNFPA PPM Disciplinary Framework (2014) are as follows:

Standards of Conduct

Paragraph 5.1.2 provides: “Staff members must comply with the standards of conduct contained in Article I of the Staff Regulations and Chapter I of the Staff Rules on “Duties, obligations and privileges” of staff members, the Standards of Conduct for the International Civil Service as adopted by the International Civil Service Commission in 2013, UNFPA’s Financial Regulations and Rules, as well as other applicable policies, instructions, administrative issuances and procedures.”

Misconduct

Paragraph 6.1.1 provides: “Misconduct includes, but is not limited to: ...

(c) assault, harassment, sexual harassment, abuse of authority or threats to other staff members or third parties; ...

(s) sexual exploitation and sexual abuse, which, in accordance with Staff Regulation 10.1(b), constitute serious Misconduct

(v) breach of the standards of conduct expected from international civil servants constitutes misconduct.

Merits

37. The sanction letter charged that the Applicant:

(a) sexually exploited and abused, sexually assaulted and sexually harassed Ms. [] P, a Malawian national and well known youth worker/volunteer/activist in the HIV and AIDS community, while [they] both attended the 2015 ICASA Conference in Zimbabwe, by grabbing her by the body, forcing [himself] on her body and touching her, forcing [his] mouth on Ms. P’s mouth, without her consent and giving her USD100 to return to the hotel with condoms;

(b) sexually harassed Ms. P in [his] vehicle, sometime in 2016 but before December 2016, by asking her to go to a lodge to have sex and to be in a sexual relationship with [him];

(c) sexually assaulted and harassed Ms. P by initiating unwelcome sexual conduct in [his] office at the UNFPA Malawi CO between 2016 and 2017.

38. The Applicant claims that:

- a. he was not informed of any investigation involving him at the earliest possible time and he was dismissed without the opportunity to be heard;
- b. the investigation was grossly biased against him;
- c. relevant documents that could have exculpatory value (such as WhatsApp messages or CCTV footage) were not acquired;
- d. the accusations were not supported by evidence and the investigation was based only on hearsay evidence;
- e. the punishment is excessive.

39. The Tribunal will examine each of these points in turn.

40. As to the procedural regularity, it results from the records that OIAS interviewed the Applicant on 18 February 2020 and the Applicant had the opportunity to comment on Ms. P's allegations, present his version of the events, identify witnesses and offer additional evidence; the Applicant was provided a copy of the investigation dossier (investigation report plus exhibits) and he was offered an opportunity to provide written comments on factual findings that were made.

41. The investigation report and its annexes show that the investigators acted fairly, with the sole intent of discovering the truth; there was no bias towards the Applicant.

42. As to the merits, the Appeals Tribunal has consistently held that when the disciplinary sanction results in the staff member's separation from service, the alleged facts must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable (see *Molari* 2011-UNAT-164).

43. In the case at hand, the Tribunal is of the view that to understand the case properly, it is crucial to first examine the relationship between the Applicant and the alleged victim of his behaviour.

44. The Applicant was a Humanitarian Coordinator for UNFPA Malawi and an NPO with over 15 years of expertise in the field of HIV programming. He acted as the focal point for HIV Prevention Programmes. He worked with sex workers and performed tasks in the field of HIV coordination and supported initiatives in the implementation of the National HIV/AIDS Frameworks. This involved working with other, local government, state actors, non-governmental organizations (“NGOs”), and direct beneficiaries of programmes that are funded and supported by UNFPA.

45. In his working capacity, the Applicant met the alleged victim, Ms. P, a Malawian national. UNFPA was supporting adolescents living with HIV and Ms. P was registered as a young person living with HIV; she was living in abject poverty and asked for contributions to support her family. She started working as a Youth Volunteer for a UNFPA Implementing Partner (“IP”), in 2009, while she was in secondary school at age 14. With the support of UNFPA, Ms. P acquired exposure to family planning programmes and started to represent young people of Malawi on both local and international platforms relating to HIV Community dialogue.

46. The Applicant and Ms. P met each other frequently over the years in relation to the development of the United Nations support program. The record clearly shows the Applicant’s constant financial support to Ms. P (the latter told the investigators that he gave her small amounts of money on several occasions).

47. In this context, there is clear and convincing evidence to support the allegations under count one, for the reasons which follow.

48. The Applicant and Ms. P attended the ICASA Conference in Harare, Zimbabwe, from 29 November to 4 December 2015.

49. Ms. P reported to the investigators that the Applicant asked her to come to his hotel in order to have dinner together, or with the offer “to give her the money for dinner”. Ms. P stated that she did not know what the Applicant’s intentions were because, before that trip, it was never an issue to meet him. Ms. P. stated that once she was in his room, the Applicant started “touching [her]...on the bed”, “[she] was trying to push [him]” and “[he was] trying to touch [her] everywhere”. Although he

“did not remove his clothes during the incident”, he was “aroused” and tried “to squeeze [her] everywhere”, threw her on the bed and laid on top of her. Ms. P could not remember how long it took her to get away from him but she stated that “it happened in a short while, in minutes”. Ms. P went on to state: “I was so surprised”, and “I did not want this and I did not...I’m sorry, I couldn’t [sic], I was giving myself a lot of questions at the same time, and trying to push [him] away, trying to scream, and then I’m like, this is Zimbabwe, who is going to hear me... My friends are downstairs. I can’t push [him], [he’s] heavier than me.” Ms. P further added: “I did not have the strength to push [him], but [he] simply let go [sic], since I was hardly breathing...[he] let go of me and gave me 100 [sic], which I did not say no to;...he had to let go [sic] and tell me to go buy dinner and buy a condom and come back to his room”. According to the investigators, Ms. P thought that the Applicant had realized that due to her HIV status, he “could not just sleep with [her]”, or because she was panicking, he had sent her to buy a condom.

50. Ms P’s recollection of the events is very clear and detailed; the victim’s accusation provided is in itself convincing evidence of the facts.

51. In this case, in the immediacy of the facts, Ms. P reported what happened to her friends, who had accompanied her to the hotel to collect money for dinner and were waiting downstairs in the lobby of the hotel. According to Ms. P, when Ms. N asked her what happened in his room, she told her everything and showed her the money. Ms. N asked her whether she was okay, and whether the Applicant had raped her or slept with her, to which Ms. P responded: “[he] did not penetrate. [He] did not get through”. Ms. N was not sure what happened in the room, but she recalled that Ms. P told her: “this guy tried to rape me” and “I ran away from him”; “he gave me 100 dollars”; they later used this money to have dinner.

52. The same facts were later disclosed to Ms. SB, a former UNFPA staff member, who told the investigators that Ms. P reported to her that the Applicant “attempted to rape” her, and that she was shocked.

53. The Investigation Report stresses that multiple witnesses (namely Ms. N, Ms. JC, Ms. CN, Ms. C Ms. K, and Ms. K), confirmed that Ms. P had disclosed to them

varying details of what had happened to her at the Holiday Inn hotel during the 2015 ICASA Conference. Some of the disclosures were contemporaneous in nature, other disclosures were later in time, but all the witness accounts are consistent with Ms. P's account of the alleged assault.

54. In particular, a disclosure to friends in 2018, resulting from the investigation report, is worth mentioning. At the '16 Days of Activism' campaign, 28 November 2018 – 4 December 2018: Ms. JC made a presentation on women's employment rights focused on defining what sexual harassment was, the forms of sexual harassment and how to detect it. After the presentation, Ms. JC reported that she was approached by Ms. P, who appeared disturbed and emotional, and told Ms. JC: "You know, this is what has been happening to me, but I did not know it was a violation of my rights. I did not know that my rights had been violated".

55. On 6 May 2019, an article by Precious Kumbani, a journalist in Malawi, was published on www.swenga.org entitled "As a Sexual Violence Survivor, Ms P is determined to Protect and Empower Girls." The article, referring to the events at stake, recounts Ms. P's experience of being sexually exploited and abused by a male executive member of a funding organization that Ms. P volunteered for as a peer educator. She was 19 years old at the time.

56. The Applicant himself (although denying the sexual assault) confirmed that he gave Ms. P USD100 in his hotel room.

57. From the investigation report, a number of witnesses stated that they had either seen or received screenshots, video clips or an audio recording of the WhatsApp messages from Ms. P, or from another witness(es), who forwarded copies of these, originating from Ms. P to them, pertaining to the events in question. As the report notes, none of these witnesses or Ms. P were able to produce WhatsApp records of any of these items from their phones because they had all changed their mobile phones twice or more over the last couple of years. Nevertheless, these witnesses were able to independently provide a general description of what was contained in these screenshots, video clips or audio

recordings, which coincided to varying degrees with the descriptions provided by Ms. P.

58. According to the investigators, there were several exchanges of Facebook communications between Ms. P and the Applicant between 11 December 2016 and 22 September 2018. Some of these messages included Ms. P seeking financial support from him, which the latter offered or agreed to provide. The content of these messages suggests that there was a time when the Applicant built a relationship of trust with Ms. P, where she was able to rely on him for support and was comfortable to meet with him outside of the UNFPA Malawi Country Office.

59. The investigators noted that

Even though Ms. P accepted these funds from [the Applicant], it should be noted that given her state of vulnerability and unstable financial situation, as explained by many witnesses and Ms. P herself, Ms. P took whatever support she could get financially, which may have put her in a compromising situation, whereby [the Applicant] started to ask her for sexual favours in return.

60. Finally, the investigators found that the Applicant, who provided Ms. P with financial support over the years, on one occasion gave her a MWK20,000 (USD27.43) cheque in person, raising the suspicion that, although formally to finance school fees, it was in reality to stop her from reporting the incident that took place at the 2015 ICASA Conference in Zimbabwe. Ms. P's evidence regarding the hush payment proposal from the Applicant is corroborated by witness hearsay evidence of her two friends, Ms. K and Ms. C, to whom she made the initial disclosure, and by Ms. JC and Ms. CN, to whom Ms. P disclosed details of the hush payment proposal, at a later date.

61. These accusations, also under under count one, are therefore confirmed by clear and convincing evidence.

62. This case is different from *Diabagate* 2014-UNAT-403, where UNAT in reversing the judgment found that V01'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.

63. The current case is different too from *Mbaigolmem* 2018-UNAT-819, where UNAT found that the Secretary-General had proved his case through clear and convincing evidence in that Mr. Mbaigolmem had invited a female colleague to his hotel room, hugged her and tried to kiss her against her will. Indeed, the abuse by the Applicant was not an isolated episode, as the Applicant is accused also for sexual assault and harassment in different places and under different circumstances in counts two and three.

64. According to Ms. P, the Applicant made unwelcome sexual advances towards her in his office (between 2016 and 2017), giving to her not only a hug when they met but “trying to squeeze” her.

65. In a different occasion in 2016 - while giving her a lift back home, “[the Applicant] also asked (her) to touch his lap” and “openly asked her for a sexual relationship (“oh we could stop by somewhere on the way, we could stop by a lodge... And I would support you, I will give you the money you want, if you want, you do a business, or if you want to go back to school, I will support you, I will give you money... You know, your challenges and whatever you’ve been through, I can help you out... Maybe you can have your school fees paid for and maybe that your father passed away, I can help you with other things like for a house, you never know.” According to the recollection by Ms. P to the investigators, as she replied, “No I can’t do that... I’m not ready”, the Applicant dropped her off in the middle of the road, where there was no transport to get back to her location, and she had to find her way home by herself.

66. While there is no witness corroboration for these two allegations under counts two and three, Ms. P’s testimony is detailed and quite specific in describing the events.

67. The Tribunal is aware that, in cases that involve misconduct of a sexual nature, credible oral victim testimony alone may be fully sufficient to support a finding of serious misconduct, without further corroboration being required (*Hallal*

UNDT/2011/046, at para. 55, affirmed by the Appeals Tribunal in *Hallal* 2012-UNAT-207; see also *Applicant* UNDT/2022/030 (appealed), and also in the dissenting opinion, para 22).

68. All the facts attributed to the Applicant have been demonstrated by clear and convincing evidence. The core of the accusations by Ms. P are fully confirmed and corroborated by the recollection of the events by the witnesses heard by the investigators. The Tribunal therefore finds it not necessary to hear Ms. P and the victim in a hearing, given that all of them gave already very detailed and consistent statements in a date closer to the events.

69. The Respondent accuses the Applicant of having provided financial support to Ms. P over several years in spite of the Organization's policies pertaining to relationships with the beneficiaries of assistance. The behaviour of the Applicant for this aspect is not under scrutiny by this Tribunal, as it has not been specifically pleaded in any of the counts charged. However, the Tribunal notes that the fact that Ms. P was partially financially dependent on the Applicant, placed her in a very vulnerable position (as a young woman living with HIV/AIDS from a very poor and unstable family background), which give to the sexual requests by the Applicant a different strength and implicitly threatening effects.

70. The said facts are comprised in the definition of sexual harassment, sexual assault, and abuse of power, as they are sexual in nature and unwelcome. While there is no doubt for the facts under count one and two, even for count three, there was not a mere request of engagement of any sort by a person who financially helped the victim; this was a clear request for sex, accompanied by a punitive reaction to the refusal.

71. Although the Applicant did not protract his assault longer after having realized they were not accepted by the victim, the Tribunal finds those acts unlawful, owing to their exploitative nature.

72. The Applicant preyed on an impoverished and vulnerable young woman living with HIV, placing her in the difficult compromising position of having to

rely on his money to pay for food and school fees. This impedes the consideration of his financial support as a mitigating factor.

73. As the Respondent highlighted, when the Applicant first met the Complainant, she was a teenager, from an impoverished and unstable background, who had survived a traumatic childhood, living with HIV. At all times, in the present case, she was a beneficiary of United Nations assistance and/or serving with an IP.

74. The Applicant, a professional in the field of HIV Prevention and AIDS, was - or at least should have been - aware of the power dynamics that embodied his relationship with the Complainant, and the Organization's policies prohibiting particular relationships with beneficiaries of assistance. When the Applicant sexually abused and assaulted the Complainant as detailed in the charged counts, this was an abuse of the Complainant's position of vulnerability for sexual purposes, exploiting the differential power that existed in his relationship with her. The financial support that the Applicant gave the Complainant over the years prior to and after the alleged misconduct, contrary to the Organization's policies, served to place the Complainant in a compromising dependency relationship with him, as detailed in the investigation report.

75. The evidence on record, including the investigation report, the coherent hearsay evidence pointing to a pattern of behaviour, the consistency of the witness statements, cumulatively constitute a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the acts of sexual harassment indicated did in fact occur.

76. These facts are contrary to the rules recalled in this Judgment and constitute misconduct.

77. The principle of proportionality in a disciplinary matter is set forth in staff rule 10.3(b), which provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

78. The Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behaviour of the staff member involved. The Tribunal is not to interfere with administrative discretion unless “the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity” (*Nyawa* 2020-UNAT-1024, para. 89 and *Portillo Moya* 2015-UNAT-523, paras. 19-21).

79. The Appeals Tribunal has held that the Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose (*Nyawa*, para. 89 and *Toukolon* 2014-UNAT-407, para. 31).

80. As UNAT also stressed (*Conteh*, 2021-UNAT-1171, para. 41 and following), the Organization has repeatedly affirmed a zero-tolerance policy towards harassment in the work relationship: the “zero-tolerance” policy is aimed at providing a safe environment for all United Nations employees, free from discrimination on any grounds and from harassment at work including sexual harassment.

81. This is particularly true in cases where there is a huge difference of power between the perpetrator and the victim, leaving them in very different economic and social conditions, especially when those conditions make the weaker person financially dependent on the stronger. These factors were clearly present in the facts of this case.

82. The sanction applied by the Administration is therefore proportionate, as sexual misconduct was aggravated by its sexually exploitative nature, and the Tribunal will not interfere with the exercise of discretion by the Organization.

Conclusion

83. In light of the foregoing, the application is dismissed.

Case No.: UNDT/NBI/2021/063

Judgment No.: UNDT/2022/103

(Signed)

Judge Francesco Buffa

Dated this 7th October 2022

Entered in the Register on this 7th October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi