UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/096
Judgment No.: UNDT/2020/094
Date: 22 June 2020
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Katya Melluish, OSLA

Counsel for Respondent:
Nusrat Chagtai, ALD/OHR, UN Secretariat
Nicole Wynn, ALD/OHR, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant, a former staff member of the International Residual Mechanism for Criminal Tribunals ("IRMCT") in Arusha, Tanzania, appeals a decision not to refer another staff member for accountability following the Applicant's complaint of prohibited conduct.

2. For the reasons stated below, the Tribunal grants the application in part.

Summary of relevant facts and procedural history

3. On 15 January 2016, the Applicant reported to the then-Registrar of the IRMCT that she had been the victim of sexual misconduct by the IRMCT Medical Officer during the entry medical examination that took place the day prior.

4. On the 27 January, the Registrar convened a fact-finding panel to investigate these allegations under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority). The fact-finding panel was composed of the Chief, Human Resources Section ("Chief, HRS") of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the Chief, Safety and Security Section ("Chief, SSS") of the ICTY.

5. The fact-finding panel interviewed the Applicant, two of her colleagues, the IRMCT nurse, the Medical Officer and the Chief Medical Officer of the ICTY.

6. On 2 June 2016, the fact-finding panel submitted its findings to the Registrar as the responsible official under sec. 5.17 of ST/SGB/2008/5.

7. On 19 December 2016, the Office of the Registrar requested the fact-finding panel to supply additional information which was provided in a supplemental report on 22 December 2016.

8. On 1 January 2017, a new Registrar was appointed to the IRMCT.

9. On 6 February 2017, the new Registrar notified the Applicant of his decision stating that he did not find, based on the report of the fact-finding panel, that there was sufficient evidence to indicate sexual harassment or other prohibited conduct under ST/SGB/2008/5. The Registrar further informed the Applicant that he would not refer the case for disciplinary action in accordance with sec. 5.18(b) of ST/SGB/2008/5 and that managerial action would be sufficient to address the matter. It was later revealed that the managerial action consisted of a five hour training course for the Medical Officer on pre-employment medical examinations.

10. On 7 April 2017, the Applicant requested management evaluation of the Registrar's decision.

11. On 17 October 2017, the Under-Secretary-General for Management accepted the recommendation of the Management Evaluation Unit ("MEU") and upheld the Registrar's decision.

12. On 17 July 2017, the Applicant filed the present application with the Nairobi Registry.

13. On 5 December 2019, at the Applicant's request, the case was transferred to the New York Registry and assigned to the undersigned Judge on 1 April 2020.

14. On 7, 8 and 18 May 2020, the Tribunal conducted a hearing. The following witnesses testified: the Applicant; the Registrar of the IRMCT; the Chief, HRS; a Legal Officer who was close to the Applicant at the time of the events; the Alternate Focal Point for Women/Gender Officer of the IRMCT; the Director of the then- Division of Medical Services ("MSD") and an Officer of UN Women as an expert witness on the application of ST/SGB/2008/5.

Consideration

The parties' submissions and scope of the case

15. The Applicant's contentions can be summarized as follows:

a. The contested decision was irrational and perverse. The facts established by the fact-finding panel amounted to sexual harassment. The Administration disregarded relevant considerations while considering irrelevant facts;

b. It was not for the fact-finding panel nor the Registrar to determine whether actual prohibited conduct had occurred. Only the then-Office of Human Resources Management ("OHRM") could have made such a determination;

c. The procedure for handling the Applicant's complaint was unduly delayed;

d. The Administration failed to protect the Applicant during the investigation and after the administrative decision was notified to her. She was forced to work in close proximity to the Medical Officer, had no proper access to medical care and no proper counseling.

16. The Respondent in essence, responds that the decision was lawful and procedurally correct, and the managerial action undertaken thereafter was adequate. The Respondent also states that the IRMCT took every measure possible to address the Applicant's concerns during and after the investigation.

Legal framework

17. The Appeals Tribunal has consistently held that the instigation of disciplinary charges against a staff member is the prerogative of the Organization, and it cannot, as

such, be required to do so (see, for instance, *Auda* 2017-UNAT-787, para. 30). In reviewing such a decision, the role of the Tribunal is not to determine whether the decision was correct but rather whether the Administration legally exercised its discretion. The Appeals Tribunal has recalled that in examining the validity of the Administration's exercise of discretion, the Dispute Tribunal's scope of review is limited to determining whether the exercise of such discretion is legal, rational, reasonable and procedurally correct to avoid unfairness, unlawfulness and arbitrariness (see, for instance, *Abusondous* 2018-UNAT-812, para. 12). In this regard, "The [Dispute] 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" (see *Sanwidi* 2010-UNAT-084, para. 40).

Was the contested decision tainted by procedural irregularities?

18. The Applicant testified to several instances in the process leading up to the contested decision, which she submits, constitute violations of the applicable procedures.

19. With respect to the investigation, the Applicant claims that the members of the fact-finding panel asked inappropriate questions during the interviews with her and that the confidentiality of the process was not respected. The Applicant stated that the fact-finding panel asked her to demonstrate on herself the way the Medical Officer had performed the breast examination. She testified that she was shocked by this request and that the Chief, SSS stated that this should not be a problem because "we are all women here". The Chief, HRS testified that she did not recall the Chief, SSS having made such a statement and that, if she had, it would have been inappropriate. The Respondent denies this claim stating that there is no evidence to support it. He recalls that while the Applicant was afforded the opportunity to and did comment on the record

about her interviews with the fact-finding panel, she did not raise the issue of the inappropriate questions until 17 August 2017 when she submitted her request for management evaluation.

20. The contemporaneous record of the Applicant's interviews of 27 and 28 January 2016, signed by the Applicant, does not reflect any such question or remark. The Applicant explained during her testimony that she chose not to raise any concerns at the time because she wanted to remain respectful, particularly given that the members of the fact-finding panel were senior staff members. Moreover, she was already concerned that her filing the complaint may have a negative impact on her career in the IRMCT and did not want to increase such a risk by complaining about the members of the fact-finding panel.

21. The Tribunal finds the Applicant's testimony on this issue was credible, while the Chief, HRS was evasive in her response, claiming that she did not remember having heard that statement because the interview took place more than four years ago. The Tribunal finds no evidence, however, to support the Applicant's concerns that her career would be negatively impacted by her filing of this complaint. The Respondent disputes this statement and recalls that the Applicant had routinely contacted senior officials, including both panel members, the Registrar, the Assistant Secretary-General for Management and the Under-Secretary-General for the Department of Management concerning her case.

22. The Applicant further claims that the Administration did not properly respect the confidentiality of the process. She states that the Chief, SSS, while standing in the hallway of the IRMCT premises, told her that allegations of sexual misconduct were commonplace in the United Nations. The Applicant feared that if that statement had been overheard by passers-by, it would have revealed that she had made a complaint of sexual misconduct. The Respondent counters that there is no evidence that the Administration breached the confidentiality of the process and that it was the Applicant

who was the one who discussed her complaint with third parties, including at least five of her friends and colleagues.

23. While talking about the Applicant's complaint in public, as recounted by the Applicant, would have been inappropriate for a member of a fact-finding panel, the Tribunal finds no evidence to suggest that the Administration breached the confidentiality of the process.

24. The Tribunal also heard evidence from the Director of the then-Medical Services Division ("Director"). The Director stated that she was not involved in the fact-finding process prior to the issuance of the 2 June 2016 report. She stated that she should have been consulted prior to the issuance of the report because the complaint reported accusations of possible sexual misconduct against a medical practitioner of the United Nations. She explained that she only received the 2 June 2016 report sometime after it was issued and was immediately concerned about how the investigation had been carried out. Her main concern was that the facts of the case required an analysis of whether the incident constituted prohibited conduct or rather reflected a performance deficiency. She stated that the fact-finding panel was not capable of making a determination of the Medical Officer's professional competence without proper consultation with her division. She further expressed concern that instead of bringing the matter up to her for her input, the fact-finding panel interviewed the Medical Officer's first reporting officer who had no technical expertise on the subject-matter. The Director stated that the report does not show clearly that the Medical Officer's conduct constitutes sexual harassment and noted that there were no other complaints concerning him. She stated that his conduct may have been a performance or skills issue.

25. The Director also expressed concern about the finding of the fact-finding panel in the supplemental report of 22 December 2016. The report stated that the Medical Officer's explanations of his performance of breast examinations and adequately filling out the medical forms were questionable. However, the panel did not find that "his

competency as a doctor also extended to his behavior regarding prohibited conduct such as sexual harassment". The Director testified that she did not believe that the panel was capable of making a finding concerning the Medical Officer's professional competency. Not only were the members of the panel not subject-matter experts, but the overview of the investigation was too narrow. The Director explained that to make a reasonable determination of a medical practitioner's competency, it was usually required to review at least nine cases handled by the medical practitioner.

26. The Director further stated that if a medical practitioner in the United Nations was found to have committed sexual misconduct which is an extremely serious professional misconduct, the Medical Division would have been obligated to report the practitioner to the regulator in his or her home country. The Director testified that she was not satisfied that the fact-finding panel had given the Medical Officer the appropriate professional consideration in reaching their conclusion.

27. The Tribunal notes further that in her email to the Registrar on 31 January 2017, the Director stated that, having reviewed the supplemental report of 22 December 2016, she was "comfortable with no further action" as regards to the possible referral of the Medical Officer to his national regulator. She further recommended that the Medical Officer be professionally counselled in the matter of record-keeping and further recommended a course in breast pathology. In terms of organizational learning, the Director requested a review of the Medical Officer's personal history form as it "seems possible that [the Organization] did not recruit a practitioner with the requisite skills and experience for this type of role". She further offered to "draft a letter to [the Medical Officer] (or advise on the content of same) regarding the professional standards issues". During her testimony in court, the Director added that she should have been consulted to determine an appropriate remedial plan for the Medical Officer and to determine whether additional managerial steps were required to ensure the institutional accountability of the Organization. She stated that her offers to the Registrar to assist in this matter went unheeded.

28. The Tribunal recalls that the managerial action undertaken in this case was a five-hour training on pre-employment medical examinations. The Registrar testified that he was satisfied that the matter of the Medical Officer's suitability for his job was properly handled with only a short training regiment because another candidate had been selected for the fixed-term position of medical officer at the IRMCT and therefore, the Medical Officer was to separate from the Organization soon thereafter. However, the Registrar stated that the selected candidate eventually withdrew his acceptance of the position and the vacancy had to be re-advertised. Eventually, this Medical Officer was successful in his application and was selected for the fixed-term position.

29. In light of this evidence, the Tribunal finds that by not seeking the Director's feedback in a timely manner, the Registrar failed to take into consideration relevant matters before making the contested decision. From the Director's testimony along with the contemporaneous evidence, the Tribunal concludes that both the members of the fact-finding panel and the Registrar himself lacked the required subject-matter expertise. Therefore, it was simply impossible for the Registrar to properly determine whether the Medical Officer's conduct amounted to prohibited conduct or professional incompetence. The Registrar was equally ill-equipped to decide whether the Medical Officer was competent to serve in his position. Moreover, without the Director's timely involvement, it was equally impossible for the Registrar to determine an appropriate remedial measure to address any perceived shortcomings in the Medical Officer's performance.

30. In light of the evidence discussed above, the Tribunal finds that the decision-making process was vitiated by a defect that rendered the contested decision irrational.

31. The Applicant further claims that the Administration's review of her complaint was unduly delayed and that the Administration failed to protect her during that time.

32. The Applicant states that she was notified of the contested decision over a year after she submitted her complaint of prohibited conduct. This, she claims, is in violation of sec. 5.17 of ST/SGB/2008/5 which states that the fact-finding report "shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report".

33. The Respondent submits that the three-month deadline set in ST/SGB/2008/5 is not mandatory. He further provides an email to the Registrar dated 2 May 2016 wherein the Chief, SSS explains that the other member of the fact-finding panel, the Chief, HRS had to go on emergency leave in mid-May 2016 to attend to a family emergency.

34. The Tribunal recalls that the complaint was filed on 14 January 2016, with the fact-finding panel being constituted the next day. Under sec. 5.17 of ST/SGB/2008/5, the Registrar should have received the report from the fact-finding panel by 14 April 2016. However, the report was not submitted until 2 June 2016, which is almost six months after the filing of the complaint.

35. The Tribunal agrees with the Respondent that the three-month deadline for submission of the fact-finding report is not mandatory. Moreover, the Tribunal is satisfied that the family emergency faced by a member of the fact-finding panel justifies the delay in this case. However, the Tribunal finds no explanation for the delay between the date of the submission of the report on 2 June 2016 and both the Registrar's request for clarification on 19 December 2016 and the subsequent supplemental report of 22 December 2016. The Tribunal finds this delay particularly concerning given that the Registrar's term was to expire at the end of 2016.

36. The Tribunal notes further that the intervention of the Director could not have contributed to the delay as claimed by the Respondent because the Registrar never sought the Director's views. Rather, it was the Director who spontaneously reached out

to the Registrar and met with him in December 2016, that is, six months after the original report was produced.

37. The Tribunal further recalls that from the date she filed her complaint on 14 January 2016 until her assignment in The Hague on 24 August 2018, the Applicant continued working in close proximity to the Medical Officer.

38. In these circumstances, the Tribunal finds that the delay in the handling the Applicant's complaint was unjustified.

39. The Applicant further challenges the adequacy of the measures taken by the IRMCT to ensure a harmonious work environment for her during and after the fact-finding process. She states that the IRMCT failed to protect her, despite her numerous requests for assistance, from frequent contacts with the Medical Officer in and around her office. She further states that because she had no access to the medical office in the IRMCT premises, she had no adequate access to healthcare. She states that there was no staff counselor in Arusha and that the Registrar misled her when he informed her that the Medical Officer would not continue working for the IRMCT when she was due to return to Arusha at the end of a brief mission in The Hague.

40. While the Tribunal has already established that the delay in processing the Applicant's complaint was unjustified, it is not satisfied that the Applicant has proven that adequate methods were not put in place to ensure a reasonable working environment while respecting the parties' due process rights.

41. As the abundant correspondence at the time shows, the IRMCT management attempted to address the issues raised by the Applicant as she raised them. With respect to the encounters between the Applicant and the Medical Officer, the Registrar and the Chief of Human Resources both testified that the Applicant's office had been moved to a section within the Registry designated as a part of the premises where she would not have a direct view of the clinic. They explained that while they had instructed the Medical Officer to avoid contact with the Applicant, barring his access to the Registry

part of the premises where the Applicant's office was located would have made it impossible for him to discharge his duties and would have had the result of disclosing the identity of the complainant. Therefore, despite all best efforts, there were some occasions in which the Applicant came across the Medical Officer.

42. The Tribunal is also satisfied that the IRMCT management also provided appropriate solutions for the Applicant's access to local medical services when the Applicant required assistance by arranging a medical evacuation when the Applicant needed it by providing access to the IRMCT nurse and putting a driver at her disposal when she needed to access medical care locally and ensuring that a staff counselor was available to the Applicant in The Hague.

43. The Tribunal is also satisfied that the Administration acted reasonably when considering the Applicant's relocation to The Hague. The Registrar persuasively testified that a move to The Hague was only considered when the Applicant applied for a vacant position there as she had never expressed any interest moving before and had on multiple occasions expressed her commitment to the work of the IRMCT branch in Arusha.

44. In light of the above, the Tribunal finds that the Administration lawfully acted within its discretion in fulfilling its obligations under sec. 6.4 of ST/SGB/2008/5.

Relief

45. As a remedy, the Applicant asks for the rescission of the administrative decision and for the Tribunal to enter a finding that the evidence rationally justifies a referral for disciplinary action.

46. The Applicant further asks the Tribunal to award her three months salary as damages for the delay in issuing a decision, three months salary for the procedural irregularities, and additional moral damages for the harm to her career caused by the Respondent's failings in recognizing the human cost of sexual harassment for which

the Respondent claims zero tolerance. The Applicant further argued that her acceptance of her current position in the Secretariat in New York shows the impact of the contested decision on her career as she was forced to accept this job and give up her job at the IRMCT for which she trained for and was truly committed to.

47. The Applicant further seeks an award of USD20,000 in moral damages for the high degree of harm done by the contested decision. The Applicant claims that the record, namely the evidence provided by the Applicant's colleague at the time, alongside the Applicant's own testimony, show the emotional harm caused by the contested decision.

48. Finally, the Applicant seeks referral of the case to the Secretary-General for possible action to enforce accountability under art. 10.8 of the Dispute Tribunal's Statute.

49. The Respondent opposes these requests, considering that the contested decision was lawful.

50. Having found that the procedural errors in the decision-making process rendered the contested decision irrational, the Tribunal deems it appropriate to remand the decision to the IRMCT. The IRMCT shall review, in consultation with the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH"), whether additional supervisory or other measures are required for the Medical Officer.

51. In determining whether an unlawful administrative decision caused emotional harm to an applicant, the Appeals Tribunal established in *Kebede* 2018-UNAT-274:

> 20. It is universally accepted that compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both. It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If one of these three elements is not established, compensation cannot be awarded. Our case

> law requires that the harm be shown to be directly caused by the administrative decision in question.
>
> 21. […] A breach of staff member's rights, despite its fundamental nature, is thus not sufficient to justify such an entitlement. There must indeed be proven harm stemming directly from the Administration's illegal act or omission for compensation to be awarded.
>
> 22. Our jurisprudence holds that, generally speaking, a staff member's testimony alone is not sufficient as evidence of harm warranting compensation under Article 10(5)(b) of the UNDT Statute. The testimony of an applicant in such circumstances needs the corroboration of independent evidence (expert or otherwise) to support the contention that non-pecuniary harm has occurred. Much will depend on the circumstances of the situation at hand, as the existence of moral damages shall be assessed on a case-by-case basis.

52. With respect to the award of compensation for moral damages, the Tribunal is guided by *Kallon* 2017-UNAT-742 where the Appeals Tribunal found:

> 70. The second kind of moral injury identified in *Asariotis* [2013-UNAT-309] is that of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights. Harm of this nature is associated with the insult to dignitas but refers to injury of a particular kind as evidenced by the manifestation of mental distress or anguish. Its presence in the applicant may confirm the violation of personality rights, but in addition might justify a higher amount as compensation. Evidence of this kind of harm speaks to the degree of injury and the issue of aggravating factors. Many who are affronted in their dignity may be of a personality type better able to withstand it, others are more vulnerable. And delictual principles (the so-called "thin skull rule") teach that we are obliged to take our victims as we find them. The best evidence of this kind of harm and the nature, degree and ongoing quality of its impact, will, of course, be expert medical or psychological evidence attesting to the nature and predictable impact of the harm and the causal factors sufficient to prove that the harm can be directly linked or is reasonably attributable to the breach or violation. But expert evidence, while being the best evidence of this kind of injury, is not the only permissible evidence. This Tribunal accepted as much in Asariotis when it explicitly stated that such harm can be proved by evidence produced. There is no absolute requirement in principle or in the rules of evidence that there must be independent or expert evidence. In some

> circumstances, taking a common sense approach, the testimony of the applicant of his mental anguish supported by the facts of what actually happened might be sufficient.

53. In the present case, with respect to the Applicant's claim regarding the impact of the contested decision on her professional career, the Tribunal recalls that she accepted her selection to a P-3 level post in a permanent office of the Secretariat in New York. Compared to her P-2 level position with the IRMCT, an institution which is meant to shut down once its operations are completed, her current post is a promotion to a more stable position.

54. The Tribunal is sympathetic to the Applicant's view that her true calling was to work in support of victims of the Rwandan genocide and that the contested decision caused her to leave the IRMCT to what she considered a less interesting job. It clearly transpired from her testimony and her submissions that she finds her new position somewhat beneath her capabilities and motivation. The Tribunal finds that these statements not only do not prove an impact to her career, but also are inconsiderate to the staff members of this Organization that the Applicant is meant to support and advise in her current role, as well as towards the many colleagues whose posts were downsized in both branches of the International Criminal Tribunals who could not transition to the IRMCT.

55. This notwithstanding, the Tribunal is persuaded that the contested decision caused an undeniable emotional harm to the Applicant. Not only did the IRMCT take over a year to communicate the outcome of the complaint after she submitted her rightful request for management evaluation on 7 April 2017, she only received a response from the Management Evaluation Unit on 17 October 2017, that is some six months later.

56. The Applicant submitted ample contemporaneous correspondence with the IRMCT management, including both the former and current Registrars, expressing the distress caused by the delay in the handling of her complaint. Moreover, the

Applicant's distress while testifying about this matter before the Tribunal, over four years after the events, was clearly visible. Additionally, the Tribunal heard corroborating evidence from a Legal Officer who worked at the IRMCT at the time of the events and shared accommodation with the Applicant for a period of time. The Legal Officer, who appeared credible and consistent in his testimony, stated that for months after the incident, the Applicant would constantly bring it up in conversation almost daily expressing utter dismay at the IRMCT management's inability to handle the matter swiftly. The witness spoke of the copious amount of time that the Applicant dedicated to writing emails to the IRMCT management asking for guidance and results. This testimony corroborates the evidence provided by the Applicant and reflected in the contemporaneous correspondence that she submitted. The Legal Officer also indicated that when discussing the matter, the Applicant showed clear signs of anxiety and stress, crying most of the time.

57. From this evidence, the Tribunal is persuaded that the contested decision, which was found to be unlawful, caused and, to this day, continues to cause the Applicant emotional distress.

58. In light of the guidance provided in *Kallon*, the Tribunal awards an amount of USD12500 in compensation for the established harm caused to the Applicant.

Conclusion

59. In light of the foregoing, the Tribunal DECIDES:

a. The application is granted in part;

b. The contested decision is rescinded and remanded to the IRMCT. The IRMCT shall review, in consultation with DHMOSH, whether additional supervisory or other measures are required for the Medical Officer;

c. The Respondent shall pay the amount of USD12500 for moral damages;

d. If payment of the above amount is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable;

e. All other claims are dismissed.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 22nd day of June 2020

Entered in the Register on this 22nd day of June 2020

(Signed)

Nerea Suero Fontecha, Registrar