



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/047

Judgment No.: UNDT/2011/181

Date: 24 October 2011

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

CHOI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former staff member of the Economic and Social Commission for Asia and the Pacific (“ESCAP”), is contesting the decision dated 28 October 2009 by which he was dismissed on grounds of harassment and abuse of authority.

2. He requests the rescission of the contested decision, his reinstatement with retroactive effect and compensation for the material and moral damages sustained.

Facts

3. The Applicant joined the United Nations in March 1995. On 1 September 2003, he was promoted to the P-5 level and transferred from the Economic Commission for Europe, in Geneva, to ESCAP, in Bangkok. At the time of the events, he was the Chief (P-5) of the Information, Communication and Space Technology Policy Section in ESCAP, holding a permanent appointment.

4. On 26 January 2008, Ms. C. (“the Complainant”), an intern in the Applicant’s Section since mid-January possessing the same nationality as the Applicant, accepted a dinner invitation from him. The Applicant brought a bottle of wine and half a bottle of whisky to the restaurant and drank almost the entire contents during the meal.

5. At the end of the meal, the Applicant drove the Complainant to the place where she was to meet a friend of her mother’s and then, after he left, she phoned him to thank him for his invitation.

6. On 28 January 2008, the Complainant chatted with a friend via instant messaging, telling her that her supervisor had asked her to go to his home to cook and clean the house and to sleep there. On 1 February, also via instant messaging, she told the same friend that, after she had asked to be transferred to another division, the Applicant had complained about her work to human resources. Over the same period of time, the Complainant also recounted the incident to several ESCAP staff members.

7. On 31 January 2008, a Human Resources Specialist from the ESCAP Administrative Services Division received a letter from Ms. C. complaining that the Applicant had invited her to a restaurant and that during dinner he had repeatedly invited her to come and clean his house, cook for him and spend the night at his home and that he had later repeated those invitations in his car.

8. On 1 February 2008, the Chief of Human Resources informed the Applicant of the allegations made by the Complainant and of her desire to move to another division of ESCAP in order to have no further contact with him and said that her request had been granted. The Applicant was invited to respond to the Complainant's allegations.

9. On 13 February 2008, the Applicant responded by denying the facts alleged.

10. On 23 July 2008, the Applicant was informed by the Chief of the Administrative Services Division of the decision of the Executive Secretary of ESCAP to launch a formal investigation into the facts alleged by the Complainant.

11. A two-member fact-finding panel conducted investigations from 23 to 30 September 2008 and on 13 January 2009, in the light of its report, the Executive Secretary of ESCAP referred the matter to the Office of Human Resources Management ("OHRM") of the United Nations Secretariat for further action.

12. On 16 March 2009, the Chief of the ESCAP Administrative Services Division attempted to hand deliver to the Applicant a memorandum of 10 March 2009 from the Chief of the Human Resources Policy Service, OHRM, informing him of the charges against him—namely, harassment and abuse of authority—and inviting him to submit his comments. The Applicant refused to accept the documents and OHRM finally transmitted them to him by email on 11 May 2009.

13. In an email of 17 July 2009, the Applicant submitted his observations on the charges against him, challenging the Complainant's credibility and the factual findings of the fact-finding panel.

14. In a letter dated 28 October 2009, the Assistant Secretary-General for Human Resources Management informed the Applicant of the Secretary-General's decision to dismiss him for professional misconduct.

15. On 25 January 2010, the Applicant submitted to the New York Registry of the Dispute Tribunal a request for extension of the deadline for submitting an application. An extension was granted until 2 March 2010.

16. On 2 March 2010, the Applicant submitted his application to the Geneva Registry and then, on 3 March 2010, to the New York Registry.

17. On the same day, the Applicant requested a change of venue from New York to Geneva, invoking *inter alia* the fact that the travel expenses and time difference were less between Bangkok and Geneva than between Bangkok and New York.

18. On 15 March 2010, the Applicant transmitted to the New York and Geneva Registries 92 documents to be annexed to his application.

19. By Order No. 50 (NY/2010) of 17 March 2010, the Tribunal rejected the Applicant's request for a change of venue, on the grounds that, firstly, applicants stationed in Bangkok at the time when the contested decision was taken were covered by the New York Registry and, secondly, at the time when the Order was issued the Applicant was in the United States.

20. On 15 April 2010, the Respondent submitted his reply to the application.

21. In an email of 9 June 2011, the Tribunal invited the parties to a directions hearing. Since the Applicant did not respond to the invitation, the hearing was cancelled.

22. By Order No. 193 (NY/2011) of 9 August 2011, Judge Ebrahim-Carstens ordered the transfer of the case from the New York Registry to the Geneva Registry, where it was assigned to Judge Cousin.

23. By Order No. 128 (GVA/2011) of 26 August 2011, the Tribunal informed the parties, *inter alia*, of its intention to require the presence of the Complainant at a hearing and asked the Respondent to provide it with her contact details.

24. On 7 September 2011, the Respondent provided the Tribunal, *ex parte*, with the Complainant's contact details, requesting that their confidentiality should be preserved in accordance with the provisions of article 18.4 of the Tribunal's Rules of Procedure. In its Order No. 141 (GVA/2011) of 13 September, the Tribunal granted the Respondent's request.

25. In Order No. 144 (GVA/2011) of 13 September 2011, the Tribunal ordered the Complainant to appear at the hearing, by virtue of the provisions of articles 6.1 of its Statute and 16.5 and 17 of its Rules of Procedure.

26. The Complainant agreed to testify and, in Order No. 154 (GVA/2011) of 23 September 2011, the Tribunal set 17 October 2011 as the date for the hearing and ordered the Complainant and the Applicant to appear in person at the expense of the Organization.

27. The hearing was held on 17 October 2011 in the presence of the Applicant and of Counsel for the Respondent. The Complainant also testified in person before the Tribunal and was examined by the Judge hearing the case, the Applicant and Counsel for the Respondent.

Parties' submissions

28. The Applicant's contentions are:

a. The facts alleged against him have not been established. It was his accuser who sexually harassed him, insisted that they should have dinner together and offered to cook and clean at his home, an offer which he declined;

b. No confrontation between his accuser and himself was organized during the investigation; the Tribunal should at the hearing organize such a confrontation, which should be held in Korean with interpretation;

c. Mere presumption without material elements cannot establish professional misconduct;

d. The sanction imposed is disproportionate, since the facts alleged are based on mere presumption;

e. His rights were violated. The fact-finding report contains falsified information and its conclusions are in contradiction with its content. He was forced to sign his interview record although he did not agree with its content.

29. The Applicant requests the Tribunal to order a new independent investigation, appearance of witnesses, including former colleagues of his, and production of a number of documents.

30. The Respondent's contentions are:

a. The professional misconduct committed by the Applicant is established by sufficient evidence. The former Administrative Tribunal ruled that, in the case of disciplinary sanctions, the burden of proof is not the same as in criminal cases and it is sufficient for the Tribunal to reasonably infer that the alleged facts occurred. This case law has been confirmed by the present Tribunal;

b. The acts of which the Applicant is accused by OHRM constitute harassment and abuse of authority and are the following: asking an intern whom he was supervising to cook and clean at his home, to spend the nights of 26 January 2008 and of subsequent weekends at his home and with him and then, in the face of her refusal, taking measures against her. The Applicant gave no coherent explanations of the allegations made against him, except to say that he was the victim of a plot;

c. The fact-finding panel appointed by the Secretary-General made a thorough investigation and relied on the fact that the Complainant had shortly afterwards reported the incident to several persons who had confirmed this, that she had never changed her version of the events and

that she had provided details. In addition, the fact-finding panel found that none of the witnesses called by the Applicant had confirmed his statements, that there was nothing to confirm his statements to the effect that it was the Complainant who had asked if she could cook and clean for him and that the Applicant's affirmation that the aim of her complaint was to change division seemed to be unfounded;

d. In addition, the Applicant committed an abuse of authority when he took it upon himself to criticize the Complainant's work in order to terminate her internship, after learning that she had been transferred to another division;

e. The alleged facts constitute serious misconduct within the meaning of the Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority);

f. The Applicant's rights to due process were respected. The investigation followed the procedures laid down in the Secretary-General's bulletin ST/SGB/2008/5 and administrative instruction ST/AI/371 (Revised disciplinary measures and procedures). The Applicant had access to all the evidence concerning the misconduct of which he was accused and had every opportunity to provide explanations and exculpatory evidence to the fact-finding panel and to the Respondent. There was no confrontation between the Applicant and the Complainant because that right is not recognized at the fact-finding stage. Similarly, at that stage, he had no right to be assisted by counsel or by a third party.

g. The Applicant does not establish that the sanction was imposed on him on any other grounds than those stated in the decision, especially not the grounds that he had refused a request made by a Member State of the United Nations;

h. The sanction imposed is proportionate to the misconduct committed and is within the discretionary authority of the Secretary-General;

i. There is no need for the Tribunal to order additional investigations or production of other documents, since those requests by the Applicant relate to facts outside the scope of this dispute.

Consideration

Regularity of the procedure

31. In contesting the sanction of dismissal imposed on him, the Applicant first maintains that the investigation process to establish the facts alleged against him was irregularly conducted.

32. The Applicant claims that he was forced to sign his interview record although he did not agree with its content, but it appears from the file that he never signed the record in question.

33. The Applicant also claims that, despite his requests, he was never allowed to confront the Complainant. However, nothing in any text applicable in disciplinary cases requires investigators to organize such a confrontation. They are to conduct their investigation as they see fit in order to establish the facts.

Existence of the facts alleged

34. Since the Applicant never admitted the truth of the facts established by the investigators, it is for the Respondent to provide sufficient elements to prove that they occurred and that they constitute professional misconduct.

35. There is no dispute regarding the fact that, on Saturday, 26 January 2008, the Applicant invited the Complainant, an intern who had been working under his direct supervision for about two weeks, to dinner at a restaurant, that he drove her in his car to the restaurant, and that they waited about half an hour for the restaurant buffet to be open. Then during the dinner, the Applicant, who had

brought with him half a bottle of whisky and a bottle of wine, drank most of the contents himself. He then drove the Complainant to a place where she was to meet a friend of her mother's. Lastly, the Complainant confirms that, once she had arrived at the friend's home, she telephoned the Applicant, as he had requested, to say that she had arrived and to thank him for the dinner.

36. On the other hand, the Applicant categorically denies having made the remarks reported by the Complainant which resulted in the disciplinary sanction.

37. The Complainant claims that, as soon as she entered the Applicant's car to go to the restaurant, he insistently asked her whether she wanted to come to his home to clean and cook because he lived alone. Then during the meal the Applicant, who had been drinking a lot, allegedly told her that he soon grew tired of the women whom he dated and preferred relationships that did not last longer than two or three months. He apparently also told her about encounters with women when he was on mission abroad. He allegedly also told her that he could discover the personality of people simply by looking at their faces, but that for her he needed to "see everything", which she interpreted as meaning that he needed to see her body. In addition, the Complainant claims that, while she was in the Applicant's car after dinner, he insisted that she should come and sleep at his home that very evening and on other weekends.

38. Both to the investigators and at the hearing during which he confronted the Complainant, the Applicant flatly denied having said these things.

39. The Tribunal must therefore, to decide on the truth of the facts alleged, assess the credibility of the Complainant's statements and, for this purpose, consider only the parts of those statements that are corroborated by testimony or documentation.

40. It appears from the case record that, in the days immediately following the incident, the Complainant reported the facts in a consistent manner to five different people, as confirmed by the statements of those people or other written documents. First, on Monday, 28 January, or two days after the dinner, she confided in an ESCAP female staff member of the same nationality as herself and

the Applicant. On the same day, the Complainant chatted with a friend via instant messaging, telling her that her supervisor had asked her to go to his home to clean and cook and to sleep. In these written exchanges, she told her friend how very uncomfortable she felt after this incident. Also on Monday, 28 January, she recounted the incident to another female intern working in human resources. Shortly afterwards, she told a human resources staff member, who had been alerted by the above-mentioned intern under his supervision, that she had accepted a dinner invitation from the Applicant and that during the dinner he had asked her to go to his home to clean and cook and that his conversation had sometimes had sexual overtones, even though he had not touched her. The human resources staff member told the investigators that the Complainant seemed very upset. Lastly, during the same week, the Complainant confided in another ESCAP staff member, also of the same nationality as herself and the Applicant.

41. On 31 January 2008, the Complainant, who had initially declined to submit a formal complaint, sent a letter to human resources complaining that, on the occasion of an invitation to dinner at a restaurant, the Applicant had repeatedly asked her to go to his home to clean, cook for him and spend the night at his home on that evening and on other weekends.

42. Subsequently, after the Executive Secretary of ESCAP had decided to launch a formal investigation into the facts recounted above, and although the Applicant denied having made those requests, the Complainant never altered her version of the facts either before the investigators or before the Tribunal at the hearing during which she testified under oath and was confronted with the Applicant.

43. There is no indication in any document placed on record that the Complainant had any interest in making false statements against the Applicant. On the contrary, it is established that she initially did not intend to make a formal complaint and that later, despite strong pressure to do so allegedly exerted by persons of the same nationality as herself and the Applicant, and despite pressure placed by the Applicant on the Complainant's father, she refused to withdraw her complaint.

44. The Applicant claims that the Complainant was manipulated by malicious people and that her sole aim was to change division, but his claims are not supported by any document or any statement made by witnesses to the investigators and, indeed, carry little weight in the record.

45. The Tribunal therefore considers that the facts recounted by the Complainant are established.

Legal characterization of the alleged acts

46. The Tribunal must now consider whether the alleged acts by the Applicant can be characterized as harassment and abuse of authority, as they were in the contested sanction decision.

47. That decision, dated 28 October 2009, concluded that by his conduct the Applicant had violated staff regulation 1.2(f) and staff rule 101.2(d) applicable at the time of the events, as well as section 3.1 of the Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) of 11 February 2008. However, that bulletin was not applicable at the time of the events, which occurred on 26 January 2008, and the Tribunal notes that on that date there was no statutory text defining harassment or abuse of authority. Nevertheless, the lack of a legal definition of harassment and abuse of authority does not prevent the Tribunal from so characterizing the alleged acts.

48. In this case, the insistent proposal made by a supervisor to an intern, during dinner alone with her, that she should come to his home to clean and cook and then sleep there is inappropriate behaviour such as to annoy and embarrass the intern and therefore constitutes harassment, especially as the proposals were made several times in the course of the evening. In addition, the fact that the staff member is the intern's supervisor means that this can also be characterized as abuse of authority.

49. The above-mentioned staff regulation 1.2(f) applicable at the time of the events stated:

... [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

50. Rule 110.1 of the Staff Rules then in force stated:

Misconduct

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.

51. Staff rule 101.2(d) further stated:

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

52. The Tribunal also notes that paragraph 2 of administrative instruction ST/AI/371 (Revised disciplinary measures and procedures) then in force stated:

... Conduct for which disciplinary measures may be imposed includes, but is not limited to:

(a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it;

...

(d) Assault upon, harassment of, or threats to other staff members;

...

(f) Misuse of office; abuse of authority; breach of confidentiality; abuse of United Nations privileges and immunities;

(g) Acts or behaviour that would discredit the United Nations.

53. The texts quoted above show that the acts of harassment and abuse of authority committed by the Applicant constitute professional misconduct liable to sanction.

Proportionality of the sanction

54. It now remains for the Tribunal to decide whether the sanction of dismissal imposed on the Applicant is proportionate to the misconduct committed.

55. In *Sanwidi* 2010-UNAT-084, the Appeals Tribunal ruled:

40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

47. Keeping in mind the matters outlined above, we hold that the UNDT, in exercising judicial review, may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on the ground that the disciplinary measure is not proportionate to the misconduct... However, while exercising judicial review, due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of the Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard.

56. In *Cabrera* 2010-UNAT-089, the Appeals Tribunal also concluded:

27. Under the circumstances we agree with the UNDT that the conduct was established and that it was serious. Though perhaps the Secretary-General, in his discretion, could have come to a different conclusion, we cannot say that the sanction of summary dismissal was unfair or disproportionate to the seriousness of the offences. The UNDT refused to substitute its judgment in this case, and this Tribunal must be deferential not only to the Secretary-General, but also to that Tribunal, which is charged with finding facts.

57. Since it is not for the Tribunal to substitute its judgment for that of the Secretary-General, who possesses discretionary authority as regards sanctions, the Tribunal has limited control over the proportionality of the sanction.

58. In this case, the Tribunal considers that the misconduct committed is particularly serious because the Applicant was a senior official directly supervising the Complainant, who was only an intern, because he never acknowledged having even made a mistake and because he made no apology. On the contrary, when faced with the accusations against him, he tried to discredit the Complainant by making the implausible claim, including at the hearing, that it was she who had insisted several times that he should take her to a restaurant for dinner and that she had made advances to him there which he had rebuffed.

59. The Tribunal therefore considers that the sanction imposed is not disproportionate to the misconduct committed and that the application should thus be rejected.

Conclusion

60. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 24th day of October, 2011

Entered in the Register on this 24th day of October, 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry