



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/152

Judgment No.: UNDT/2020/195

Date: 20 November 2020

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ANDRIANTSEHENO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Miryoung An, AAS/ALD/OHR, UN Secretariat

Introduction

1. This is an application filed by the Applicant contesting the Under-Secretary-General for Management, Strategy, Policy and Compliance's ("USG/DMSPC") decision to separate him from service with compensation in lieu of notice and with termination indemnity for serious misconduct. The Respondent argues that the Applicant's actions amounted to serious misconduct justifying the imposed sanction and that his application should be dismissed. The application partially succeeds.

2. The Tribunal held a Case Management Discussion ("CMD") on 27 February 2020 where the parties informed the Tribunal that an oral hearing was not required in determining this case¹ and subsequently filed their closing submissions on 28 July 2020.

Facts and Procedure

3. At the time of the contested decision, the Applicant held a continuous appointment as a Statistician at the United Nations Economic Commission for Africa ("UNECA"), in Addis Ababa, Ethiopia, at the P4-12 level.

4. On 29 October 2019, he filed an application contesting his separation from service with compensation in lieu of notice and with termination indemnity in accordance with staff rule 10.2(a) for misconduct for the following acts:

- a. On 21 June 2018, he attempted to hug V01 against her will in the UNECA compound;
- b. During 25 and 28 June 2018, at the Kuriftu resort where a Management Development Programme ("MDP") training was taking place he asked

¹ Respondent's response to the Applicant's submissions of 20 March 2020, paras. 2 and 3 and the Applicant's further submission pursuant to Order No. 050 (NBI/2020) on 2 April 2020.

V01 for her room number and told her that he would go to her room on multiple occasions;

- c. During 25 and 28 June 2018, at the MDP, he blocked V01's way out of, and/or into the conference room where the training was being given;
- d. On 25 June 2018, at the Kuriftu resort, he asked V02 for her room number when he met her for the first time; and
- e. On 26 or 27 June 2018, at the Kuriftu resort, while watching a football game with a group of people, he asked V02 repeatedly if he could sleep in her room, and asked her to cook Thai food for him. When V02 replied that she did not cook, he told her that she should know how to cook Thai food because she is a woman.

5. The Respondent filed his reply on 13 December 2019 urging the Tribunal to dismiss the application in its entirety.

6. The Applicant joined UNECA as a Statistician in 2004. He was dismissed from service on 20 August 2019. According to the sanction letter², the decision was arrived at after the Applicant was informed through a memorandum, dated 18 March 2019, from the Office of Human Resources Management ("OHRM"), setting out allegations of misconduct against him.³ In the said memorandum, he was informed that if the allegations were established, his conduct would constitute discrimination, and/or harassment, and/or sexual harassment under then applicable ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority),⁴ staff regulation 1.2(a) and staff rule 1.2(f).

7. He was also asked to provide, within one month of his receipt of the

² Application, annex 11; reply, annex R/7.

³ Application, annex 9.

⁴ Superseded by ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) issued on 10 September 2019.

memorandum containing the allegations, any written statement or explanation that he wished to provide in response to the allegations. He was advised that he was free to request at the earliest time possible for any extension of time to submit his response if he needed more time.

8. The Applicant was also advised that he could avail himself of the assistance of the Office of Staff Legal Assistance and that he could seek the assistance of any counsel at his own expense to assist him prepare his case in response.

9. After a thorough review of the entire dossier, including his comments, the USG/DMSPC concluded that the allegations against the Applicant were established, by clear and convincing evidence, hence the dismissal.

Submissions

The Applicant

10. The facts of the case have not been established with a high degree of probability and the conclusions being drawn are not warranted.

11. The penalty of separation is entirely disproportionate considering that it was a problem that could be addressed through training and monitoring. The investigation failed to produce a balanced report.

12. The abrupt termination had more than a financial impact, it injured his reputation in the eyes of his community by equating his conduct with the most serious cases of fraud, sexual harassment and violation of his duties. The manner of his separation denied him the opportunity to leave United Nations service in a dignified manner.

13. This case is based on verbal exchanges and is necessarily dependent on selective recollections of conversations for which there is no record of what was actually said. Subjective impressions are not reliable evidence. There is room for misinterpretation. His own words in his interviews as well as his more recent witness

statement are a fair reflection of what occurred, its context and his intentions. The Applicant admits that he expresses himself poorly in English and may have offended people because of their perceptions of him. He is a large man, can speak loudly and can intimidate without being aware of it.

14. V01's allegations consist of three incidents. The first is that on the morning of 21 June 2018, the Applicant grabbed her inappropriately. This was in an open, public location with another staff member nearby. She allegedly threatened to report him for harassment. He maintains this never occurred as described. The only witness did not see him grabbing her but said he overheard something being said but not the words described by her. All three people supposedly present when this happened have different recollections of what occurred or did not occur. V01 did not make a complaint at the relevant time but added it to her subsequent complaint to embellish it. The charge is neither clear nor convincing.

15. The second incident concerned the Applicant's request for V01's room number. He does not deny he did this but has explained the reasons in connection with her role as group coordinator and that his requests were made in open, public areas with others present, including a man he maintains was her husband. While she may have been annoyed by his persistence, the conclusion it was sexual harassment is unwarranted. The statements of other staff are mere hearsay. The location was in a public area, with other people present watching a sports event on television and it was far too noisy for anyone to overhear what was said. All these discrepancies call into question the credibility of the charges and her attribution of improper motives.

16. The third incident is more of a general complaint that on several occasions he blocked V01's movements in or out of the training room or otherwise tried to intimidate her. The Applicant maintains that these incidents were exaggerated, and the Office of Internal Oversight Services ("OIOS") found no evidence to substantiate them.

17. It is clear that V01 does not like him and is annoyed by any request he makes

to her. It is also clear that when she expressed her displeasure, he ceased any behaviour that she objected to. At the same time, the Applicant presented other considerations that may have accounted for her resentment or led to mobbing by some UNECA colleagues.

18. In connection with V02, their conversation was intended as just friendly exchanges between participants in the programme. The Applicant engaged in these knowing her as a married, middle aged, Thai colleague with several children. The attribution of improper motives is contrary to his background as a third generation Seventh Day Adventist, who is active in his Church. She initially testified she found their initial exchanges awkward since she did not know him or know he was part of the same training group. She also stated she did not want to file a complaint, because she felt that his intentions were innocent. Others have made her comments into a complaint for their purposes.

19. Isolated comments or gestures, regardless of the impact on the recipient, cannot be considered as harassment or sexual harassment in the absence of a clear expression that it is unwelcome or a work relationship with an imbalance of power. The original complaint filed was for harassment, not sexual harassment, but was later transformed into a sexual harassment complaint by those pursuing the zero-tolerance policy.

20. He has suffered material and moral damages in connection with his abrupt separation from service on grounds of misconduct, which has been made worse by the Respondent's belated and illegal reduction of his termination indemnity. The decision letter clearly stated he was to receive compensation in lieu of notice and with termination indemnity, in accordance with staff rule 10.2(a) (viii). No mention was made of a reduced termination indemnity. The intention to pay the full termination indemnity was confirmed by the Respondent's own actions in paying that amount. It is frankly disingenuous for the Respondent, knowing the established practice, to argue seven months later as an afterthought that the payment of a reduced amount was intended all along and does not need to be stated. The fact that this revelation

occurred only after the Applicant raised credible financial claims including the failure to pay him the three months' notice that was specified in the decision, is evidence of the Respondent's bad faith and constitutes an abuse of process, warranting the payment of legal fees.

21. The Applicant also prays for the following additional reliefs:
- a. USD20,000 to compensate him for rental and other expenses he incurred between 20 August and 29 October 2019 because he was forced to stay in Addis Ababa without an income for two months after his separation;
 - b. EUR20,000 for taxes and other costs incurred in shipping his newly purchased car to Madagascar because his separation from service caused him to lose his tax exemption privilege as a United Nations staff member;
 - c. EUR30,000 compensation for moral damages, damage to his reputation and for emotional stress for which he sought treatment; and
 - d. EUR70,000 for "material and moral" damages.

The Respondent

22. There is clear and convincing evidence that the Applicant committed the alleged acts of misconduct.

23. The two victims, V01 and V02, gave persuasive statements, describing the incidents in detail. There are other eyewitnesses who provided consistent statements corroborating the victims' account. On the contrary, the Applicant's testimony is not credible. Many of his assertions raised in these proceedings are either unsubstantiated, unfounded or simply irrelevant.

24. The established facts constitute harassment and sexual harassment of V01 and V02 under ST/SGB/2008/5. The Applicant engaged in improper and unwelcome conduct which offended and/or humiliated V01 and V02. The Applicant's conduct

might reasonably be expected or be perceived to cause offence or humiliation to V01 and V02 as evidenced by witness statements on the record.

25. The sanction imposed on the Applicant was neither blatantly illegal, arbitrary or discriminatory nor otherwise abusive or excessive. It is in line with the past practice in comparable disciplinary cases involving sexual harassment, which normally resulted in termination of the subject staff member's employment. As recognized by the United Nations Appeals Tribunal ("UNAT"), the Organization is entitled and obliged to pursue a severe approach to sexual harassment.

26. In determining the appropriate sanction, the Administration considered all relevant and mitigating circumstances. In particular, the Applicant's long service with the Organization and the Applicant's expression of regret and apology for his conduct were given weight as mitigating factors. As a result, the disciplinary sanction imposed on him was not the most severe one.

27. The Applicant's due process rights were respected throughout the investigation and disciplinary process. The Applicant has not made any specific submission with respect to procedural fairness.

28. The Respondent makes the following submissions in response to the reliefs sought by the Applicant:

a. The Applicant received overpayment of indemnity, at least, equivalent to USD45,641.46. ST/AI/2009/1 (Recovery of overpayments made to staff members) states that overpayment creates on the part of the staff member an indebtedness and should normally be recovered in full;

b. The Applicant was not paid the compensation in lieu of notice, which would have been USD38,020.32. The outstanding amount of compensation in lieu of notice should be deducted from the overpayment of termination indemnity, USD45,641.46 because the Applicant has received more than what

he would have received if the separation entitlements had been processed properly;

c. The Respondent rejects the Applicant's contention that the Administration was the cause for his stay in Addis Ababa for the claimed period of two or more months;

d. The Applicant is not entitled to compensation for alleged delay in processing his separation and check out from the UNECA. There was no undue delay. The Applicant delayed in complying with the formalities required of him in accordance with the standard check-out procedure. The Applicant was responsible for the time taken to complete the check-out process;

e. The Respondent denies any responsibility relating to the Applicant's private transaction of purchasing a vehicle as it was the Applicant's own decision to purchase a vehicle from Belgium for his personal use and to import the vehicle to Ethiopia. The Administration was not involved in the Applicant's private dealings for effectuating the purchase and the shipment;

f. The Applicant has failed to provide sufficient corroborating independent evidence in support of his claim for moral damages as required under art. 10.5(b) of the UNDT Statute and the jurisprudence of the United Nations Appeals Tribunal:

i. In support of his claimed medical condition, the Applicant submitted two documents - a statement of an individual claimed to be a pastor in Madagascar and a hand-written note, dated 5 November 2019, with a letterhead of "Polyclinique Adventiste Soamanandrarinny" ("the PAS note");

ii. Nothing in the Applicant's submission indicates that the pastor is a medical professional who could independently assess the

Applicant's mental and physical well-being; and

iii. The PAS note does not explain what medical issues it attests to, and how any such medical issues were caused by the Applicant's separation in August 2019. It, therefore, does not provide sufficient independent evidence of, first, that the Applicant suffered from the claimed medical condition and that there is a causal link between the contested decision and the medical condition suffered.

Considerations

29. The Applicant was dismissed for violating the following rules:

a. Staff regulation 1.2(a) which provides that:

Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

b. Staff rule 1.2(f) providing that:

Staff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization, including activity in connection with the administration of justice system, nor shall staff members threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions. Staff members shall not threaten, retaliate or attempt to retaliate against such individuals or against staff members exercising their rights and duties under the present Rules.

c. Section 2.1 of ST/SGB/2008/5 which provides that:

In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2 (a) and staff rules 101.2 (d),

201.2 (d) and 301.3 (d), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, any form of discrimination, harassment, including sexual harassment, and abuse of authority is prohibited.

30. Formal allegations of misconduct concerning sexual harassment of two individuals were levelled against him in accordance with section 5.18(c) of ST/SGB/2008/5, section 8.3 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and disciplinary process) and Chapter X of the Staff Rules.

31. After outlining the particulars of the allegations, the Assistant Secretary-General for Human Resources, advised the Applicant that, “if established, [his] conduct would constitute discrimination, and/or harassment, and/or sexual harassment”⁵. After the investigations, it was found that the Applicant had violated all three provisions⁶.

32. Having gone through the entire record, the Tribunal notes that despite the multiplication and generalisation of the violations in the memorandum of allegations and the sanction letter, it is only the allegation of sexual harassment which was specifically pursued⁷ and which the Applicant answered to⁸.

33. In determining this application, the Tribunal reminds itself that:

Sexual 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

⁵ Annex R/4, para. 31.

⁶ Annex R/7.

⁷ Annex R/1, para. 2, Annex R/2, para. 2, Annex R/3 para. 2, Annex R/4 para. 2, and Annex R/7, para. 1.

⁸ Annex R/6 para. 2

colleagues should expect to lose their employment⁹.

34. The Tribunal is further reminded that whilst bearing the legal and zero-tolerance policy on sexual harassment objectives in mind, when dealing with staff members accused of misconduct, the Tribunal is guided by the principle that in a system of administration of justice governed by law, the staff member is presumed innocent until proven guilty of the alleged misconduct¹⁰.

35. Therefore, judicial review of a disciplinary case requires this Tribunal to consider the evidence adduced and procedures utilized during the course of investigation by the Administration. In this context, the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct under the Staff Regulations and Rules, and whether the sanction is proportionate to the offence¹¹. The Tribunal's role is also to consider whether a staff member's due process rights were respected¹².

36. Furthermore, the Tribunal reminds itself that, "when judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".¹³

37. The Applicant is alleged to have sexually harassed two staff members in violation of section 1.3 of ST/SGB/2008/5. Sexual harassment is defined 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

⁹ *Mbaigolmem* 2018-UNAT-819 para. 33.

¹⁰ *Bagot* 2017-UNAT-718.

¹¹ *Ibid.*, para. 46.

¹² *Suleiman* 2020-UNAT-1006 citing *Nadasan* 2019-UNAT-918, para.38; *Siddiqi* 2019-UNAT-913, para. 28.

¹³ *Sanwidi* 2010-UNAT-084, para. 40.

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. Sexual harassment may occur between persons of the opposite or same sex. Both male and females can be either the victims or the offenders¹⁴.

38. According to section 9.1 of ST/AI/2017/1, the applicable standard of proof is clear and convincing evidence, for imposing separation or dismissal of the subject staff members. UNAT has held that the clear and convincing standard means evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred¹⁵.

39. It follows that facts will constitute sexual harassment if there is a combination of any unwelcome sexual advance, a request for a sexual favour, verbal or physical conduct or gesture of a sexual nature or any other behaviour of a sexual nature that *either* creates a reasonable expectation or perception to cause offence or humiliation to another; *and* interferes with work or is made a condition of employment *or* creates an intimidating, hostile or offensive work environment.

40. The particulars of the allegations are outlined as follows:

(1) On 21 June 2018, the Applicant attempted to hug V01 against her will in the UNECA compound.

41. The Tribunal must consider the definition of sexual harassment and determine whether based on the evidence the Respondent has established to the requisite standard of clear and convincing evidence that the actions of the Applicant in (1) above constituted sexual harassment. Whether the conduct amounted to an unwelcome sexual advance or a request for sexual favor; or verbal or physical conduct or a gesture of a sexual nature or any other behaviour of a sexual nature. The answer is in the negative based on the facts, law and jurisprudence.

¹⁴ Section 1.3 of ST/SGB/2008/5.

¹⁵ *Mbaigolmem, op cit.*, para. 32.

42. In terms of the facts, when V01 was asked to describe the events of this day she did not convincingly say that the Applicant attempted to hug her. The following excerpt of the transcript of the investigation interview between the Investigator (“IV”) and V01 casts doubt on the veracity of this allegation:

IV: Okay, so when you say that he grabbed you, can you just describe exactly what you mean by that, did he hold on to you, where did he hold you?

V01: Yeah, he hold my... on my chest like when you are... as your relative or when your husband or when you have some kind of affair or like close friend when they come and hold you or grab just like that.

V01: They hug you... I don't know.

IV: So his arms around you, so his arms went around your back?

V01: Yes.

IV: Okay and when he put his arms around your back how close to you did he hold you against him?

V01: No... no, he was very close but I was so much disappointed, I was not happy with this action and then I just throw him away, **I just throw his hand and I just did that, yeah.**

IV: Okay, so when he put his arms around you, was it so that your chest touched against his chest or was it looser than that?

V01: No, we were close but when you are shocked or when you are not ready for this kind of... you know how my reaction would be.

IV: Mhmm.

V01: I reacted immediately and then **I just took off his hand from me.**

IV: Okay, so you pushed him away as he put his arms around you?

V01: Yes.¹⁶ (Emphasis added).

43. The Investigator tried to steer the evidence toward a hug but this did not come out clearly. The Tribunal’s analysis is that the facts do not establish an incident involving attempted hugging.

44. V01 states that the manner in which the Applicant grabbed her could have

¹⁶ Reply, annex R/2 (Part 1, interview transcript with V01, lines 316-333).

been seen by an independent bystander as something that either related persons or husband and wife or lovers or close friends could do. It cannot therefore reasonably be concluded that this incident was an unwelcome sexual advance or conduct of a sexual nature within the meaning of ST/SGB/2008/5.

45. Based on the law and jurisprudence, the act of attempting to hug V01 in public view fails the test of establishing that sexual harassment occurred because the expectation or perception of the Applicant's behaviour by a reasonable person within a multicultural environment would not subscribe to the Respondent's finding that such conduct constituted sexual harassment without prior notice or warning that it was unwelcome.¹⁷

46. The legal requirement to raise the Applicant's awareness that his conduct is unwelcome as a first step to addressing sexual harassment derives from section 5.5 of ST/SGB/2008/5¹⁸ providing that aggrieved individuals are encouraged to notify the offender of their complaint or grievance and ask him or her to stop as, in some instances, the alleged offender may not be aware that his or her behaviour is offensive.

47. This element was discussed at length in *Perelli*¹⁹ as follows;

The pertinent question before this Panel (JDC) is, therefore, not why staff were allegedly reluctant to report incidents, but whether instances of alleged sexual harassment were brought to the attention of [Ms. Perelli] and/or of appropriate officials of the Organization. As shown above, the answer to this crucial question is a definite "no". (Italics in original.) It went on to conclude: Based on its careful analysis of the totality of circumstances, the Panel finds that, although a particular behaviour is found "inappropriate", no conduct automatically rises to the level of sexual harassment merely on the basis of its sexual overtones and lack of "appropriateness," no matter how reprehensible one finds that conduct to be, unless it involves the elements articulated

¹⁷ See generally, *Applicant* 2013-UNAT-280.

¹⁸ A complainant may opt to forego this stage but in this Tribunal's opinion reasons must be given for such an option as a way of promoting peaceful settlement of such cases.

¹⁹ 2013-UNAT-291.

in the relevant rules and jurisprudence. In the instant case, [Ms. Perelli's] conduct was definitely inappropriate, out of place and vulgar, often disgustingly so. However, absent any indication that [Ms. Perelli] had been put on notice or reasonably should have understood that some staff members considered that her conduct created an intimidating, hostile or offensive work environment, the conditions set out in the relevant SGB's and ST/AIs were not met. The Panel therefore finds that [Ms. Perelli's] conduct as established did not constitute sexual harassment.²⁰

48. Despite the finding by the Joint Disciplinary Committee ("JDC") that the conduct did not constitute sexual harassment, the Secretary-General summarily dismissed Ms. Perelli. The UNDT upheld the decision. However, UNAT found the dismissal legally and factually unsustainable, holding that.

...[i]t was not, in our considered opinion, open to the Secretary-General to ignore the very thorough analysis conducted by the JDC on the issue of Ms. Perelli's notice as to whether her conduct was unwelcome"²¹ and that " in failing to take the factors outlined in the JDC's report into account, the UNDT legitimised the Secretary-General's unlawful rejection of the JDC findings and thereby allowed the dismissal of Ms. Perelli to be affirmed on foot of a charge of sexual harassment, which could not be sustained given the absence of the third required statutory element, namely, that the conduct complained of was unwelcome."²²

49. UNAT, reiterated this position and applied it in *Bagot*, discussed below.

50. It is the Tribunal's finding that the Applicant's attempt to hug V01 does not on its own qualify as an unwelcome sexual advance or request for sexual favour; or verbal or physical conduct or gesture of a sexual nature or any other behaviour of a sexual nature.

(2) *Asking for V01's room number on multiple occasions.*

51. The Respondent submits that the Applicant's asking for V01's room number

²⁰ Ibid, para. 58.

²¹ Ibid, para. 65.

²² Ibid, para. 66.

on multiple occasions constituted sexual harassment. However, both the Applicant and V01 narrated that as course coordinator, V01 was the focal point for all matters concerning the smooth running of the programme administratively or otherwise. It was therefore necessary for the Applicant and other participants for that matter to know V01's room number in case she was required to sort out matters concerning the training, accommodation, hotel facilities or individual participants. V01 said she was not a trainer or trainee at this Programme, her role was to assist participants with their personal and training requirements. She stated for instance that when one of the participants fell ill, she was obliged to stay with the patient and when V02 had an issue with a fellow participant, it was to V01 that she went to register her concern.

52. In addition to applying the reasoning appearing in paragraphs 41-50 above, the Tribunal finds that the circumstances of this case, in particular, considering that the relationship of V01 and the Applicant was ongoing for the duration of the training, 25-28 June, it would have been expected that V01 would give direct notice to the Applicant that his behaviour was unwelcome. She would have set clear boundaries. This way the Applicant would have been put on notice on where he stood in relation to V01. This requirement was discussed in *Applicant* where one of the issues that came up on appeal was that the Appellant had ignored the parameters of friendship established by the complainant who had set up an express and "clear barrier beyond which the staff member was not to venture".²³ Furthermore, the record does not show that despite the Applicant's persistence, V01 reported the incidents to relevant authorities for redress. According to the record of interview, it was only after an incident involving V02 was reported to her that she shared her own experience²⁴. Under the circumstances of this case, this cannot be said to have been a report to relevant authorities.

53. The Respondent's finding therefore, that the Applicant's asking for V01's room number on multiple occasions constituted sexual harassment is not supported

²³ 2013-UNAT-280, para. 47.

²⁴ Reply, annex R/2 (Part 2, Interview transcript with V01, lines 72-80).

by any clear and convincing evidence. The facts do not establish sexual harassment as defined in ST/SGB/2008/5 and as interpreted in various jurisprudence.

(3) *Between 25 and 28 June 2018, at the MDP, the Applicant blocked V01's way out of and/or into the conference room where the training was being given.*

54. The Respondent states that the Applicant blocked V01's access into or out of the training room on multiple occasions and that this constituted sexual harassment. The Applicant asserts that this did not happen. Nobody witnessed these incidents throughout the duration of the training. Neither V01's supervisor nor any senior member in attendance or any member of hotel staff had knowledge of these events. V01's reaction, she said was to "run-away" or hide from the Applicant²⁵. This reaction did not give the Applicant notice or warning that there were boundaries that he ought not to have crossed. There was no notice at all that his behaviour was unwelcome.

55. In a comparative case, the Commissioner-General of the United Nations Relief and Works Agency ("UNRWA") pursued a possible misconduct case against Mr. Bagot under UNRWA General Staff Circular (GSC) No. 06/2010 (Prohibition of discrimination, harassment- including sexual harassment and abuse of authority). In applying the elements of this circular on sexual harassment (paragraph 6(c)) which is *pari materia* with ST/SGB/2008/5, to the facts, UNAT held that;

This Tribunal notes that, for behaviour of a staff member to be punishable as constituting the disciplinary offence of sexual harassment or harassment pursuant to Paragraph 6 (c) and Paragraph 6 (b) of GSC No. 06/2010 it is not enough to be found "inappropriate". No conduct automatically rises to the level of sexual harassment merely on the basis of its sexual overtones and lack of "appropriateness" or to the level of harassment on foot of its "inappropriate" character. This is true no matter how reprehensible one finds that conduct to be, unless it involves the elements articulated in the relevant rules and jurisprudence"²⁶ "...conduct, even assuming

²⁵ Reply, annex R/2 (Part 1, Interview transcript with V01 lines 435-443).

²⁶ *Bagot, op. cit.*, para. 62.

arguendo that it was inappropriate, absent any indication that he had been directly put-on notice or reasonably should have understood that Ms. L considered that his conduct was unwelcome or created an intimidating, hostile or offensive work environment, does not meet the conditions set out in the relevant provisions²⁷.

56. Consistent with these principles, it is the Tribunal's conclusion that the Respondent has not established through clear and convincing evidence that the Applicant sexually harassed V01. It is clear that this case is distinguishable from *Mbaigolmem* where UNAT found that the Secretary-General had proved his case through clear and convincing evidence that Mr. Mbaigolmem had invited a female colleague to his hotel room, hugged her and tried to kiss her against her will²⁸. In that case, the incident took place at a workshop and the victim reported the incident before the end of the workshop whereupon Mr. Mbaigolmem was orally informed of the complaint of inappropriate behaviour against him by a staff counsellor. In the case at bar the incidents involving V01 were reported at the end of the Programme and in the context of sharing her experiences²⁹.

57. The case at bar is also distinguishable from *Applicant* where the Appellant was alleged to have engaged in 16 incidents of sexual harassment. The investigation found that only eight were substantiated and that the Appellant "agreed that it was possible that he had touched one or more of the complainants". His behaviour was found to meet the elements of sexual harassment.³⁰ There is no such clear evidence from either the Applicant or V01 in this application.

²⁷ Ibid., para. 65.

²⁸ 2018-UNAT-819, para. 32.

²⁹ Reply, annex R/2 (Investigation Report, interviews of witnesses), para. 63. "When Mr. Cisse learned about Mr Andriantseheno's approach to V02 earlier in the morning, he decided to report the issue to the MDP Coordinator, V01. V01 then told Mr. Cisse that Mr. Andriantseheno had also asked for her room number. Mr. Cisse then decided to report the issue to Mr. Saviour, as he was the most senior staff member participating in the MDP".

³⁰ 2012-UNAT-209.

Allegations made in relation to V02

(4) *On 25 June 2018, at Kuriftu resort, the Applicant asked V02 for her room number when he met her for the first time.*

58. The Respondent found that asking V02 for her room number constituted sexual harassment. The record shows that at the time the Applicant asked V02 for her room number, she was not aware that the Applicant was one of the participants at the training. She had never seen him before. He did not introduce himself. The training had not commenced yet. Further, the interview transcript with V02 shows that the Applicant asked for room numbers generally of V02 and her colleague with whom she was exploring the premises. It is therefore a distortion of facts to allege that the Applicant targeted V02. The response from V02 during investigations is that she felt “uncomfortable” with the question about their room number because she did not know the Applicant³¹.

59. ST/SGB/2008/5 applies to workplace relationships, therefore it is irregular for V02 or any person on her behalf, to claim to have been sexually harassed by an individual she had never met before in her life, someone she did not know at all³². An individual who at the time of the incident was for all purposes and intents not a known work colleague, supervisor or otherwise. In fact, at this point, V02 regarded this initial interaction as “just a friendly exchange”³³, small talk. To constitute sexual harassment, “the sanctioned conduct of the staff member must be work-related”³⁴. This incident is therefore not proven sexual harassment.

³¹ Reply, annex R/2, (Interview transcript with V02 lines 73-77).

³² Reply, annex R/4, para. 15 and Annex R/2 (Interview transcript with V02 lines 73-77).

³³ Reply, annex R/2 (Interview transcript with V02, lines 262-269).

³⁴ *Bagot, op. cit.* para. 52.

(5) *On 26 or 27 June 2018, at the Kuriftu resort, while watching a football game with a group of people, the Applicant asked V02 repeatedly if he could sleep in her room and asked her to cook Thai food for him. When V02 replied that she did not cook, the Applicant told her that she should know how to cook Thai food because she was a woman.*

60. All the individuals who witnessed the events of the night in question including V02 considered the Applicant's conduct inappropriate. The following morning, a colleague warned the Applicant that his behaviour the previous night toward V02 was inappropriate and that he should consider apologising. The Applicant approached V02 and apologised for his behaviour. No similar incident was reported by V02 or any other person against the Applicant after this warning and apology.

61. This was unwelcome verbal conduct of a sexual nature because of the connotations ascribed to the Applicant's utterances, for instance, that he would sleep in V02's room or on the veranda to her room and that she should make him Thai food. However, the warning that his behaviour was inappropriate constituted notice. UNAT found that sexual harassment had not occurred where after being asked to stop, the Appellant "immediately ceased"³⁵ to pursue the victim.

62. Further, although the utterances did create a reasonable expectation or perception to cause offence or humiliation to another, they did not interfere with work or made a condition of employment *or* create an intimidating, hostile or offensive work environment. The incident took place on the last evening of the training, the course coordinator assured V02 that there was nothing to worry about, that the Applicant would not sleep in her room³⁶, V02 was able to stay on at the hotel without any incident or any further interaction with the Applicant. This is what she said in her own words:

³⁵ Ibid., para. 51.

³⁶ Reply, annex R/2 (Part 2 of the Interview transcript V01 lines 92-107).

...I didn't want to continue, so I just said, Okay; please understand that, regardless of your intentions, when you say these things, it makes other people feel uncomfortable. And not just me; it was the whole group that felt that way, and I hoped that he didn't say such things to anybody ever again, regardless of whether they're married or not. You know, he's learned from his mistakes, and that he reflects from his actions. So I just accepted the apology, and then that was it from that moment. He went on; he left the resort, and I stayed on an extra day.³⁷

63. Therefore, the incident fails to meet the elements of sexual harassment that the conduct must interfere with work or made a condition of employment *or* create an intimidating, hostile or offensive work environment.

Due Process Violations

64. The Applicant alleges that his due process rights were violated. That he was not accorded the presumption of innocence. That the investigation report was not balanced. That facts were misinterpreted to support a finding of misconduct. The Respondent avers that the Applicant was afforded his due process rights. He knew the allegations against him, he gave his responses and comments and that all these were taken into consideration in coming up with the sanction.

65. The Tribunal agrees that the Respondent's investigations were skewed toward finding a case for sexual harassment regardless of the inadequacy of evidence to substantiate the allegations and an expression that V02 did not wish to invoke section 5.11 of ST/SGB/2008/5 (lodging formal complaint against the Applicant)³⁸. For instance, an analysis of the investigation interview transcripts of V01 and V02 reveals a litany of leading questions, misrepresentations and misinterpretations which subsequently tainted the findings of the investigations in its report³⁹ thereby undermining the credibility of the process. The following instances are to the point:

a. The Investigation Report refers to the Applicant grabbing V01 and in

³⁷ Reply, annex R/2 (Interview transcript with V02, lines 217-229).

³⁸ The record does not show why the Administration felt it necessary to invoke section 5.11 of the ST/SGB/2008/5 despite a clear expression from the victim against it.

³⁹ Reply, annex R/2 (Part V, Investigation Report).

reaction V01 removing the Applicant's "**hands**", but the interview transcript with V01 reveals that the Applicant grabbed V01 with one hand and she removed it from her. She emphasised this by repeating it and clearly that is what happened;⁴⁰.

b. The Investigation Report states that V01 was afraid of the Applicant's "**intentions**" when he asked her several times for her room number⁴¹ but it does not indicate what V01 said to V02 on 28 June about what she thought of the Applicant's intentions. This is what transpired:

I said let me also share my experience and I shared her my experience and I said "Nothing will happen. Everything is safe" and then I said... and that's what I... that's when I shared my experience. Yeah. We have to take question, we have to... nothing has happened here. He has... he was asking me my room since the very day but nothing has happened. At least I am willing and I tell him my room number, how can he force me... so it just because I just want to inform her or to make her easy. I said "Nothing will happen, whatever you plan is you can go ahead with your plan" I said"⁴²

c. The Investigation Report refers to V01 reporting the incidents to senior colleagues participating in the Programme⁴³, however it omits to state that this report was made in the context of sharing her experience after V02 had reported an incident to her as a course coordinator. This is what triggered the report:

IV: So at that time when V02 told you about her experience was that when you then told her about your experiences? V01: Yes. When she told I was surprised, I was shocked and he does this to all of... all the people, all the participants. I said let me share... let me also share because she was very scared because she is from Asian country by... she came from Asia. She is also a nationality... with nationality of... when she comes to Africa I

⁴⁰ See, the Tribunal's emphasis in para. 42 above.

⁴¹ Reply, annex R/2 (Interviews of victims, Investigation Report, para. 25).

⁴² Ibid., (Part 2 Interview transcript lines 91-108).

⁴³ Ibid., Investigation Report, para. 27.

didn't want her to have a bad image about my organization, ECA or about Africa. Maybe it is her first experience to visit Africa, I don't want her... so I said "This is like this, you know this... he did this also to me. Please don't be afraid"⁴⁴.

d. The Investigation Report states clearly that V02,

"expressed that she did not wish to submit an official complaint against [the Applicant] but, in her opinion, two actions should be taken: (1) that [the Applicant] should be instructed to undertake the relevant training on prohibited conduct; and (2) that [the Applicant] should not be allowed to attend the second module of the MDP, scheduled for September 2018"⁴⁵.

66. This was a breach of the Applicant's right to be presumed innocent. Had the Respondent conducted the investigation in good faith, it would have found that the case of sexual harassment by both V01 and V02 was not made out. This case can be distinguished from *Applicant*⁴⁶ where the UNDT found that the dismissal of the Appellant was unlawful because it breached the Organization's rules and procedures for disciplinary investigations as well as general requirements of due process. UNAT vacated the decision on the ground that a review of the applicable law and facts revealed that the Administration fully respected the Appellant's due process rights throughout the proceedings. The difference is that unlike in the *Applicant* where the facts and the law giving rise to the sanction were established by clear and convincing evidence, in the instant case the facts do not support a finding of sexual harassment because the investigation and disciplinary process ignored the relevant applicable law and jurisprudence.

67. The Tribunal is not satisfied that the Respondent has adduced clear and convincing evidence to sustain a finding that the Applicant violated any rule or regulation.

⁴⁴ Ibid., (Part 2, interview transcript for V01, lines 72-80).

⁴⁵ Reply, annex R/2, Investigation Report, para. 37.

⁴⁶ 2012-UNAT-209, para. 37.

Judgment

68. The Tribunal finds that the Respondent ignored relevant factors pertaining to the legal framework to sustain a case of sexual harassment. Consequently, he arrived at a decision that is not supported by law. In terms of *Sanwidi* the Tribunal must interfere with the Respondent's exercise of discretionary power that gave rise to these proceedings because his finding is illegal. It was held in that case that:

There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.

69. The Application succeeds.

Remedies

70. The Applicant seeks rescission of the contested decision and other remedies outlined in his submissions above.

71. In accordance with arts. 10.5(a) and (b) of the UNDT Statute, as part of its judgment, the Dispute Tribunal may only order one or both of the following: (a) rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph; (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant.

72. The Tribunal has wide discretion in setting the amount of compensation in lieu of rescission, however it must be guided by judicious principles which are outlined as follows:

The UNDT may award compensation for actual pecuniary or economic loss, including loss of earnings. We have consistently held that “compensation must be set by the UNDT following a principled approach and on a case-by-case basis” and “[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case” “Contemplating the particular situation of each claimant, it carries a certain degree of empiricism to evaluate the fairness of the ‘in lieu compensation’ to be fixed”.⁴⁷

73. The Tribunal orders rescission of the contested decision or, if the Administration so chooses an award to the Applicant of two years’ net base salary at the rate in effect at the date of this Judgment in lieu of rescission of the dismissal.

74. The Applicant made several other monetary claims including for moral damages. The Tribunal finds that the Applicant has not justified his claims for moral damages with credible corroborative evidence. The exhibit marked A/19 in support of the Applicant’s alleged illness is written in shorthand, without transcription or translation or authentication of the source. The Tribunal agrees with the Respondent’s submission that this claim should be dismissed.

75. The Applicant’s other various monetary claims are not supported by the law which provides for only two situations in which this Tribunal may order compensation. He has not justified why he should be compensated outside the legal framework. In terms of claims for special damages, the Applicant has not justified these claims that they arose through the Respondent’s decision or that the Respondent could reasonably have foreseen that the Applicant would incur the claimed damages. These are rejected.

76. The Applicant applied for anonymity in the publication of this judgment due to the embarrassment to his family members from being associated with these charges and the personal implication for his Seventh Day Adventist evangelistic work being carried out through televised programmes during the coronavirus pandemic.

⁴⁷ *Krioutchkov* 2017-UNAT-712, para. 16.

77. The reasons given for the application for anonymity by the Applicant are self-serving and not relevant for the consideration of his application. Exhibit A/19, purportedly a testimony on the Applicant's righteousness and good deeds as a member of the Seventh Day Adventist Church, from his District Pastor, states that the Church does not believe in the allegations against the Applicant considering among others that he is married to a beautiful young lady in her mid-twenties and that it is impossible that he could be unfaithful with an Ethiopian married woman in her 40's.

78. A motion for anonymity must be justified by valid reasons, In *Williams*, UNAT stated the following in response to the Appellant's request for anonymity,

Moreover, if Mr. Williams is seeking to keep his identity confidential or anonymous in the Judgment to be published by the Appeals Tribunal when it decides his appeal, the Appeals Tribunal has previously determined that "[t]he names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability". And Mr. Williams has not shown any "greater need than any other litigant for confidentiality". Staff members of the Organization often challenge employment-related decisions pertaining to their performance or even misconduct before the internal justice system. If confidentiality attached in each case, there would be no transparency regarding the operations of the Organization, which would be contrary to one of the General Assembly's purposes and goals for the internal justice system. Thus, Mr. Williams's possible embarrassment or discomfort in discussing events at ICAO or events surrounding his father's death is not good cause to grant the motion for confidentiality⁴⁸.

79. Further, UNAT has held that the purpose of confidentiality is to protect victims of misconduct. The Applicant has not shown that he is a victim of misconduct⁴⁹. The Tribunal declines the motion.

⁴⁸ Order No. 146 (UNAT/2013), para. 5.

⁴⁹ *Oh* 2014-UNAT-480 para. 23.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 20th day of November 2020

Entered in the Register on this 20th day of November 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi