



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

Judgment No. 2023-UNAT-1384

**Humphreys Timothy Shumba
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Leslie F. Forbang Judge Katharine Mary Savage
Case No.:	2023-1778
Date of Decision:	27 October 2023
Date of Publication:	20 November 2023
Registrar:	Juliet E. Johnson

Counsel for Appellant: Oscar Asima Taulo

Counsel for Respondent: Sylvia Schaefer

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. Humphreys Timothy Shumba, a former staff member of the Office of the United Nations Population Fund (UNFPA), contested the decision of the Administration to summarily dismiss him for serious misconduct in accordance with Staff Rule 10.2(a)(ix) for allegedly sexually harassing, abusing and exploiting a young person (contested decision).¹

2. By Judgment No. UNDT/2022/103 ² (impugned Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed Mr. Sumba's application and concluded that: i) all the acts attributed to Mr. Shumba had been demonstrated by clear and convincing evidence and amounted to misconduct; ii) the sanction imposed by the Administration was proportionate to the offence; and iii) there had been no bias against Mr. Shumba during the investigation process.

3. Mr. Shumba appeals and for the reasons set out below, the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) grants the appeal and reverses the impugned Judgment.

Facts and Procedure

4. In 2008, Mr. Shumba joined the Organization as a National Program Officer for HIV prevention with UNFPA. At the time of his dismissal, he was employed as a Programme Specialist at the NOC grade, step level 10, with the same HIV prevention portfolio. He was also acting as the Focal Point on the HIV prevention programmes in the UNFPA Malawi Country Office (UNFPA Malawi CO).³

5. In his working capacity, Mr. Shumba became acquainted with a Malawian national teenager who worked as a Youth Volunteer for a UNFPA Implementing Partner (the Complainant), a partnership through which UNFPA supported adolescents living with HIV.⁴ The Complainant

¹ Secretary-General's Bulletin ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations).

² *Shumba v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/103.

³ Investigation report, paras. 36-38.

⁴ The Complainant contends that she met Mr. Shumba sometime between 2010 and 2011. Mr. Shumba submits that he could have met the Complainant anytime between 2010 and 2014. See investigation report, paras. 26 and 163.

started working as a Youth Volunteer in 2009. She was a UNFPA-funded programme beneficiary and was registered as a young person living with HIV in abject poverty.⁵

6. Over the years, the Complainant and Mr. Shumba developed a close relationship that Mr. Shumba himself describes as “a father and daughter” relationship and which led him to provide her with financial support.⁶

7. On 26 January 2019, the Country Representative, UNFPA Malawi CO, Ms. W.H., received a letter from the Complainant in which she raised that:⁷

- While attending the International Conference on Aids and STIs in Africa (ICASA) in 2015, in Harare, Zimbabwe, Mr. Shumba enticed and indecently sexually harassed her; and
- Between 2016 and 2017, Mr. Shumba continued to abuse her sexually in his office in Malawi and openly asked for a sexual relationship, which she did not accept.

8. On 27 January 2019, the Office of Audit and Investigation Services (OAIS) of UNFPA received by e-mail a complaint from Ms. W.H. against Mr. Shumba in which she reported the allegations raised by the Complainant against him.⁸

9. OAIS conducted a preliminary review of the case. It determined that there was sufficient indication of misconduct on the part of Mr. Shumba and, therefore, opened an investigation on 15 November 2019.⁹

10. On 18 February 2020, Mr. Shumba was notified of the allegations made against him by the Complainant. On that same date, he was interviewed by OAIS.¹⁰

11. On 29 October 2020, OAIS issued its investigation report in which it considered that the following allegations were substantiated:¹¹

- In 2015, during the ICASA Conference held in Zimbabwe, at the Holiday Inn Hotel, Mr. Shumba sexually assaulted the Complainant by grabbing her by the body, forcing himself on her body and touching her, forcing his mouth on the Complainant’s mouth,

⁵ Investigation report, paras. 26-35.

⁶ Investigation report, paras. 124-125 and 165.

⁷ Investigation report, para. 1.

⁸ Investigation report, para. 1.

⁹ Investigation report, para. 7.

¹⁰ Investigation report, paras. 17-18.

¹¹ Investigation report, para. 228.

without her consent and giving her USD 100 to return to the hotel with condoms (the hotel incident);

- On one occasion, sometime in 2016 but before December 2016, whilst in Mr. Shumba's vehicle, Mr. Shumba asked the Complainant to go to a lodge to have sex and to be in a sexual relationship with him. In return, Mr. Shumba offered to provide the Complainant with financial support for her education and assistance with her family's needs (the vehicle incident);
- Between 2016 and 2017, Mr. Shumba subjected the Complainant to unwelcome sexual conduct in his office at the UNFPA Malawi CO (the office incidents); and
- In 2018, Mr. Shumba gave the Complainant a hush payment in the form of a MWK 20,000 cheque to stop her from reporting the incident that took place at the Holiday Inn Hotel in Zimbabwe, in 2015.

12. On 3 December 2020, a copy of the investigation report was provided to Mr. Shumba. He was offered an opportunity to provide his written comments on the factual findings, which he did on 7 and 26 December 2020.¹²

13. On 6 April 2021, the Administration informed Mr. Shumba by letter that he was formally charged with serious misconduct and placed on Administrative Leave Without Pay (ALWOP) for the remainder of the disciplinary process. The sanction letter charged him with the following:¹³

Count one: Sexually exploited and abused, sexually assaulted and sexually harassed the Complainant, 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 the Complainant's mouth, without her consent and giving her USD 100 to return to the hotel with condoms;

Count two: Sexually harassed the Complainant 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;

Count three: Sexually assaulted and harassed the Complainant by initiating unwelcome sexual conduct in his office at the UNFPA Malawi CO between 2016 and 2017.

14. On 18 April 2021, Mr. Shumba provided his comments to the 6 April 2021 letter.

¹² Letter of notification of charges dated 6 April 2021, para. 26.

¹³ Letter of notification of charges dated 6 April 2021, para. 4.

15. On 20 May 2021, Mr. Shumba was informed by letter that the Administration had determined that his actions constituted sexual misconduct in respect of which the disciplinary measure of dismissal was imposed in accordance with Staff Regulation 10.1(a) and Staff Rules 10.1(a) and 10.2(a)(ix). The letter also provided that:¹⁴

...

The Administration has undertaken a very detailed and multi-layered review of the facts and circumstances relating to this matter. The Administration has also given careful consideration to your account of the events as well as your arguments on the legal issues. The Organization appreciated that there was no eyewitness available in this case to directly corroborate the [Complainant]’s account or your account of the three events that transpired between 2015 and 2017. Therefore, this case, as it relates to the issue of misconduct of a sexual nature, turned on the availability of a chain of circumstantial evidence.

...

This decision was not taken lightly or arrived at easily. UNFPA’s mandate entails, *inter alia*, that violence against women is wrong and that all forms of gender-based violence must end, a standard we must apply in our own affairs as well.

16. On 26 July 2021, Mr. Shumba filed an application with the Dispute Tribunal contesting the Administration’s decision to impose on him the disciplinary measure of dismissal. In his application, Mr. Shumba requested for “a formal hearing where [he] would be given an opportunity to challenge the evidence against [him] in the present case and also invite [his] witness/es”.¹⁵

17. On 3 August 2022, the UNDT issued Order No. 105 (NBI/2022) in which it decided that “the relevant facts in the present case [were] clear and there [was] no need to conduct a hearing on the merits as the matter [could] be determined on the basis of the documents on record”.

Impugned Judgment

18. In the impugned Judgment, with regard to Mr. Shumba’s argument that the investigation was biased against him, the UNDT found that the OAIIS investigators acted fairly and that he “had the opportunity to comment on the [Complainant]’s allegations, present his version of the events, identify witnesses and offer additional evidence; [he] was provided a copy of the investigation dossier (investigation report plus exhibits) and he was offered an opportunity to provide a written comments on factual findings that were made”.¹⁶

¹⁴ Dismissal letter dated 20 May 2021.

¹⁵ UNDT application, para. 3.1.

¹⁶ *Ibid.*, paras. 40-41.

19. The UNDT noted that although the Secretary-General accuses Mr. Shumba “of having provided financial support to [the Complainant] over several years in spite of the Organization’s policies pertaining to relationships with the beneficiaries of assistance”, this element “[was] not under scrutiny by [the UNDT], as it ha[d] not been specifically pleaded in any of the counts charged”.¹⁷

20. However, the UNDT held that it was crucial to analyze the relationship between Mr. Shumba and the Complainant. It further noted that they “met each other frequently over the years in relation to the development of the United Nations support program” and that he demonstrated a “constant financial support” to the Complainant, a vulnerable “young woman living with HIV/AIDS from a very poor and unstable family background” that was “partially financially dependent” on him.¹⁸ The UNDT also observed that “[a]ccording to the investigators, there were several exchanges of Facebook communications between [the Complainant] and [Mr. Shumba] (...) suggest[ing] that there was a time when [he] built a relationship of trust with [her], where she was able to rely on him for support and was comfortable to meet with him outside UNFPA Malawi [CO]”.¹⁹

21. The UNDT then examined the facts in support of each count of misconduct.

22. First, the UNDT found that the Complainant’s testimony during her interview with the OAIS investigators was “very clear and detailed”. Therefore, relying on the Complainant’s recollection of the event to the OAIS investigators, the UNDT found that the facts to support the allegations under count one were established by clear and convincing evidence.²⁰

23. From 29 November to 4 December 2015, the Complainant and Mr. Shumba both attended the ICASA Conference in Zimbabwe. One evening, Mr. Shumba asked the Complainant to come to his hotel room to have dinner with him (or to give her the money for dinner). However, once the Complainant arrived in his room, Mr. Shumba was “aroused” and started touching her on the bed, trying to touch and “squeeze her everywhere”. The Complainant tried to push him away, but she could not as he was heavier than her. The event, which lasted a few minutes, ended when

¹⁷ *Ibid.*, para. 69.

¹⁸ *Ibid.*, paras. 43-46 and 69.

¹⁹ *Ibid.*, para. 58. See also investigation report, paras. 119-130.

²⁰ *Ibid.*, para. 50.

Mr. Shumba let her go “since [she] was hardly breathing” and told her to “go buy dinner and buy a condom and come back to his room”.²¹

24. With regard to count one, the UNDT observed that immediately after the event, the Complainant reported the event to her friend, Ms. S.N., who confirmed to the OAIS investigators that the Complainant told her, when asked what happened in the hotel room, that “this guy tried to rape [her]”, “he gave [her] 100 dollars” and “[she] ran away from him”.²² The UNDT also observed that Mr. Shumba himself, while denying the sexual assault, confirmed that he gave USD 100 to the Complainant in his hotel room.²³

25. The UNDT also noted that multiple witnesses (namely Ms. S.N., Ms. C.N., Ms. H.C., Ms. D.K. and Ms. J.C.) confirmed to the OAIS investigators that the Complainant related to them the hotel incident in detail and that even if some disclosures came later in time, “all the witness accounts [were] consistent with [the Complainant]’s account of the alleged assault”. The UNDT also took into consideration the fact that some of the witnesses mentioned that they “had either seen or received screenshots, video clips or (...) audio recording[s] of the WhatsApp messages from [the Complainant], or from other witness(es), who forwarded copies of these, originating from [the Complainant] to them, pertaining to the events in question”.²⁴ Indeed, even if none of the witnesses were able to produce said evidence, the UNDT found that they “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 [the Complainant]”.²⁵

26. With regard to the witnesses interviewed by the OAIS investigators, the UNDT relied in particular on Ms. J.C.’s interview. Ms. J.C. reported to the OAIS investigators that at the end of 2018, she was invited to make a presentation on sexual harassment during the “16 Days of Activism” campaign in Malawi. The Complainant was present, and, after her presentation, she

²¹ *Ibid.*, paras. 47-50. See also investigation report, paras. 53-62.

²² *Ibid.*, para. 51. See also investigation report, paras. 63-67. However, the investigation report also mentions that later, Ms. S.N. told the OAIS investigators that the Complainant had not actually mentioned the word “rape” but had told her that Mr. Shumba tried to have sex with her and that she fought him and ran away.

²³ *Ibid.*, para. 56. See also investigation report, para. 168.

²⁴ *Ibid.*, paras. 52-53 and 57. The UNDT also noted that Ms. P.S.B., a friend of the Complainant, told the investigators that the Complainant told her that Mr. Shumba “attempted to rape” her. See also investigation report, paras. 200-201.

²⁵ *Ibid.*, para. 57. See also investigation report, paras. 200-201.

approached Ms. J.C. and told her “[y]ou 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”.²⁶

27. Moreover, in addition to the witnesses interviewed by OAIS, the UNDT also took into consideration that, on 6 May 2019, an article entitled “As a Sexual Violence Survivor, [the Complainant], is determined to Protect and Empower Girls” was published. In that article, the Complainant described that she had been sexually exploited and abused by a male executive member of a funding organization that she volunteered for as a peer educator and referred specifically to the hotel incident.²⁷

28. Last, the UNDT also considered the OAIS’ finding that Mr. Shumba made a hush payment proposal to the Complainant on one occasion by giving her MWK 20,000 (USD 27.43) in exchange for her not reporting the hotel incident.²⁸

29. With regard to counts two and three, relying on established jurisprudence, the UNDT found that “[w]hile there [was] no witness corroboration for these two allegations under counts two and three, [the Complainant]’s testimony [was] detailed and quite specific in describing the events” and that, therefore, it was sufficient to establish by clear and convincing evidence the facts in support of the allegations under those counts.²⁹

30. With regard to count two, the UNDT, referring to the investigation report, found that, in 2016, while giving her a lift back home, Mr. Shumba openly asked the Complainant to touch his lap and to have a sexual relationship with him. He specifically said: “Oh we could stop by somewhere on the way, we could stop by a lodge... And I will 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 the 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”. When the Complainant

²⁶ *Ibid.*, para. 54. See also investigation report, paras. 87-96.

²⁷ *Ibid.*, para. 55. See also investigation report, paras. 97-99. In that article, the Complainant also stated that she was 19 years old when that hotel incident occurred.

²⁸ *Ibid.*, para. 60. See also investigation report, paras. 142-152 and 222-227.

²⁹ *Ibid.*, paras. 66-68. See also *Hallal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-207.

refused, Mr. Shumba stopped his car and left her in the middle of the road.³⁰ Mr. Shumba has denied this version of events.

31. As to count three, the UNDT concluded that, between 2016 and 2017, Mr. Shumba made an “unwelcome sexual advance towards [the Complainant], giving her not only a hug when they met but ‘trying to squeeze’ her”.³¹ Mr. Shumba denies this.

32. The UNDT held that such acts amounted to sexual harassment, sexual assault, and abuse of power, as they were sexual in nature and unwelcome. In particular, the UNDT stressed that those acts were unlawful and amounted to misconduct, owing to their exploitative nature. Indeed, the UNDT found that the financial support that Mr. Shumba gave to the Complainant placed her in a compromising dependency relationship with him. It also observed that Mr. Shumba was aware of the power dynamics between them and, nevertheless, engaged in “abuse of the Complainant’s position of vulnerability for sexual purposes, exploiting the differential power that existed in his relationship with her”.³²

33. Finally, the UNDT found that the dismissal was proportionate to the nature and gravity of Mr. Shumba’s misconduct, in accordance with Staff Rule 10.3(b). Relying on Appeals Tribunal jurisprudence, the UNDT recalled that the Administration has discretion to weigh aggravating and mitigating factors and to impose an adequate sanction and that it will not interfere lightly with that 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”.³³

³⁰ *Ibid.*, para. 65. See also investigation report, paras. 113-118 and 216-218.

³¹ *Ibid.*, para. 64. See also investigation report, paras. 100-112 and 211-215.

³² *Ibid.*, paras. 70-74.

³³ *Ibid.*, paras. 77-79. See also *George M’mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 89; *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523; *Toukolon v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-407.

Submissions

Mr. Shumba's Appeal

34. Mr. Shumba requests the Appeals Tribunal to set aside or reverse the impugned Judgment and to order his reinstatement to his previous position. Alternatively, he requests “a compensation equal to [s]alary for two years” as well as “any other orders that [the] Appeals Tribunal deems fit”.

35. Mr. Shumba submits that the Dispute Tribunal erred in procedure, fact and law as well as failed to exercise jurisdiction vested in it in dismissing his application.

36. First, relying on *Liyanarachchige*,³⁴ Mr. Shumba submits that the UNDT committed an error in procedure and failed to exercise jurisdiction vested in it by not conducting an oral hearing despite the fact that he had clearly requested one to cross-examine the Secretary-General's witnesses. He contends that the UNDT ignored the fact that the allegations he was facing were serious and that “the evidence to be accepted [had to] be duly tested by due process”.

37. Second, Mr. Shumba argues that the UNDT erred in law and in fact when it found that the financial support and frequent meetings that he had with the Complainant amounted to clear and convincing evidence with respect to the allegation of sexual harassment. He further notes that these factors were irrelevant and that the UNDT erred in considering them. Moreover, Mr. Shumba argues that the UNDT also erred when it ignored the fact that his relationship with the Complainant “was like those of father and daughter and [his] constant financial support, if any were being remitted along that line”.

38. Third, Mr. Shumba contends that the UNDT also erred in fact when it dismissed his application even if there was no other “evidence such as text messages, alleged WhatsApp messages and emails”. Moreover, Mr. Shumba observes that the UNDT relied “heavily” on the Complainant's version of the facts, even if she failed to produce a lot of the corroborating evidence that she referred to.

39. Fourth, with regard to count one, Mr. Shumba contends that the UNDT's finding that he gave money to the Complainant to go buy condoms not only lacks factual basis, “common sense and logic”, but is also not supported by evidence. Indeed, Mr. Shumba contends that “[t]here is no way someone who had already embarked on a journey to sexually harass the victim would stop and

³⁴ *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.

ask her to go and look for condoms”, especially a person responsible for working with people with HIV who is used to carrying condoms.

40. Fifth, Mr. Shumba submits that the UNDT erred in law and in fact when it failed to apply the test of clear and convincing evidence. Indeed, he contends that the UNDT did not consider his version of the events, i.e., that the allegations were “all lies”, as well as the fact that there was no corroborating evidence, as admitted by the Secretary-General who “clearly acknowledg[ed] that the disciplinary action was purely based on circumstantial evidence”. Therefore, he argues that the UNDT erroneously ignored established Appeals Tribunal jurisprudence stating that the alleged facts must be established by clear and convincing evidence.³⁵

41. Last, Mr. Shumba contends that the UNDT erred in fact when it concluded that the investigation was fair, even if the OAIS investigators asked leading questions, “simply because he was given [a] cosmetic opportunity to comment on the report without being given to confront the witness or asking them question”.

The Secretary-General’s Answer

42. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

43. The Secretary-General submits that the UNDT correctly determined that the imposed disciplinary sanction was lawful.³⁶

44. First, the Secretary-General contends that the UNDT did not commit an error in procedure in deciding the case based on the written submissions of the parties. Indeed, the Secretary-General argues that Mr. Shumba did not request an oral hearing. However, even if he had requested it, the Secretary-General contends that pursuant to Article 16 of the Dispute Tribunal Rules of Procedure, the UNDT correctly used its discretion to decide whether to hold an oral hearing or not. Moreover, relying on Appeals Tribunal jurisprudence, the Secretary-General observes that, even in disciplinary matters, there are “cases where the record before the UNDT arising from the investigation may be sufficient for it to render a

³⁵ *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164.

³⁶ The Secretary-General notes that Mr. Shumba does not contest the UNDT’s findings that the facts amounted to misconduct and that the sanction was proportionate.

decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand”.³⁷

45. The Secretary-General further observes that, contrary to Mr. Shumba’s submission, the fact that the allegations of misconduct raised against him had a sexual element is not a factor to be considered by the UNDT when determining if an oral hearing is warranted.

46. Moreover, the Secretary-General contends that Mr. Shumba’s reliance on *Liyanarachchige* is misplaced because that decision related to a disciplinary measure imposed solely on the basis of statements given by anonymous witnesses.³⁸

47. Second, the Secretary-General submits that the UNDT correctly concluded that the facts on which the dismissal was based had been established by clear and convincing evidence. The Secretary-General observes that Mr. Shumba’s disagreement with the UNDT’s findings as well as its evaluation of the witnesses’ credibility does not amount to errors of law or fact.

48. In particular, with regard to count one, the Secretary-General submits that the UNDT correctly found that the Complainant’s version of the facts was “in itself convincing evidence of the facts” and that her evidence was corroborated, although noting that a credible witness does not require corroboration in order to meet the standard of proof required to support a finding of misconduct.

49. The Secretary-General also observes that, contrary to Mr. Shumba’s contention, the UNDT and the OAIS investigators took into consideration the fact that the WhatsApp messages to which the Complainant referred to were not presented before it.

50. With regard to counts two and three, the Secretary-General submits that the UNDT correctly concluded that the Complainant’s oral testimony before the OAIS investigators, even if not corroborated, was sufficient to conclude that the facts on which these counts were based had been established by clear and convincing evidence.

³⁷ *Mohammed Yousef abd el-Qader Abu Osba v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1061, paras. 41-42; *Nadasan v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-918, paras. 39-40; *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, paras. 26-28.

³⁸ *Liyanarachchige* Judgment, *op. cit.*

51. Furthermore, the Secretary-General argues that, contrary to Mr. Shumba's arguments, the UNDT did not base its findings of clear and convincing evidence on the fact that he provided constant financial support to the Complainant or ignored his argument that their relationship was like those of father and daughter, but rather "rightfully found that [those] facts (...) support[ed] a 'sexually exploitative nature' of their relationship".

52. Third, the Secretary-General submits that the UNDT correctly concluded that Mr. Shumba's due process rights had been respected. The Secretary-General observes that Mr. Shumba's arguments with regard to the investigation does not identify any error by the UNDT, but are rather largely a repetition of the ones that he made before the Dispute Tribunal. However, relying on Appeals Tribunal jurisprudence,³⁹ the Secretary-General recalls that it is not sufficient for Mr. Shumba to indicate that he disagrees with the impugned Judgment, that the appeals procedure is not an opportunity for a party to reargue the case and that his arguments should be dismissed on this ground alone.

53. In any event, even if the Appeals Tribunal were to consider Mr. Shumba's argument, the Secretary-General submits that the OAIS conducted a thorough investigation and that there was no indication of bias against him during the investigation (and the disciplinary) process. The Secretary-General also notes that Mr. Shumba did not have a right to meet or confront the Complainant during the investigation process.

54. Last, the Secretary-General submits that Mr. Shumba cannot request compensation for the first time on appeal.⁴⁰

Considerations

55. The main issue for consideration and determination in the present appeal is whether the UNDT erred when it found that the decision to summarily dismiss Mr. Shumba for serious misconduct, in accordance with Staff Regulation 10.1(a), Staff Rules 10.1(a) and 10.2(a)(ix), was lawful.

56. The contested decision was the outcome of a complaint filed by the Complainant. OAIS undertook an investigation which led to the finding that Mr. Shumba had sexually exploited and abused, sexually assaulted, and sexually harassed the Complainant, a Malawian national

³⁹ *AAA v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1280, para. 72.

⁴⁰ *Harris v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-896, para. 68.

while they both attended the 2015 ICASA Conference in Zimbabwe, while they were in his vehicle sometime in 2016, and while they were both in his office at the UNFPA Malawi CO between 2016 and 2017.

The Legal Framework

57. Staff Regulation 10.1 provides that:

- (a) The Secretary-General may impose disciplinary measures on staff members who engage in misconduct;
- (b) Sexual exploitation and sexual abuse constitute serious misconduct.

58. Staff Rule 1.2(e) and (f) provides that:

- (e) Sexual exploitation and abuse is prohibited (...) 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.
- (f) 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.

59. Section 1.3 of the Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) defines sexual harassment as "any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident".

60. The term "sexual exploitation" means "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another". Similarly,

the term “sexual abuse” means “the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions”.⁴¹

61. The Appeals Tribunal has previously held that:⁴²

... A finding of [sexual exploitation, abuse or] sexual harassment against a staff member of the Organization is a serious matter (...) [that may] have grave implications for the staff member’s reputation, standing and future employment prospects. For that reason, the UNDT may only reach a finding of [sexual exploitation, abuse or] sexual harassment on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that all the elements of [sexual exploitation, abuse or] sexual harassment have been established in accordance with the standard of clear and convincing evidence. In other words, the [sexual exploitation, abuse or] sexual harassment must be shown by the evidence to have been highly probable.

... To ensure the satisfaction of the standard of proof in disciplinary cases, the UNDT ordinarily will be obliged to convene an oral hearing at which the alleged wrongdoer will be afforded an opportunity to face and cross-examine those who accuse him or her of misconduct.

The UNDT Procedure

62. Article 19 of the UNDT Rules of Procedure gives the Dispute Tribunal broad discretion in the expeditious disposal of the case. It states that the Dispute Tribunal “may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties”. However, Article 16(2) of the UNDT Rules of Procedure specifically provides that “a hearing shall *normally* be held following an appeal against an administrative decision imposing a disciplinary measure”.⁴³

63. That did not occur in this present case. The Dispute Tribunal did not hold an oral hearing but determined in pre-hearing Order No. 105 (NBI/2022) that “the relevant facts (...)”

⁴¹ Section 1 of the Secretary-General’s Bulletin ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse).

⁴² *Appellant v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1210, paras. 37-38; *Ramos v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1256, paras. 36-38.

⁴³ Emphasis added.

[were] clear” and “there [was] no need to conduct a hearing on the merits as the matter [could] be determined on basis of the documents”.

64. As previously stated by the Appeals Tribunal, Article 2(1) of the UNDT Statute contemplates a wide appeal or merit-based review in which the UNDT is required to establish the disputed facts of the alleged misconduct through a *de novo* process of the admission and evaluation of evidence.⁴⁴ The Appeals Tribunal has consistently confirmed that:⁴⁵

... [T]he task of the UNDT in a disciplinary matter is to determine whether: i) the facts on which the sanction is based are established according to the evidentiary standard of clear and convincing evidence; ii) the established facts qualify as misconduct in terms of the applicable legal framework; iii) the sanction is proportionate to the misconduct; and iv) there has been due process or procedural fairness by the original decision-maker.

65. The Appeals Tribunal has also explained that applications against a contested decision imposing a disciplinary measure such as separation from service, with the required standard of clear and convincing evidence, differ significantly from a conceivable judicial review of the fairness of the OAIS investigation and the reasonableness of its decision. Therefore, the UNDT is required to engage in a fact-finding exercise to establish whether the facts pertaining to the allegations of misconduct exist as a high probability, to apply the principles, rules and standards of the legal framework to decide if the proven facts constitute misconduct, and then decide (on the evidence) whether the sanction was proportionate.⁴⁶

66. Article 16(2) of the UNDT Rules of Procedure provides that an oral hearing should *normally* be held in disciplinary cases because the imposition of a disciplinary measure will normally involve disputes of fact that cannot be reconciled or resolved satisfactorily without it.⁴⁷ If there are real and genuine disputes of fact that cannot be reconciled on the papers, it normally will require oral evidence under oath for examination and cross-examination to allow for reasoned findings on credibility, reliability and probability. Therefore, the general rule under this Article is that for disciplinary cases, the UNDT will conduct an oral hearing except

⁴⁴ *AAC v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1370, para. 38.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, para. 39.

⁴⁷ Emphasis added.

in specific instances where it is not necessary with regard to the evidence and circumstances of the case.

67. In the present case, the UNDT held that the relevant facts were “clear” and the merits of the case could be determined on the documents, largely the investigation report. However, we find that the facts are not “clear” on the allegations. Mr. Shumba categorically denies the alleged misconduct at the 2015 ICASA Conference, in his vehicle, and in his office at the Malawi UNFPA CO as alleged by the Complainant. There are no direct witnesses to the conduct alleged. There are genuine disputes of fact between Mr. Shumba and the Complainant regarding what occurred in these incidents.

68. Nevertheless, the UNDT concluded that since “[t]he core of the accusations (...) [were] fully confirmed and corroborated by the recollection of the events by the witnesses heard by the investigators[,] (...) it [was] not necessary to hear [the Complainant] (...) in a hearing, given that all of them gave already very detailed and consistent statements in a date closer to the events”.⁴⁸

69. The UNDT relied on the corroboration of witnesses heard by the OASIS investigators. However, all the witnesses relied upon by the OASIS investigators were not direct witnesses to the incidents but obtained their evidence and information from the Complainant. As such, their evidence is hearsay evidence.

70. Hearsay evidence is evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. Hearsay may be admitted and relied upon having regard to: “i) the nature of the proceedings; ii) the nature of the evidence; iii) the purpose for which the hearsay evidence was tendered; iv) the probative value of the hearsay evidence; v) the reason why the evidence was not given by the person upon whose credibility the probative value of the evidence depends; and vi) the prejudice to a party, which the admission of such evidence might entail”.⁴⁹

71. In this instance, the proceedings were disciplinary in nature and as such the Dispute Tribunal would normally conduct an oral hearing to enable it to assess the oral testimony of witnesses, resolve disputes of fact and determine the matter. However, rather than oral testimony, only the evidence of these witnesses as recorded in an investigation report

⁴⁸ Impugned Judgment, para. 68.

⁴⁹ AAC Judgment, *op. cit.*, para. 50.

was produced to corroborate the truth of the events alleged by the Complainant. The Dispute Tribunal relied on this evidence significantly not only to make its findings that misconduct occurred but also to deny Mr. Shumba an oral hearing.

72. The Appeals Tribunal has opined that “the admission of adverse hearsay evidence by definition denies a party the right to challenge it effectively and fairly since the declarant is not before the tribunal and cannot be cross-examined”.⁵⁰ In the present case, the prejudice to Mr. Shumba in admitting and relying upon this evidence is significant.

73. For that reason, hearsay is usually given lesser weight. Moreover, hearsay evidence is normally not admitted or relied upon if it is used to prove the truth of the hearsay statement but only to support the fact that the statement was made.

74. We have previously opined that, in most cases, it will be unlikely that the Administration can discharge its burden before the UNDT to establish the relevant facts by clear and convincing evidence based solely on the investigation report and entirely hearsay evidence, without an oral hearing. But this will depend on the circumstances of the case before the UNDT.⁵¹ For example, there may be documentary, audio or video evidence or circumstances surrounding the parties or witnesses that may support the decision not to hold an oral hearing. However, that is not the case before us.

75. There is no dispute that Mr. Shumba financially supported the Complainant for many years, since she was a young child. The Complainant was a beneficiary and recipient of humanitarian assistance from UNFPA. Mr. Shumba does not dispute that there was a supportive relationship with the Complainant but characterized it as one of “father and daughter”. The Complainant requested help and he started providing financial support to her and her family in 2014-2015.⁵² This is confirmed by screenshots of Facebook Messenger messages included in the investigation report.⁵³ These messages from 2017 to 2018 confirm regular requests by the Complainant for money to Mr. Shumba.⁵⁴ There is nothing on the face

⁵⁰ *AAO v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1361, para. 60.

⁵¹ *Mbaigolmem* Judgment, *op. cit.*, paras. 28-29.

⁵² Investigation report, para. 165.

⁵³ Investigation report, Exhibit 50, Facebook Messenger exchange between Mr. Shumba and the Complainant, pp. 746-768.

⁵⁴ Investigation report transcript, 10 August 2022, Mr. Shumba’s statement, p. 517: 986-990.

of those messages to suggest that Mr. Shumba is seeking anything in return from the Complainant for that financial support.

76. In the impugned Judgment, the UNDT held that Mr. Shumba “built a relationship of trust” with the Complainant and seemed to accept the investigators’ conclusion that the Complainant was in a “compromising situation” whereby Mr. Shumba “started to ask for sexual favours in return”.⁵⁵ The UNDT further found that there was a “clear request for sex, accompanied by a punitive reaction to the refusal”.⁵⁶ However, there is no evidence beyond the Complainant’s about a request for sexual favours by Mr. Shumba.

77. Further, both the UNDT and the OAIS investigators ignored evidence that other personnel of UNFPA Malawi CO also provided the Complainant with financial support. Indeed, Ms. T.M., a National Programme Coordinator for Sexual and Reproductive Health and HIV, UNFPA Malawi CO, told the OAIS investigators that UNFPA Malawi CO staff members would “check” on the Complainant since she was a child.⁵⁷ Ms. J.M. also told the OAIS investigators that “many” staff members from the UNFPA Malawi CO had financially supported the Complainant in terms of cash and/or groceries to support her and her family and that when the Complainant would visit the office, she would ask for support from the staff members.⁵⁸ Ms. S.B. also confirmed that she would “collect contributions” to support the Complainant and her family.⁵⁹

78. As for Mr. Shumba asking for sexual favours in return for support, the only evidence of this is from the Complainant. The OAIS investigators confirmed in the investigation report that “[t]here was no concrete evidence of such a [romantic] relationship”.⁶⁰

79. Regarding the hotel incident at the 2015 ICASA Conference, in the impugned Judgment, the UNDT found the Complainant’s “recollection of events (...) clear and detailed” and therefore “convincing”.⁶¹ The UNDT relied on multiple witnesses (namely Ms. S.N., Ms. C.N., Ms. H.C., Ms. D.K. and Ms. J.C.) who confirmed that the Complainant disclosed to them varying details of what happened in the hotel. The UNDT further found that even if only

⁵⁵ Impugned Judgment, paras. 58-59.

⁵⁶ *Ibid.*, para. 70.

⁵⁷ Investigation report, para. 32.

⁵⁸ Investigation report, para. 32.

⁵⁹ Investigation report, para. 45.

⁶⁰ Investigation report, para. 52.

⁶¹ Impugned Judgment, para. 50.

some of the disclosures were contemporaneous, they were all “consistent” with the Complainant’s account of the alleged assault.⁶²

80. However, the UNDT ignored and did not completely reconcile that the witnesses’ evidence was entirely based on what the Complainant told them. There was no rationale on the necessity for relying on that evidence or about the reliability of such hearsay evidence. The UNDT did not consider or apply the factors in admitting and relying upon this evidence in particular the nature of the proceedings, the nature of the evidence, and why evidence cannot be given by the Complainant and the witnesses at a hearing.⁶³ Further, the UNDT did not consider at all the prejudice to Mr. Shumba in not having an oral hearing which denied him the ability to question the Complainant on her version of events, to question the witnesses and elicit from them evidence which could have supported his own version, and to cast doubt upon the credibility and reliability of their version by confronting them with a different perspective of the probabilities.⁶⁴

81. Also, the UNDT did not adequately reconcile the internal inconsistencies in these witnesses’ statements to the OASIS investigators. For example, with regard to the hotel incident at the 2015 ICASA Conference, Ms. S.N., a friend of the Complainant, confirmed that she accompanied the Complainant to the hotel and waited for her in the lobby while the Complainant went up to see a “Malawian man” staying there. She did not confirm that this man was Mr. Shumba. When the Complainant came down, Ms. S.N. initially told the OASIS investigators that the Complainant had a USD 100 note, and they went for dinner and ice cream. After further questioning, she then stated that the Complainant told her the man tried to “rape” her, but she did not give much “thought” to it. Later, Ms. S.N. told the investigators that the Complainant did not actually use the word “rape” but said the man “tried to have sex with her and that she fought him and ran away from him”.⁶⁵

82. Ms. J.C. told the OASIS investigators that the Complainant told her, with regard to that same incident, that “her boss” called her to his hotel room for a “stipend” and he “raped” her but then explained there was a translation issue with the Malawian word for “rape” and she was not clear on whether it refers to the use of force.⁶⁶ Moreover, Ms. B.K., a staff member of

⁶² *Ibid.*, para. 53.

⁶³ AAC Judgment, *op. cit.*, para. 50.

⁶⁴ *Ibid.*, para. 66.

⁶⁵ Investigation report, para. 64.

⁶⁶ Investigation report, paras. 84-85.

UNFPA Malawi CO who attended the “16 Days of Activism” campaign in Malawi, told the OAIS investigators that the Complainant told her in 2018 that she was “raped” in the hotel room. However, in the present case, there is no allegation of rape.⁶⁷

83. Similarly, the UNDT did not reconcile inconsistencies in the statement of Ms. H.C. who said that, in 2018, the Complainant told her that a UNFPA staff member “came to her room and made sexual advances towards [her]”.⁶⁸ However, this contradicts the Complainant’s and Mr. Shumba’s statements that she went to Mr. Shumba’s hotel room.

84. Further, the UNDT noted that a number of witnesses stated that they had either seen or received screenshots, video clips or audio recordings of WhatsApp messages from the Complainant pertaining to the events in question. However, none of the witnesses or the Complainant produced these messages or records. Their statements about what is contained in these unproduced messages amounted to hearsay and are of little evidential value as it relates to the content of those messages.

85. Similarly, the witnesses’ statements of the vehicle incident in 2016 and the incident in Mr. Shumba’s office at the UNFPA Malawi CO are entirely based on information from the Complainant. It is not disputed that, given the nature of her work, it was normal for the Complainant to visit the UNFPA Malawi CO and to interact with staff members including Mr. Shumba in his office.⁶⁹ UNFPA staff members confirmed that they saw the Complainant going into Mr. Shumba’s office but there was nothing “suspicious”. Moreover, two witnesses, a friend of the Complainant, Ms. H.C., and Ms. J.C., who helped the Complainant submit her complaint, stated that they recall the Complainant describing in “vague” details an incident in Mr. Shumba’s office.⁷⁰ As for the incident in Mr. Shumba’s vehicle, there are no witnesses that can corroborate it. Also, Mr. Shumba was not the only staff member that would give a ride to the Complainant.

86. Again, the investigation reports Ms. H.O. stating that the Complainant told her that Mr. Shumba gave her MWK 120 or 20,000 in 2018 to stop her from reporting the matter or as “hush payment” and that she saw screenshots of text messages confirming this payment, but

⁶⁷ Investigation report, para. 93.

⁶⁸ Investigation report, para. 76.

⁶⁹ Investigation report, paras. 100 and 102.

⁷⁰ Investigation report, para. 104.

such evidence has not been produced. Moreover, that witness also says that “she could not remember very clearly” but “thought” this man was “offering [the Complainant] money”.⁷¹

87. Despite the weaknesses of the evidence and inconsistencies in the record, the UNDT held that the evidence on the record, including the investigation report, was “coherent hearsay evidence pointing to a pattern of behaviour”, and the “consistency of the witness statements”, cumulatively, constituted a “clear and convincing concatenation of evidence establishing with a high degree of probability (...) that the acts of sexual harassment did in fact occur”.⁷²

88. However, we are unable to comprehend how the Dispute Tribunal was able to reach this finding without explaining or reconciling inconsistencies in the witnesses’ evidence and the inherent weaknesses of relying entirely upon hearsay evidence.

89. As such, we find that the Dispute Tribunal committed an error of procedure by not holding an oral hearing such that it affected the outcome of the case pursuant to Article 2(1)(d) of the Appeals Tribunal Statute (Statute). This is not an instance in which the UNDT can forgo an oral hearing under Article 16(2) of the Dispute Tribunal Rules of Procedure as the evidence in record in this case cannot attain that standard of clear and convincing evidence. This means that the UNDT also erred on a question of fact, resulting in a manifestly unreasonable decision when it found that the alleged misconduct had been proven by clear and convincing evidence.

90. As such, the contested decision must be set aside. With the proper disposition of this case, we would have preferred to have remanded the matter back to the Dispute Tribunal for a proper hearing and to consider appropriate potential remedies, including specific performance. However, considering the delays in this matter and that the facts of this case occurred more than eight years ago, it is more than doubtful that the witnesses are still available. Therefore, it would not be in the interest of justice and it would be impracticable to remand the matter to the Dispute Tribunal to conduct an oral hearing.

91. Consequently, the most expeditious and just remedy is that the contested decision be rescinded with compensation in lieu, and Mr. Shumba’s name expunged from the sexual offender registers such as the ClearCheck database.

⁷¹ Investigation report, para. 156.

⁷² Impugned Judgment, para. 75.

Judgment

92. Mr. Shumba's appeal is granted, and Judgment No. UNDT/2022/103 is hereby reversed.

93. The following orders are issued:

- i) The contested decision is rescinded;
- ii) The Secretary-General is directed to expunge the name of Mr. Shumba from the relevant registers including the ClearCheck database;
- iii) Further to Article 9(1)(a) of the Statute, in the event of the Secretary-General electing not to rescind the contested decision, the Secretary-General is directed to pay Mr. Shumba in lieu compensation in an amount equivalent to two years of his net base salary within 30 days of this Judgment. Interest on the late payment of this amount shall accrue at five per cent above the United States Prime Rate.

Original and Authoritative Version: English

Decision dated this 27th day of October 2023 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Forbang

(Signed)

Judge Savage

Judgment published and entered into the Register on this 20th day of November 2023 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar