

Introduction

1. The Applicant, who was

19.

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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 (PPMö) on the Prohibition of Harassment, Sexual Harassment and A

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: í

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

(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 principle of 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

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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 ðtrying to squeezeö her.

65. In a different occasion in 2016 -

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, seu lu

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

