



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/033/
UNAT/1710
Judgment No.: UNDT/2011/215
Date: 20 December 2011
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

EKOFO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bernard C. Adams, OSLA

Counsel for Respondent:
Stephen Margetts, ALU/OHRM, UN Secretariat

Introduction

1. On 26 June 2009 the Applicant filed an appeal to the former United Nations Administrative Tribunal against the decision of the Secretary-General to have a written censure placed in his official status file. The censure was the result of a disciplinary case brought against the Applicant in which he was charged with “having improperly touched” the complainant’s “upper body, fondled her breasts, attempted to fondle her private parts and groped her,” in violation of staff regulations 1.2(b), (e) and (f) and Staff Rule 301.3(d).

2. On 1 January 2010, this case was transferred to the Nairobi Registry of the United Nations Dispute Tribunal (UNDT) in accordance with ST/SGB/2009/11 on Transitional Measures Related to the Introduction of the New System of Administration of Justice.

3. The Tribunal held a hearing in this matter on 9 December 2010. The Applicant testified on his own behalf, and the Respondent called three witnesses: the complainant, SG, her friend and fellow staff member, MR, and her supervisor, EN.

Facts

4. The Applicant joined the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) on 21 June 2004 as a Radio Technician at the GL-4 level. He was based in Lubumbashi.

5. On 18 December 2006, the Applicant travelled to the Kalemie Office of MONUC in the Democratic Republic of Congo (DRC), to fix a problem with the radio equipment there. He was required to travel at very short notice, and was not able to arrange overnight accommodation in advance of his visit. The Applicant decided to sleep on the floor of the radio room, but another staff member, SG, the complainant in this case, invited him back to her house. The Applicant stayed at SG’s house on the

nights of 18 and 19 December 2006. MR, another female staff member was also staying at the house at the time. The Applicant returned to Lubumbashi on 20 December.

6. The following week, on 26 December, SG filed a complaint of sexual assault against the Applicant alleging that on the night of 19/20 December 2006, she awoke in the middle of the night to discover the Applicant touching her upper body and fondling her breasts. She alleged that he asked her to caress him and repeatedly tried to get into her bed, despite her telling him to stop and attempting to fight him off. SG stated that the incident lasted about 15 minutes.

7. On 22 March 2007, the Special Representative of the Secretary-General (SRSG) convened an investigation panel, consisting of two MONUC staff members, to look into the allegations. The investigation panel interviewed the complainant and the Applicant on 3 and 4 April 2007. On 17 April, the Panel submitted a report of its findings on the allegations in which it concluded that “[the Applicant] has most likely attempted to have sexual contact with [SG] in the evening of 19 December 2006...”

8. On 8 August 2007, the Director, Department of Field Support (DFS) recommended to the Assistant Secretary-General, Office of Human Resources Management (OHRM), that the Applicant be subjected to disciplinary action. Consequently on 8 October 2007, the Applicant was charged by OHRM with “having improperly touched [SG’s] upper body, fondled her breasts, attempted to fondle her private parts and groped her, in violation of the Organization’s Staff Regulations and Rules.” This led to his suspension from duty with full pay on 15 October 2007.

9. The Applicant was asked to provide his response to the allegations. On 23 October 2007, the Applicant did so, denying the alleged conduct entirely, and stating that he slept through the night of 19/20 December and never went near SG’s bedroom nor made any advances to her. He pointed out that the other occupant of the house, MR, did not hear any noise, whereas SG alleged that she screamed and shouted. He further pointed out that the complainant did not call UN security either during the night or the

following day, and further, that she actually drove him to the airport on 20 December. The Applicant suggested that these facts were inconsistent with SG's version of events.

10. On 19 November 2007, OHRM referred the case to the Joint Disciplinary Committee (JDC). The JDC was convened to consider the case in July 2008. The JDC held a hearing in Kinshasa, DRC, on 9 August. The complainant did not appear at the hearing because she had left the Organisation and the JDC could not locate her. The JDC described her account of events on the basis of the original complaint, the evidence she had provided to the investigation panel, and as understood by the SRSB, in the following way:

...he touched 'toute la partie supérieure [sic] du corps,' or her upper body, including her breasts. She does state that she tried to rebuff his physical advances as persistently as he tried to touch her. She states that she thought she rebuffed him for fifteen minutes, but she was not certain of the amount of time that elapsed. There is no evidence that the staff member acted with violence. In her statement to the [investigation panel], at no point does [SG] state that he forced her to submit to him, pinned her down, or otherwise rendered her helpless for any amount of time. According to her, the staff member kept asking her to respond to his advances ('caress-moi' [sic]). She does not claim that he fondled her genitals. She stated she was not fully aware and was 'complètement [sic] endormie,' which the [JDC] takes to mean the complainant was still coming out of sleep. Having finally pushed him away, the staff member retreated to his room. Later, the complainant states, the staff member returned, although this time he did not attempt to touch her. Rather, it appears that this second time he appeared contrite and apologetic.

11. The JDC issued a report of its findings and recommendations on 23 December 2008. In its report, the JDC found itself unable to conclude that the incident occurred as described by SG in her original complaint. The JDC noted a number of inconsistencies in the complainant's own statements about the alleged incident and also between her version of events and the testimony of other witnesses. The JDC noted, for example, the "emotional vehemence" with which she described the events in her original complaint and found this "difficult to explain" if "not inconsistent with" the fact that she had driven the Applicant to the airport the following day. The JDC therefore

concluded that the evidence did not support the charge of sexual assault and recommended that this charge be dropped. The JDC did recommend, however, that the Administration follow-up with the Applicant to ensure his fulfilment of the requisite training regarding the Organization's harassment and gender sensitivity policy.

12. Following receipt of the report of the JDC, the Secretary-General reviewed the case and noted that the JDC did not consider the evidence supported a charge of sexual assault. However, "[a]s the Secretary-General considers that a charge of sexual assault is different to the charge in question," the Secretary-General did not accept the recommendation of the JDC that the charge be dropped. The Secretary-General concluded that the Applicant committed the actions as charged and that this was inappropriate conduct which did not meet the standard expected of an international civil servant. As well as imposing a written censure, the Secretary-General accepted the recommendation of the JDC that the Applicant attend a harassment and gender sensitivity course.

13. By a letter dated 6 January 2009, the Applicant was informed of the Secretary-General's decision not to accept the findings of the JDC and to impose the disciplinary sanction of a written censure, which would be placed in the Applicant's official status file.

The Applicant's submissions

14. The Applicant submits the following:

- (a) The Respondent did not meet his burden of proof with respect to proving that there was a sexual assault or sexual harassment;
- (b) Even though the investigation report and the SRSG's referral describe the Applicant as sexually assaulting the complainant, sexual assault is not defined in any United Nations administrative issuances;

- (c) The report of the investigation panel has a fundamental error of reasoning in its findings, which contradicts United Nations procedures for dealing with sexual harassment;
- (d) The Respondent erred in the exercise of his broad discretion when he decided that a letter of censure should be placed in the Applicant's file; and
- (e) The Administration's failure to produce the Complainant for the JDC hearing prevented the JDC from resolving contradictions in her accounts.

The Respondent's submissions

15. The Respondent submits the following:

- (a) The Secretary-General has broad discretion to determine what behaviour constitutes misconduct, to evaluate the facts and to determine the appropriate disciplinary measure;
- (b) The Applicant failed to meet the standards of conduct required of international civil servants. Thus, the decision of the Secretary-General to impose on the Applicant the disciplinary measure of a written censure was proportionate and a valid exercise of his discretionary authority;
- (c) Although the JDC concluded that it lacked evidence to support a charge of "sexual assault", the charge in question was not a criminal allegation of "sexual assault" but rather that of sexual misconduct as prohibited under the United Nations Staff Regulations and Rules.

Issues

16. The role of the Tribunal in reviewing disciplinary cases is to examine the following:¹

- (a) Whether the facts on which the disciplinary measure was based have been established;
- (b) Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations;
- (c) Whether the disciplinary measure applied is proportionate to the offence; and
- (d) Whether there was a substantive or procedural irregularity.

17. Consequently, these are the issues that will be explored in the present matter. In considering these issues, the Tribunal will scrutinize the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available and draw its own conclusions.² The Tribunal is not bound by the findings of the JDC or of the Secretary-General.

Considerations

Issue 1 - Whether the facts on which the disciplinary measure was based have been established

18. In the case of *Molari* UNAT-2010-164 the Appeals Tribunal considered the issue of the standard of proof required in disciplinary cases. The Appeals Tribunal held that:

¹ *Mahdi* 2010-UNAT-018; *Abu Hamda* 2010-UNAT-022; *Haniya* 2010-UNAT-024; *Aqel* 2010-UNAT-040; and *Maslamani* 2010-UNAT-028.

² *Diakite* UNDT/2010/024.

...when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.³

19. This Tribunal must then consider whether, on the basis of the evidence before it, the complainant's version of events is highly probable. If it is anything less than highly probable, the Applicant must be given the benefit of the doubt and the Tribunal must conclude that the facts on which the misconduct charge was based have not been established.

20. The Applicant was charged with misconduct for "having improperly touched [SG's] upper body, fondled her breasts, attempted to fondle her private parts and groped her" in violation of Staff Regulations 1.2(b),(e) and (f) and Staff Rule 301.3(d). This Tribunal heard from SG herself, as well as the other occupant of her house, MR, and SG's supervisor, EN.

21. In her testimony to this Tribunal and her statement to the investigation panel SG explained the events that occurred in the early hours of 19-20 December 2006. She stated that she offered hospitality to the Applicant who had nowhere else to stay for a couple of nights before he was due to go back to his duty station. On the material day the Applicant went home by himself as SG had to work late. When she reached home she saw that the lights in the room occupied by the Applicant were off. She went to bed in her room and did not check on the Applicant.

22. SG stated that she fell asleep and after about half an hour she woke up abruptly. The situation was a bit hazy. She saw the Applicant who was trying to get into her bed. He had one leg in the bed and the other one on the floor. He touched the upper part of her body. As she was still sleepy she was trying her best to push him away. The

³ *Molari UNAT-2010-164*, para. 2, citing *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para. 27.

Applicant was telling her to caress him and asking her whether she wanted him. He tried to glide his hands towards her private parts but she managed to prevent that.

23. SG stated that the Applicant then left but returned to her room later and this time he just stood by the bed. SG felt scared and crouched in her bed to protect herself. The Applicant again asked her whether she wanted him. This second time he did not touch her. SG then told him firmly to leave her room, and eventually he did.

24. The next day in the early morning SG drove the Applicant to the airport for him to catch his plane to get back to his duty station. She did so because she wanted to get rid of him as soon as possible. In the car the Applicant was apologetic, telling her that he just went crazy.

25. The next day SG asked MR, who was occupying another room at her house, whether she had heard anything on the previous night but MR told her that that she had heard nothing. MR told the Tribunal and the investigation panel that she was fast asleep at the relevant time. She also stated that SG was a bit reluctant to give a detailed account of what had happened as she is a very private person and MR believed that SG felt that her privacy had been shamefully invaded. But MR had sensed that something had happened to SG and when she questioned her, SG related the incident of the night of 19/20 December to MR.

26. Both MR and EN, SG's supervisor to whom the latter talked, said that SG was in a state of shock and distressed and was not keen on making a formal complaint because of the shame and humiliation she felt following the incident. But MR and EN encouraged her to do so. EN had received a call from SG who related the incident to her. EN stated that after the incident, SG was nervous, tense and on her guard all the time. She added that the reason SG left the United Nations was because she had to continue to work with the Applicant.

27. Persuaded by MR and EN, and despite her reticence and the shame she felt, on 26 December 2006 SG went ahead and filed her complaint. She emphasized that in the DRC there is a lot of violence towards women and she believed that she had to complain and tell the truth to ensure that this would not happen again.

28. As stated above, the Applicant denied the charges and in his testimony to this Tribunal and in his statements to the investigation panel he said that he slept all night and never went into SG's room. He tried to buttress his denial by stating that SG did not call the MONUC security or the security guards who were outside her residence on that night. The Applicant said that SG's contention that she shouted could not be believed because MR had not heard anything. Further, SG drove him to the airport the following morning, which was not the conduct of a victim of a sexual assault.

29. In *Diakite* UNDT/2010/024, this Tribunal laid down the legal principle that should guide it in assessing the evidence in disciplinary matters. The Tribunal had this to say:

The Tribunal has first to determine whether the evidence in support of the charge is credible and sufficient to be acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected *en bloc*. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or doubtful.⁴

30. After analyzing the oral testimony and the statements of SG and the witnesses as well as the version given by the Applicant this Tribunal has reached the conclusion that it is highly probable that the incident took place as related by SG. There is no

⁴ *Diakite* UNDT/2010/024, para. 71.

reason to doubt it. There is no evidence of ill-motivation on SG's behalf and she appeared to this Tribunal to be an honest witness who was upset and embarrassed by the incident but who was determined to tell the truth.

31. The fact that SG was reticent to make a complaint and that MR and EN had to fish for details and convince her to file a complaint might be considered adverse to her credibility. But that would be taking a very simplistic approach to her evidence. The Tribunal considers that in cases of a sexual nature or involving the forced invasion of a person's physical privacy it is not only the factual aspects of the incident that need to be considered but also the character and personality of the alleged victim.

32. There is undisputed evidence to show that SG, as explained by EN, kept a lot to herself. MR stated that she had known SG over a period of time and that she is a very private person. The Tribunal also notes that following the incident SG was cautious about relating the incident because, as stated by MR, she was concerned at what would happen to her both in her professional and personal life if she went ahead with it. The personality, character, and attitude of SG are clear indications that her account of the incident was not a premeditated concocted conspiracy emanating from a warped mind. There is no evidence to indicate that she would have any motive to invent such an allegation against the Applicant or that she would gain in any way by openly talking about an unpleasant, intimate, and, as she perceived it, humiliating experience.

33. It is true that SG did not raise as great a hue and cry as might have been expected in the circumstances but the fact that she did call out is an indication that she attempted to alert those around. It is no fault of hers if those around could not hear her distress call. That cannot be held against her. Furthermore, given the character of SG, as noted by the Tribunal above, it is consistent with her version of events that she was reluctant to cause a row.

34. The version of events as told by the Applicant is much more obviously an attempt to brush aside a serious incident by suggesting that SG's story could be faulted

because she did not scream loudly enough or because she took the Applicant to the airport. At best, that Applicant's attempt to extricate himself from a tight corner was feeble and has the opposite effect to what he desired: his attack on the credibility of SG has only buttressed further the complaint levelled against him.

35. This Tribunal has assessed both the documentary evidence and the oral testimony presented in this case. The Tribunal has considered in particular the following issues: the time at which the complaint was made; the initial reticence of the complainant to file a complaint; her overall mindset following the incident; her testimony and explanations; the testimony and statements of the two ladies to whom the complainant talked after the incident; the testimony of the Applicant and his written statements as well as the various explanations he has given. In the end, this Tribunal has reached the conclusion that the Respondent has discharged the burden of proof to the requisite standard in this matter.

Issue 2 - Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations

36. The Applicant was charged with misconduct violating Staff Regulation 1.2(b), (e) and (f) and Staff Rule 301.3(d). Staff Regulation 1.2 (b) requires that:

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

37. Staff Regulation 1.2(e) and (f) state:

(e) By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants.

(f) While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They 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 their status.

38. Staff Rule 301.3(d) states:

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

39. It is true that the nature of the incident that is the subject matter of this case is not described specifically in the Staff Regulations cited above. At best the incident amounts to a form of conduct which is not "befitting" the status of an international civil servant. However, it seems to this Tribunal that the incident does amount to sexual harassment, and a sexual approach of this nature, when unwanted, is committed "in connection with work" even if it takes place outside office hours and outside the workplace, but is perpetrated by a staff member upon another staff member.

40. This Tribunal takes the view that the facts, as proven on the evidence, clearly indicate that a form of sexual assault occurred. The suggestion that the Applicant did not "force himself" on SG doesn't stand up to scrutiny. By its very nature, this incident amounts to conduct unbecoming of an international civil servant and in the view of this Tribunal it can also be described as sexual harassment which is prohibited within the Organization.

Issue 3 - Whether the disciplinary measure applied is proportionate to the offence

41. The Applicant was visited with a written censure. The Tribunal does not have the power to modify this sanction in order to impose a higher one. However, the Tribunal cannot help pointing out that the sanction erred on the side of leniency and it will be up to the Secretary-General to exercise his discretion to impose a sanction commensurate with the misconduct which this Tribunal has found to have occurred.

Issue 4 - Whether there was a substantive or procedural irregularity

42. On the issue of procedural irregularity, the Applicant was informed of the charge, and he was given adequate time to respond to it. All the materials relating to the investigation were made available to him. Admittedly in a disciplinary matter which is of a quasi criminal nature the issue may arise whether a staff member should be informed of his or her right to representation or legal assistance at the investigation stage. The well entrenched practice within the Organisation has been not to allow any representation or legal assistance at the investigation stage as such an investigation is considered to be confidential in nature. However, the irony of the situation is that the staff member is required to collaborate in the investigation and if subsequently OHRM decides to level charges against that staff member, whatever incriminating statements he or she may have made during the investigation are, as a rule, used against him or her. That practise on the face of it looks unfair.

43. It is inconceivable that a staff member who is in the grip of, or facing, trained investigators, should be left alone to wrestle with questions the answers to which are used against him ultimately.

44. In the present case however that is not the situation. The Applicant did not make any incriminating statements and denied the charge. Even the former JDC did not find the charge proven, a conclusion that was not approved by the Respondent who had the power to reverse the findings of such a panel.

45. The Applicant also complained that the JDC was not in a position to fairly and properly assess the evidence in the case. True it is that the JDC did not hear the complainant and acted on her written statement. That was wrong. What the JDC did was to act on the testimony of an absent witness. The Tribunal refers to the Appeals Tribunal decision in the case of *Liyarachchige* UNAT 2010-087, where a finding of guilt in a disciplinary matter was quashed on the ground that the finding was based solely on the testimony of anonymous witnesses who had not been tendered for cross-examination. The Appeals Tribunal stated:

The use of statements gathered in the course of the investigation from witnesses who remained anonymous throughout the proceedings, including before the Tribunal, cannot be excluded as a matter of principle from disciplinary matters, even though anonymity does not permit confrontation with the witnesses themselves but only with the person who recorded the statements of the anonymous witnesses. However, such statements may be used as evidence only in exceptional cases because of the difficulties in establishing the facts, if such facts are seriously prejudicial to the work, functioning and reputation of the Organization, and if maintaining anonymity is really necessary for the protection of the witness. Furthermore, it should be possible to verify the circumstances surrounding anonymous witness statements and to allow the accused staff member to effectively challenge such statements.

It should be recalled, however, that even assuming that the above-mentioned conditions were met, a disciplinary measure may not be founded solely on anonymous statements. In disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defence and the requirements of adversary procedure.⁵

46. This reasoning should equally be applicable to the situation where the evidence of guilt is encompassed in the written statement of an absent witness. To that extent, the Applicant is correct. However, he was afforded a full hearing before this Tribunal and had an opportunity to hear and question the complainant. Therefore, whatever

⁵ *Liyarachchige* UNAT 2010-087, (English), paras.19-20.

procedural irregularity there may have been before the proceedings reached this Tribunal, has now been cured.

Conclusion

47. There was a procedural irregularity in the manner in which the Secretary-General reached his decision to impose a disciplinary sanction upon the Applicant—the complainant did not testify to the JDC and the Applicant had no opportunity to cross-examine her. However, this Tribunal is entitled to consider matters afresh and in so doing, the Applicant was afforded the opportunity to challenge the complainant’s testimony fully. This Tribunal is convinced that the misconduct alleged took place as described in the original complaint, and that it amounts to both sexual harassment in connection with work as well as conduct unbecoming of an international civil servant. In such circumstances, the sanction imposed upon the Applicant, a written censure, is, in the view of this Tribunal, a lenient measure for which the Applicant ought to be gratified.

48. In light of the above, the Application is refused in its entirety.

(Signed)

Judge Vinod Boolell

Dated this 20th day of December 2011

Entered in the Register on this 20th day of December 2011

(Signed)
Legal Officer

For: Jean-Pelé Fomété, Registrar, Nairobi