UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/008
Judgment No.: UNDT/2018/095
Date: 27 September 2018
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

NADASAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Ms. Miryoung An, ALS/OHRM, UN Secretariat
Ms. Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. On 18 January 2017, the Applicant, a former Air Operations Assistant with the United Nations Stabilization Mission in Haiti ("MINUSTAH"), filed an application contesting the imposition of a disciplinary sanction consisting of separation from service with compensation in lieu of notice and with termination indemnity, under staff rule 10.2(a)(viii).

2. The sanction was based on a finding that the Applicant had sexually harassed Ms. X (name redacted for privacy), a staff member at the French Embassy in Liberia, and thereafter a staff member of the United Nations Children's Fund ("UNICEF") between the period January 2012 and October 2015.

3. The Respondent argues that the application should be dismissed in its entirety contending, *inter alia*, that the grounds of the Applicant's challenge to the disciplinary sanction are unclear in the application, and that the application itself clearly affirms the facts central to the case, namely that: (a) the Applicant knew or should have known that Ms. X did not want his advances; and (b) he continued his approaches, reasonably knowing that they would offend her.

Facts

4. The Applicant, then a staff member of the United Nations Mission in Liberia ("UNMIL"), first met Ms. X, then a Project Manager at the French Embassy in Liberia, in January 2012 at the Sajj House restaurant in Liberia. The Applicant developed romantic feelings for Ms. X and in April or May 2012 called her office phone inviting her for a drink. Ms. X did not accept the invitation and hung up the phone. Between 21 June and 6 August 2012, the Applicant telephoned Ms. X multiple times and sent her text messages communicating his sexual attraction. Ms. X ignored the calls and sent the Applicant a text message in July 2012 stating that she was not interested in his advances and that if he did not stop contacting her she would call the

police. The Applicant, however, continued his advances by sending her over one hundred messages on Facebook from 21 June to 22 November 2012.

5. In November or December 2012, Ms. X made a complaint against the Applicant to the Chief Security Adviser of UNMIL. Ms. X alleged that the Applicant had begun to harass her after they first met in January 2012 at the Sajj House restaurant in Liberia by sending her numerous texts and Facebook messages of an intimidating and sexual nature.

6. In December 2012, as a consequence of the complaint and at the request of Ms. X, the Chief Security Adviser made an effort to resolve the matter informally by meeting with the Applicant and requesting that he stop contacting Ms. X. However, as the Applicant persisted, he was warned again by the Chief Security Adviser, who had also enlisted the assistance of a colleague of the same nationality as the Applicant in an effort to impress upon him the importance of leaving Ms. X alone and abiding by the rules of the Organization.

7. In December 2013, Ms. X left Liberia to become a staff member of the UNICEF office in Haiti.

8. On 6 February 2013, the French Ambassador to Liberia sent a letter to the Special Representative of the Secretary-General ("SRSG") for UNMIL, requesting UNMIL's assistance in this regard as the Applicant had continued to contact Ms. X via text and telephone messages.

9. On 11 February 2013, the matter was referred for investigation to the UNMIL Special Investigations Unit ("SIU").

10. In February 2014, the Applicant applied for an open position at his level in MINUSTAH in Haiti and was subsequently recruited for the position.

11. In July 2014, the Applicant left Liberia to join MINUSTAH in Haiti.

12. In July 2014, the UNMIL SIU determined that the matter should proceed by way of a complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) in MINUSTAH, where the parties had since located.

13. On 25 November 2014, the Chief, Conduct and Discipline Team, MINUSTAH, received a request from the Chief, Conduct and Discipline Team, UNMIL, to address the unresolved complaint of possible sexual harassment. The case was then re-assigned to the MINUSTAH Conduct and Discipline Team by the Department of Field Support ("DFS").

14. On 27 March 2015, in accordance with the provisions of ST/SGB/2008/5, the Special Representative of the Secretary-General for MINUSTAH convened an investigation panel of two MINUSTAH staff members, Mr. AO (name redacted for privacy), Chief Integrated Mission Training Center in MINUSTAH and Ms. CM (name redacted for privacy), Planning Officer in the Office of the Special Representative of the Secretary-General ("the Panel"), to conduct a fact-finding investigation into the reported harassment.

15. On 14 August 2015, the Panel issued its report which found that the allegations of prohibited conduct pursuant to ST/SGB/2008/5 by the Applicant towards Ms. X were well-founded and amounted to possible misconduct.

16. On 15 September 2015, the Applicant's case was referred to the Office of Human Resources Management ("OHRM") for appropriate action. The referral was based on the Panel's report, dated 14 August 2015.

17. By memorandum dated 30 October 2015, delivered on 26 November 2015, the Applicant was requested to respond to formal allegations of misconduct.

18. By email dated 9 December 2015, the Applicant submitted his comments on the allegations of misconduct. Following a review of his comments, and by email dated 1 June 2016, the Applicant was provided with additional information and was

invited to provide any further comments. By email dated 8 June 2016, the Applicant submitted his further comments.

19. By email dated 26 July 2016, the Applicant was provided with the additional information obtained following receipt of his comments and he was invited to submit any further comments within two weeks. Having received no response by the end of the two-week period, OHRM sent an email to the Applicant on 22 August 2016 to inform him that no response had been received, inviting him again to submit further comments, giving him the new date of 6 September 2016. The Applicant did not submit a further response.

20. By letter dated 4 October 2016, the Applicant was informed that: (a) upon review of the dossier, and taking into account the Applicant's comments on the allegations, the Under-Secretary-General for Management ("USG/DM") had concluded that the allegations against the Applicant are established by clear and convincing evidence; and (b) the USG/DM had decided to impose upon the Applicant the disciplinary measures of separation from service with compensation in lieu of notice and with termination indemnity.

Procedural History

21. On 18 January 2017, the Applicant filed an application before the Tribunal and the Respondent filed his reply on 20 February 2017.

22. On 12 March 2017, the Applicant filed two documents consisting of emails from the Applicant to unidentified staff members.

23. The present case was reassigned to Judge Alexander W. Hunter, Jr. on 8 January 2018.

24. On 19 January 2018, by Order No. 8 (NY/2018), the Applicant was ordered to file a submission by 24 January 2018 indicating the relevance of the documents filed by him on 12 March 2017 and the Respondent was ordered to file a response to the

Applicant's submission dated 24 January 2018 by 29 January 2018. On 24 January 2018, the Applicant filed a submission pursuant to Order No. 8 (NY/2018).

25. On 29 January 2018, the Respondent filed a submission responding to the Applicant's submissions of additional documents pursuant to Order No. 8 (NY/2018).

26. On 9 February 2018, the Respondent filed a submission entitled "Motion for Case Management Discussion".

27. On 9 February 2018, by Order No. 33 (NY/2018), the Tribunal directed the parties to, *inter alia*, file one of the following by 14 February 2018: (a) if the parties agree that this matter should be decided on the papers, they shall file their respective closing submissions; or (b) if either or both parties request a hearing, they shall file a joint submission proposing hearing dates.

28. On 14 February 2018, the parties filed their respective closing submissions.

Parties' submissions

29. The Applicant's principal contentions may be summarized as follows:

The investigation was biased and based on false statements by Ms. X.

a. The contested decision is flawed as the Applicant's actions were taken out of context in order to fit the provisions under ST/SGB/2008/5. The contested decision was mainly based on Ms. X's declarations which are false and exaggerated. The Administration ignored the convincing evidence in the Applicant's favor;

b. The Panel was partial and did not properly consider all the evidence before it. The report produced by the Panel shows a clear bias in favor of Ms. X by giving full credit to her declarations and never questioning them, not even when they were clearly self-contradicting and erroneous;

c. The Applicant's actions towards Ms. X were driven by his genuine attraction and love for her, with intentions for a long-term relationship. The Applicant does not believe that a harasser would envision a lifelong relationship with his victim. His intentions were improperly regarded as irrelevant;

d. The concerns for Ms. X's safety expressed by her are fake since the Applicant always behaved in a predictable manner, respected her interdiction to approach her and telegraphed his actions. In addition, Ms. X was part of a very strong social group and had powerful protectors;

e. The Applicant denies any accusations of sexual harassment towards Ms. X. The only "wrongdoings" the Applicant admits to are: a) overestimating his chances for a relationship with Ms. X, mainly due to her encouragement; and b) writing a number of Facebook messages between 11 August 2012 and 30 September 2012 (after receiving a text message from Ms. X's cell number to tell the Applicant she had a boyfriend already) in an attempt to get Ms. X to communicate with the Applicant and re-gain her affections;

f. Ms. X further encouraged the Applicant by actively "un-blocking" him from Facebook. The Applicant's messages were prompted by Ms. X's action of unblocking the Applicant from messaging her on Facebook on or before 11 August 2012. The Applicant took the "un-blocking action" on Facebook as a sign that Ms. X continued to be interested in the Applicant and as a great encouragement to continue writing to her;

g. The Applicant ceased pursuing a relationship with Ms. X on 30 September 2012 and other communications which happened sparsely over the next three years were not and cannot be considered as "pursuing" or "approaching" as the Respondent contends;

h. With regards to the Respondent's contention that the application itself states the facts central to the case, namely, that the Applicant knew that Ms. X did not want his advances and that he continued his approaches, knowing they would offend her, the Applicant rejects these statements as inexact and out of context. The Applicant only knew for sure that Ms. X did not want his advances after 22 November 2012, when she made her complaint. Prior to that, her last action with regards to the Applicant was to unblock the Applicant from Facebook messaging on or before 11 August 2012. After 30 September 2012, none of the sparse communications over a period of the following three years could be interpreted as "approaching" but were all of a totally different nature and intention, namely, peaceful forms of protest against the unfair treatment.

The allegations made by Ms. X were made in bad faith.

i. Ms. X made her claims as revenge. It is clear now that Ms. X became upset, infuriated or frustrated when she saw the Applicant stop his advances towards her on 30 September 2012 and continue with his life;

j. There is a clear time overlap between Ms. X's public "character-assassination" actions, followed shortly after by her multiple complaints, and the Applicant's "breaking loose from her spell" on 30 September 2012 and starting a new relationship, of which she was aware;

k. The Applicant also submits as being relevant that he has never before been accused of harassing, stalking or disturbing anyone's life, privacy or safety.

The investigation was procedurally flawed.

l. Due to technical reasons, the Applicant had no access to the third round of questions sent to him by OHRM on 26 July 2016 and, consequently,

did not provide a reply. As a result, the Applicant's due process rights to defend himself were not respected;

m. The Facebook messages were tampered with and are not valid evidence;

n. There were errors and procedural irregularities with regard to the investigation of the Panel and the Panel was biased;

o. The four-year-long tainted investigation and the ensuing flawed and improper administrative decision caused serious prejudice to the Applicant including to his personal image, and have destroyed his career and livelihood. In addition, the prolonged stress and pressure the Applicant was subject to since November 2012 seriously affected his health and well-being. The Applicant seeks compensation, namely: (a) USD500,000 for the loss of his job; (b) USD250,000 for the damage caused to the Applicant's personal image; and (c) USD250,000 for the damage caused to the Applicant's health by the prolonged stress, tension and anxiety suffered during the long investigation.

30. The Respondent's principal contentions may be summarized as follows:

a. The material facts of this case are not in dispute. The evidence in the record before the Tribunal clearly establishes the Applicant's sexual harassment of Ms. X. During the proceedings before the Tribunal, the Applicant has provided no information or evidence to support his factual contentions that Ms. X's complaint "was a totally groundless accusation";

b. The Applicant's conduct amounts to serious misconduct and the disciplinary sanction imposed on the Applicant is proportionate to the offence of his conduct;

c. The Applicant's procedural rights were fully respected throughout the investigation and the disciplinary process. The additional information submitted by the Applicant in January 2018, namely, his emails to mission personnel in which he alleged he could not access his work email, is not exculpatory and thus not relevant to this case.

Consideration

Scope of review

31. Section 5.20 of ST/SGB/2008/5 outlines the scope of judicial review (emphasis added):

> 5.20 Where an aggrieved individual or alleged offender has grounds to believe that the *procedure followed in respect of the allegations of prohibited conduct was improper*, he or she may appeal pursuant to chapter XI of the Staff Rules.

32. The consistent jurisprudence of the Appeals Tribunal in cases concerning the imposition of a disciplinary measure is that the Dispute Tribunal must verify if a three-fold test is met as follows: (1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts qualify as misconduct; and (3) whether the sanction is proportionate to the offence (*Abu Hamda* 2010-UNAT-022; *Haniya* 2010-UNAT-024; *Wishah* 2015-UNAT-537; *Portillo Moya* 2015-UNAT-423). It is also incumbent on the Tribunal to determine if any substantive or procedural irregularity occurred (*Maslamani* 2010-UNAT-028; *Hallal* 2012-UNAT-207), either during the conduct of the investigation or in the subsequent procedure.

33. Before commencing its review, the Tribunal must recall that it is not vested with the authority to conduct a fresh investigation of the initial harassment allegations (*Messinger* 2011-UNAT-123; *Luvai* 2014-UNAT-417). It is not the Tribunal's role to substitute its own judgment for that of the Secretary-General (see, e.g., *Sanwidi* 2010-UNAT-084). However, the Tribunal may draw its own conclusions from the

evidence collected by the fact-finding panel (*Mashhour* 2014-UNAT-483; *Dawas* 2016-UNAT-612).

Have the facts on which the disciplinary measure is based been established?

34. The Tribunal finds that the material facts on which the disciplinary measure is based have been sufficiently established and are not in dispute between the parties. In particular, the Tribunal notes that the Applicant has admitted that: (a) he had a romantic interest in Ms. X from their initial meeting at the Sajj House restaurant, Liberia, in January 2012 and expressed his interest through phone calls and text messages to Ms. X between June and August 2012 , some of which contained sexual content; (b) Ms. X ignored the calls and after receiving the Applicant's text messages, she sent the Applicant a text message in July 2012 stating that she was not interested in his advances and that if he did not stop contacting her she would call the police; (c) the Applicant was placed on notice by various individuals, including the Chief Security Adviser at UNMIL, to stop contacting Ms. X; and (d) the Applicant however continued to approach Ms. X until November 2015. These facts are corroborated by additional documentary evidence including: (a) the Applicant's own statements; (b) a copy of over one hundred Facebook messages from the Applicant to Ms. X between 21 June and 22 November 2012; (c) the Applicant's telephone records showing the phone calls and text messages sent by him to Ms. X between June and August 2012; (d) the letter dated 6 February 2013 from the French Ambassador to Liberia to the SRSG, UNMIL, in which the Ambassador requested the SRSG's assistance in addressing the concerns raised by the Applicant's actions; (e) copies of emails from the Applicant to Ms. X between October 2014 and October 2015, in which he made further contact in Haiti; and (f) witness statements adduced as part of the Panel's investigation, including that of the Applicant, Ms. X, the Chief Security Adviser's statement and Ms. AC's (name redacted for privacy) email statement.

Did the established facts amount to serious misconduct under the applicable staff regulations and rules?

35. The Tribunal is satisfied, having regard to the contents of the evidence on file, that the established facts considered in their entirety amount to misconduct in the form of sexual harassment for the reasons particularized below.

36. The essence of the Applicant's claim is that his actions were incorrectly determined by the Administration to amount to misconduct in the form of sexual harassment. The Applicant argues that the evidence on record has been taken out of context by the Administration. He contends that Ms. X was erroneous in her subjective belief that she was the victim of sexual harassment and that what occurred between the Applicant and Ms. X did not amount to sexual harassment as his true intention was to initiate and engage in a long-term romantic relationship with Ms. X.

37. The Applicant's case must be assessed under the applicable legal framework which consists of staff rule 1.2 (Basic rights and obligations of staff) and ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

38. Staff rule 1.2(f) provides that 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.

39. ST/SGB/2008/5 was promulgated for the purpose of "ensuring that all staff members of the Secretariat are treated with dignity and respect and are aware of their role and responsibilities in maintaining a workplace free of any form of discrimination, harassment, including sexual harassment […]". Under this Bulletin, discrimination, harassment, including sexual harassment, and abuse of authority are classified as "prohibited conduct".

40. ST/SGB/2008/5 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". ST/SGB/2008/5 further provides that all staff members, in their interactions with others, are expected "to act with tolerance, sensitivity and respect for differences. Any form of prohibited conduct in the workplace or in connection with work is a violation of these principles and may lead to disciplinary action, whether the prohibited conduct takes place in the workplace, in the course of official travel or an official mission, or in other settings in which it may have an impact on the workplace".

41. The Appeals Tribunal held in *Applicant,* 2012-UNAT-209, that the test of sexual harassment is "not if [the applicant's] actions and behaviour can be explained but the perception of his behavior by a reasonable person within a multicultural environment". This Tribunal held in *Hallal*, UNDT-2011-046, that the perceptions of a victim are to be considered relevant in a case of sexual harassment. The Tribunal further notes that sexual harassment can manifest itself in different forms, its determination is fact specific, and its occurrence is not limited to work places during work hours.

42. In his application, the Applicant stated that he first saw Ms. X in January 2012 at a restaurant in Monrovia, Liberia and developed an attraction to her. He then attempted to contact her several times in an attempt to develop a relationship with her. The Applicant admitted in his witness statement, dated 12 June 2015, that he sent Ms. X text messages such as: "I would like to meet with you", and "I am deeply attracted to you, I would love to be with you". The Applicant makes it clear in his application that he knew his approaches to Ms. X were not welcome. The Applicant stated that when he sent Ms. X a text message in July 2012, she "replied with a very angry tone ... that she 'already had a boyfriend' and [he] should stop contacting her". He further stated that he did not get a response from Ms. X to his various subsequent

messages and she had blocked him on Facebook. In her witness statement, Ms. X stated that she decided to tell the Applicant clearly that she was not interested and sent the Applicant text messages warning him that if he did not stop contacting her, she would call the police. Despite Ms. X's request to stop, the Applicant continued to contact her. The Applicant kept writing to Ms. X on Facebook from 21 June until November 2012, sending her "a total of 131 messages" and that "she continued to ignore [him]". The Applicant further conceded in his application that he used words which could be interpreted as sexual in nature and that he sent "140 [Facebook] messages with a few euphemism[s] with potentially sexual connotation[s]". The record confirms some of the Applicant's Facebook messages were of a sexual nature as follows:

> At 9:48 a.m., on 14 August 2012: ".... so you have NOT blocked me again? ... please, please ... stop writing to me, stop texting me, stop talking to me! ... ay, ay, ay! ... that means you DO want to be "punished" ... you're even ex[c]ited about the prospect of it... well, [Ms. X], my dear, well noted ... we'll definitely see to it!!! ... bye for now ... "
>
> At 6:10 p.m., on 16 August 2012: "LAST WARNING!!! By choosing, against all good advice, not to shut me out for good and for ever, you hereby acknowledge accepting the high risk of being subjected to some cruel caressing, slow kissing, heavy cuddling and even more serious ... you know what, by the undersigned ...:)) c. student of TYY and i'm not joking"
>
> At 8:36 a.m., on 20 August 2012: "why the blondes favor contraceptive pills over condoms? - because they are easier to swallow! ... :))"
>
> At 6:29 a.m., on 29 September 2012: "have you heard this one? ... good education is like an erection; when you have it, everybody can see it!"
>
> At 12:28 p.m., on 22 November 2012: " ... and than they handcuffed me and said "whatever you say, can and WILL be held against you!", and said "[Ms. X]!" ... "

43. The Applicant's continued efforts to contact Ms. X are also evident in the phone records of the Applicant obtained by the Special Investigations Unit, UNMIL, which show that he telephoned Ms. X multiple times between June and August 2012.

44. The record shows that following receipt of the Facebook messages, Ms. X made a complaint to the Head of Security at UNMIL in order to informally address the matter. The Applicant acknowledges that he was warned by various individuals, including the Head of Security at UNMIL, to leave Ms. X alone. Nevertheless, the Applicant continued to pursue contact with Ms. X as he knew, according to his statements in his application to the Dispute Tribunal, that "it was going to further annoy Ms. X when she saw [him] at 'her places'" and he considered "this as [his] little revenge for the wrong she had caused [him]".

45. In December 2013, Ms. X departed from Liberia to take up a position in Haiti with MINUSTAH. The Applicant stated in his application that he knew, at the time of application for a job in Haiti, that Ms. X "was working in Haiti and that it would annoy her to find out [he] was also relocating there" and "it gave [him] satisfaction... another small revenge for all humiliation and character assassination she had subjected [him] to". The Applicant continued his efforts to contact Ms. X in Haiti and stated that he "wrote a few emails to [Ms. X] between mid-August and 19 November 2015, some showing affection and concern".

46. The Tribunal considers that the Applicant's conduct amounts to sexual harassment in violation of staff rule 1.2(f). A plain reading of the Applicant's Facebook messages shows their sexual nature. Moreover, in the Tribunal's view, the Applicant was put on notice that his sexual advances were unwelcome by Ms. X's text message in July 2012 requesting that he stop contacting her. However, the Applicant continued sending sexually oriented messages to Ms. X. In this context, the Applicant's actions can reasonably be perceived as intimidating, lacking sensitivity and were in pursuit of his own personal gratification.

47. The Tribunal further finds that the Applicant has shown no understanding of the impact of his conduct on Ms. X and seems to still be under the impression that sexual harassment cannot occur in a situation where the harasser has romantic longer-term relationship interests in the complainant. In this regard, the Applicant puts forward a number of contentions which are based on his misapprehension of the

circumstances surrounding his actions towards Ms. X, such as that he and Ms. X had allegedly engaged in "mutual flirting and seduction". The Tribunal agrees with the Respondent's submission that these contentions do not mitigate the gravity of the essential facts under consideration.

48. In *Hallal,* UNDT-2011-046, the Tribunal held that the subjective belief of the victim must be taken into account in determining whether sexual harassment has occurred. It is very clear from her complaint to the Chief Security Adviser and her statements that Ms. X was distressed by the Applicant's unwelcome and persistent advances, and felt harassed and unsafe, especially as she became aware from the content of several messages that the Applicant was awaiting Ms. X in a car near her residence and watching her coming home from work.

49. Moreover, the Tribunal finds no merit in the Applicant's claim that the allegations made by Ms. X were made in bad faith as a way of "revenge" by her. On the contrary, the evidence on file demonstrates Ms. X's consistent rejection of the Applicant's conduct. She attempted to informally resolve the matter in good faith several times, including clearly communicating to the Applicant that his advances were not welcome and were inappropriate. In Ms. X's witness statement dated 14 April 2015, she stated that she pursued the formal complaint as she became increasingly scared by the Applicant's behavior and by his inability to understand the impact of his actions on her. Ms. X's account is corroborated by the other witness statements adduced as part of the Panel's investigation, including the Chief Security Adviser's statement, who attested to the fact that Ms. X approached him for assistance in resolving the matter, stating that she did not want to create trouble for the Applicant but wanted the harassment to stop. As Ms. X became increasingly concerned about her safety in light of the Applicant's continued advances, she requested of her friends to "keep an eye on [her]". The Tribunal finds that Ms. X's actions went above and beyond what a staff member should have to endure to secure their wellbeing. The Applicant on the other hand, seems to have very little sensitivity towards Ms. X's concerns, nor does he appear to grasp the impact of his actions on

Ms. X's welfare. His focus seems to have been entirely on his own selfish desire to pursue his attraction to Ms. X through a sexual relationship or a friendship.

50. Based on the foregoing, the Tribunal finds that the Applicant's actions amounted to misconduct in accordance with staff rule 1.2(f).

Due process

51. Finally, the Applicant contends that the disciplinary measure imposed upon him was unlawful by pointing to a number of alleged flaws that occurred during the investigation and argues that he was not given due process.

52. The Applicant states that the investigation was flawed with a number of procedural irregularities including: (a) the Applicant was not able to fully respond to the charges against him as he had no access to the third round of questions sent to him by the OHRM on 26 July 2016 and consequently did not provide a reply; (b) the Facebook messages are not valid evidence as the version of the Facebook messages presented as evidence by Ms. X may have been tampered with/edited; (c) the Panel's report incorrectly quoted the amount of Facebook messages sent by the Applicant "as 200, 500, more than 500, 700" when in fact they were "140" and the Panel did not take the time to properly review the messages; and (d) his proposed witness was not interviewed by the Panel.

53. After review of the record, the Tribunal is satisfied that the investigation respected the formal requirements set out in ST/SGB/2008/5 and that the Applicant was afforded due process. Notably, the Applicant was interviewed by the Panel on 12 June 2015 and asked about all material aspects of this case. He had the opportunity to review his record of the interview and make amendments and introduce new material. He signed the amended record of his interview to certify its accuracy on 7 August 2015. On 30 October 2015, the Applicant was provided with the allegations of misconduct memorandum, together with all supporting documentation. In the allegations memorandum, the Applicant was informed of his right to seek the assistance of counsel and was given the opportunity to comment on the allegations

against him. The Applicant was afforded an opportunity to request an extension of time in which to submit his comments on the allegations of misconduct. The Applicant provided further comments on 9 December 2015, and in June 2016 which were considered by the Panel. On both occasions, the Panel undertook further fact-finding exercises, which again resulted in a finding that there was no exculpatory evidence embodied therein. Based on the foregoing, the Tribunal considers that at every critical stage of the investigation, the Applicant was given adequate time and the opportunity to comment and to provide supplemental information.

54. The Applicant claims that he was not able to fully respond to the charges against him as he had no email access to the questions sent to him on his work email account by the OHRM on 26 July 2016. The Tribunal considers that the Applicant has failed to submit sufficient evidence showing his alleged access problem. He states in his 24 January 2018 submission that "[t]he discontinued access to the email was probably due to password expiration and non-renewal during the limited allotted tim[e] window". It is undisputed that the Applicant did not contact the dedicated communication channel that he had been using for the disciplinary process (chiefhrps-ohrm@un.org), he did not inform them of any alleged problem with his work email account, nor did he provide them with his personal email. In any case, the Chief of the Communications and Information Technology Service at the mission confirmed that the Applicant had "continuous access" to his work email account "from his arrival (or account creation) on 17 September 2014 until his departure in October 2016". The Tribunal agrees with the Respondent in that it is not correct for the Applicant to claim breach of procedural fairness based on his own failure to duly inform the decision-maker of the status of his contact information.

55. In addition, upon review of the third set of questions sent by email to the Applicant on 26 July 2016, the Tribunal is of the view that the additional information would not have changed the final outcome of the matter. The email contained additional documentation adduced by the OHRM as the result of a supplement inquiry undertaken following the Applicant's comments on the allegations of

misconduct. The additional information concerned: (a) the Applicant's recruitment for MINUSTAH; (b) an email statement from a witness proposed by the Applicant, Ms. AC (name redacted for privacy) outlining her version of the events during the initial meeting at the Sajj House restaurant, Liberia between the Applicant, Ms. X and herself (which corroborated Ms. X's version of the events); and (c) an opinion from the Medical Service Division that there was no clear causal relationship between the Applicant's medical condition in 2008 and the alleged actions concerning Ms. X. Upon review of the 26 July 2016 email by the OHRM, none of the information cited would have affected the material findings of the Panel.

56. In regard to his complaint that one of his proposed witnesses was not interviewed by the Panel, the Tribunal notes that the Panel maintains the discretion to determine how to conduct the investigation of a complaint, including who may have relevant information about alleged conduct and the extent to which additional enquiries and/or evidence may be required to reach a conclusion in regard to the issues under investigation (*Masylkanova* UNDT-2015-088). The only specific limitation on this discretion is contained in sec. 5.16 of ST/SGB/2008/5 which provides that "[t]he fact-finding investigation shall include interviews with the aggrieved individual, the alleged offender and any other individuals who may have relevant information about the conduct alleged". The Panel complied with this requirement and properly exercised its discretion on how to conduct the investigation, including diligently investigating the Applicant's account of events, including interviewing witnesses proposed by the Applicant such as Ms. AC.

57. The Applicant also argues that the Panel did not properly review the evidence and, in particular, did not count the number of Facebook messages stating that the "[Facebook] messages quoted by various actors in their statements vary widely (200, 500, more than 500, 700) when in fact they were 140". The Tribunal notes there is some discrepancy in the volume of Facebook messages quoted in the various statements; however, finds that the discrepancy to be immaterial. The Applicant himself admits he sent Ms. X 140 Facebook messages in his closing statement and

131 messages in his application. The Tribunal is satisfied that the Panel considered the totality of the evidence on file in making its determination. Furthermore, the Tribunal is of the view that whilst both content and quantity of communications are factors in determining harassment, however, one sexually inappropriate message can amount to sexual harassment, depending on the context and the perceptions of a complainant.

58. The Applicant's challenge to the credibility of both Ms. X and the evidence on file has no merit. He provides no satisfactory evidence to support his contentions that Ms. X made false statements in bad faith, that she engaged in mutual flirting or welcomed the Applicant's advances through allegedly unblocking him on Facebook after initially blocking him, or that she tampered with the content of the Facebook messages. The Tribunal finds no evidence to suggest that Ms. X was not credible. To the contrary, her version of events is also corroborated by the documentary evidence.

59. Based on the above, the Tribunal is satisfied that the key elements of the Applicant's right to due process were met. The Applicant has not met his burden in proving that the contested decision was based on a mistake of fact, a lack of due process, or that it was arbitrary or motivated by prejudice or other extraneous factors. Consequently, the Tribunal considers that it is clear from the evidence that the Applicant's conduct was continuous and was sexual in nature and was neither welcomed nor desired by Ms. X, and that there can be no other possible interpretation as to the intent behind the Applicant's actions other than to sexually harass Ms. X.

Was the disciplinary measure imposed proportionate to the misconduct?

60. The jurisprudence on proportionality of disciplinary measures provides that the Tribunal will give due deference to the Secretary-General unless the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary. Should the Dispute Tribunal establish that the disciplinary measure was disproportionate, it may order imposition of a lesser measure. However, it is not the role of the Dispute Tribunal to second-guess the correctness of the choice made by

the Secretary-General among the various reasonable 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 (see *Sanwidi* 2010-UNAT-084; *Said* 2015-UNAT-500; *Hepworth* 2015-UNAT-503; *Portillo Maya* 2015-UNAT-523).

61. The Respondent submits that the disciplinary measure of separation with compensation in lieu of notice and with termination indemnity (rather than the more severe measure of dismissal) was proportionate for the Applicant's misconduct and consistent with the practice of the Secretary-General in similar cases.

62. The evidence, notably the decision letter dated 4 October 2016, shows that the USG/DM considered the nature of the Applicant's actions, took into account the principles of consistency and proportionality, as well as whether any aggravating and mitigating considerations applied to the case at hand.

63. The past practice of the Organization in cases involving sexual harassment shows that disciplinary measures have been imposed at the strictest end of the spectrum, namely, separation from service or dismissal in accordance with staff rule 10.2(a). The Appeals Tribunal stated in *Mbaigolmem,* 2018-UNAT-819, that:

> … [s]exual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment.

64. In the present case, the evidence shows that the USG/DM considered, as mitigating factors, the period of time taken to resolve the matter, the Applicant's long service with the Organization, including services at various field missions, and the Applicant's claimed stress from a heavy workload and difficult work environment. All of these factors were taken into account in determining the disciplinary measure to be imposed.

65. In light of the above, the Tribunal finds that the disciplinary measure imposed of separation from service with compensation in lieu of notice and with termination indemnity was proportionate to the misconduct that the Applicant committed and was consistent with the practice of the Secretary-General in similar cases.

Conclusion

66. The Applicant's claim is rejected in its entirety.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 27th day of September 2018

Entered in the Register on this 27th day of September 2018

(Signed)

Nerea Suero Fontecha, Registrar, New York