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5. On 1 July 2009, OIOS issued its Report, in which it concluded that Mr. Diabagate: (1) had engaged in sexual activity with V01 in violation of Section 3.2(b) of ST/SGB/2003/13 of 9 October 2003, entitled “Special measures for protection from sexual exploitation and sexual abuse”; (2) had engaged in sexual relationships with local women, and such conduct is “strongly discouraged” under ST/SGB/2003/13; (3) conveyed non-UN personnel in UN vehicles without the requisite authorities and waivers in violation of MONUC Administrative Circular No. 20004/05; and (4) “failed to uphold the highest standards of efficiency, competence and integrity required of a UN staff member as per Staff Regulation 1.2(b)”. Based on these conclusions, OIOS recommended that appropriate disciplinary action be taken against Mr. Diabagate.

6. On 13 August 2009, the Director, Department of Field Support, concurred with OIOS’s findings and conclusions and recommended to the Office of Human Resources Management (OHRM) that disciplinary action be brought against Mr. Diabagate and that he should be summarily dismissed. He further recommended that the Office of Legal Affairs consider referring the matter to the national DRC authorities for criminal accountability.

7. On 5 March 2010, the Chief, Human Resources Policy Service, OHRM, charged Mr. Diabagate with violating former Staff Regulation 1.2(b) and 1.2(q), former Staff Rule 101.2(c), and ST/SGB/2003/13 by:

- (1) engaging in sexual activity with V01, a minor;
- (2) exchanging money and/or goods and/or services for sex from known prostitutes;
- (3) engaging in sexual relations with beneficiaries of United Nations assistance, namely, local Congolese women;
- (4) failing to honour his obligations to the local court; and

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15. On 19 August 2011, the UNDT issued Order No. 96 (NBI/2011) continuing the hearing to 17-18 October 2011 so that Mr. Diabagate could cross-examine V01 and W01. Subsequently, the UNDT again continued the hearing to 23-24 January 2012. On 23 January 2012, Mr. Diabagate's counsel cross-examined W01 and partially cross-examined V01, who refused to answer more than a few questions.

16. On 23 January 2013, the UNDT issued Judgment No. UNDT/2013/009, in which it determined that: (1) it was proven that Mr. Diabagate had engaged in a sexual relationship with V01; (2) it was not proven that Mr. Diabagate had engaged in sexual relationships with beneficiaries of United Nations assistance; and (3) it was proven that Mr. Diabagate had engaged in the unofficial and unauthorized use of UN vehicles, as he had conceded. Based upon its determination that he had engaged in a sexual rela

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physical examination of V01, records from the local school regarding V01's age, 15 witness statements taken during the OIOS investigation, and the oral testimony before the Dispute Tribunal. It is not unusual for victims of sexual crimes to recant their initial accounts of abuse; thus, the evidence must be considered as a whole.

27. The UNDT did not err in taking oral evidence on 20 July 2011. It correctly found that the absence of Mr. Diabagate and his counsel from the hearing did not violate Mr. Diabagate's right to a fair hearing. Given the circumstances of the case, Mr. Diabagate cannot show that he suffered any prejudice since he later had an opportunity to cross-examine the witnesses.

28. The UNDT did not err in applying the burden of proof. The UNDT's references to "preponderance of evidence" and an "inference" that the events had "likely" taken place meet the proper standard.

Considerations

29. "Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration." ² "In this context, the UNDT must 'examine whether the facts on which the sanction is based have been established (pr1.8798 0 TD 8(a)-4.9(n).1td,.4(ole)-3.)-5.5-h 4372.0002 Tc .1192 T0

be established by clear and convincing evidence,” which “means that the truth of the facts asserted is highly probable”.⁵

31. The Administration summarily dismissed Mr. Diabagate on three grounds. The UNDT determined that the first ground for dismissal, i.e., the charge that he had engaged in sexual activity with a minor (V01), had been established. The UNDT determined that the second ground for dismissal, i.e., engaging in sexual relations with beneficiaries of United Nations assistance, namely local Congolese women, had not been established. And the UNDT determined that the third ground for dismissal, i.e., engaging in the unofficial and unauthorized use of United Nations vehicles, had been established based upon Mr. Diabagate’s admission of that ground.

32. On appeal, Mr. Diabagate raises several claims challenging the UNDT’s conclusion that he should be summarily dismissed because he engaged in sexual activity with a minor (V01), which was serious misconduct in violation of the Staff Regulations and Rules. In particular, Mr. Diabagate’s appeal focuses on the first prong of the requisite legal analysis: whether the “facts on which the sanction is based have been established” by clear and convincing evidence. For the reasons discussed below, the Appeals Tribunal determines that the UNDT erred in law and fact when it concluded that the charge against Mr. Diabagate of sexual activity with a minor (V01) had been established.⁷

33. The record before the Dispute Tribunal consisted of oral testimony given under oath at the hearing held by the UNDT and documentary evidence. In her testimony before the UNDT, V01 admitted meeting with Mr. Diabagate on one occasion, but denied having engaged in sex with him. She also testified that Ms. Hughette Piongo told her to lie to the OIOS investigators (in her interview) about having sex with Mr. Diabagate. V01 testified that V01 told her that she had engaged in sex with Mr. Diabagate and that she had spent time at his house. Mr. Diabagate testified that he had not engaged in sexual activity with V01 and asserted that the allegation of sexual activity with her was designed by Ms. Piongo to extort

⁵ *Molari v. Secretary-General* (the ~~081~~ *081* ~~engag witeitne 801 andad b6d~~).

money from him. The other witnesses merely recited what they had been told or what they had heard. Thus, the testimony given under oath at the hearing before the UNDT offered no direct or even circumstantial evidence that Mr. Diabagate had sexual activity with a minor (V01).

34. The documentary evidence before the UNDT included various police and other reports, the OIOS Report and the typed statements of the witnesses' interviews taken during the OIOS investigation. The investigative interview of V01 was conducted in Swahili and subsequently transcribed into an English-language statement. V01 was not placed under oath before giving her interview and she did not sign the transcribed version of her interview statement. As such, V01's transcribed statement

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Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar