



**Before:** Judge Francis Belle  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

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v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Irene Kashindi

**Counsel for the Respondent:**  
Nicole Wynn, AAS/ALD/OHR, UN Secretariat  
Rosangela Adamo, AAS/ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant holds a fixed-term appointment at the FS-4 level with the United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo (“MONUSCO”). She serves as an Administrative Assistant and is based in Kinshasa.

## **Procedural History**

2. On 3 May 2019, she filed an application with the Dispute Tribunal. The Applicant described the decisions she challenges as: (a) continued harassment, unfair treatment and abuse of authority that cannot be classified as one single decision; (b) breach of several rules and regulations; (c) not being considered and bypassed for promotion on several occasions resting with a decision made on 22 January 2019; (d) not being compensated for work performed at a higher level; and (e) failure to address a claim for sexual harassment and abuse.

3. On 10 June 2019, the Respondent filed his reply.

4. On 9 January 2020, the Applicant filed a motion seeking an order for interim measures to reassign her to another duty station because of alleged ill-treatment by her colleagues and her Second Reporting Officer (“SRO”) following the filing of her application on 3 May 2019. The Tribunal issued Order No. 013 (NBI/2020) dismissing the motion for interim measures.

5. On 23 July 2020, the Tribunal issued Order No. 140 (NBI/2020) to manage the case. Among other things, the Tribunal asked the parties if they were amenable to the matter being resolved *inter partes*.

6. On 4 August 2020, the parties filed a joint motion for suspension of proceedings pending mediation and asked that the matter be referred to the United Nations Ombudsman and Mediation Services (“UNOMS”) to facilitate the process. This motion was granted on 6 August 2020 by Order No. 147 (NBI/2020) suspending proceedings to 31 August 2020.

7. On 31 August 2020, the Director of Mediation Services wrote to the Registry of the UNDT seeking more time for the parties to continue with their “good faith efforts” to resolve this matter without recourse to litigation.
8. On 2 September 2020, the Tribunal issued Order No. 168 (NBI/2020) granting the extension of time that was sought.
9. On 2 October 2020, the Director of Mediation Services informed the Tribunal that the parties were continuing their discussions in good faith towards a partial settlement of the dispute, and that an extension of the suspension of proceedings would facilitate finalization of those discussions.
10. On 6 October 2020, the Tribunal issued Order No. 195 (NBI/2020) to allow more time for the partial settlement to be finalised.
11. On 15 October 2020, the Applicant informed the Tribunal that the dispute had been partially settled and withdrew that part of the claim which was no longer in dispute.
12. The Tribunal held a case management discussion with the parties on the same day to discuss delineation of the issues that remain in dispute.
13. On 19 October 2020, the Tribunal issued Order No. 205 (NBI/2020) to schedule the filing of further submissions on receivability and the need for an oral hearing. These submissions were filed and responded to as directed in the Order.
14. On 16 November 2020, the Tribunal held another case management discussion with the parties.
15. On 10 December 2020, the Tribunal ruled that the matter is suitable for determination on the basis of the parties written submissions and directed the parties to file their closing submissions.
16. The parties filed their respective closing submissions on 18 December 2020.

## **Facts and Submissions**

17. The Applicant claims to have been sexually harassed by a colleague (VL) on 8 July 2015. She reported the matter to her supervisor on the same day.

18. On 5 and 6 June 2016, she reported verbal harassment and abuse by the same colleague.

19. On 20 August 2017, the Applicant reported the alleged sexual abuse to the Office of Internal Oversight Services (“OIOS”).

20. On 17 November 2017, the Applicant sought management evaluation of “various breaches and actions including matters dealing with abuse of authority, performance evaluation, harassment and failure to take action on [her] complaint on sexual exploitation and abuse.”

21. The Management Evaluation Unit (“MEU”) responded to the Applicant on 28 November 2017. MEU found the Applicant’s request for review not receivable as she had not identified a reviewable administrative decision. On the alleged sexual harassment and abuse, MEU advised the Applicant to report the matter to OIOS; which she had already done.

22. On 24 November 2017, MONUSCO issued job opening (“JO”) 81515 for the Position. The Applicant applied for the position on 27 November 2017. MONUSCO Human Resources Section (“HRS”) screened in 92 job applicants for the Position, including the Applicant, and invited them to take a written assessment. The Applicant did not sit the test.

23. On 22 August 2018, the Investigation Division of OIOS issued an investigation report in which it found that the Applicant’s claims were substantiated. OIOS forwarded the report to the United Nations Development Programme (“UNDP”), as the subject of the complaint was a UNDP staff member.

24. On 14 March 2019, the Applicant filed a second request for management

evaluation.

25. On 15 April 2019, after the Applicant filed her application before the Dispute Tribunal, UNDP informed OIOS that there was insufficient evidence that “VL engaged in misconduct” and that the case against her had therefore been closed.

26. On 13 May 2019, OIOS informed the Applicant of UNDP’s decision on the matter. This was the Respondent’s first communication to the Applicant on the subject since her complaint in 2017.

27. It is the Respondent’s case that the Dispute Tribunal is not competent to hear the Applicant’s general complaints of harassment and abuse of authority, allegations of unspecified violations of rules and regulations, failure to address a sexual harassment complaint and lack of compensation for work performed at the FS-5 level. With respect to these allegations, the Application is not receivable *ratione materiae* because the Applicant has not identified a reviewable administrative decision within the meaning of art. 2.1(a) of the UNDT Statute.

28. On the question of abuse of authority and failure to address the Applicant’s complaint of sexual harassment and abuse, the Respondent submits that the Applicant is time-barred; she had 90 days from the receipt of the management evaluation review on 28 November 2017 to file her application but did not. The Respondent also submits that there “was no failure to respond to the Applicant’s complaint,” as OIOS had written to inform her of the outcome of the process on 13 May 2019.

29. The Applicant’s complaint of abuse of authority by her supervisor could not be taken further because although the Applicant submitted a complaint to the MONUSCO Conduct and Discipline team on 18 June 2018, she did not respond to their request for further information.

30. In sum, the Respondent submits that the only reviewable administrative decision identified by the Applicant is the selection decision dated 22 January 2019, in which the Applicant was informed that she was not selected for the FS-5 post. The

Applicant was given full and fair consideration in the selection exercise to the extent that she participated in it. Having declined to sit the assessment test, the Applicant's candidature could not be further considered.

31. The Applicant contends that it is not possible to isolate her claims. All the claims should be looked at as part of a whole chain of events which constituted continuing wanton abuse of authority, humiliation and distress the Applicant continued to receive which had adverse effects on her health leading to hospitalization for depression-related sickness.<sup>1</sup> All the actions and omissions in question have direct legal consequence and constitute breaches of the "terms of appointment or contract of employment." The jurisprudence cited by the Respondent cannot therefore apply

32. The Applicant takes issue with the fact that OIOS took almost two years to reply to her complaint on sexual harassment, and the Respondent close to four years from the date of the incident in 2015 to hurriedly communicate the outcome. The Applicant is aggrieved with the decision to close the matter without having spoken to her. The investigation, the Applicant submits, was improperly conducted and the Respondent's submissions on receivability clearly shows that he has misunderstood the sequence of events as complained of by the Applicant. The Applicant's complaints show "wanton and continuous harassment" by her superiors, which conduct the Respondent had a duty to protect her from but did not.

### **Considerations**

33. The Tribunal considers that there are three matters to be resolved. Firstly, there is the allegation of continued harassment, unfair treatment and abuse of authority to which the Applicant allegedly fell victim over a period of time. Secondly, there is the more precise complaint of a non-selection after her application to be considered for a post; thirdly, the alleged mishandling of an alleged sexual harassment complaint.

34. The Tribunal recalls that there is an established procedure for dealing with

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<sup>1</sup> Annex 9, application.

harassment of any kind affecting the Organization's various programmes and staff. The Applicant is a staff member of the United Nations Secretariat and would have been aware of the procedures for dealing with allegations of harassment. It would be logical to presume that any such procedure consists of a number of elements. Firstly, a report should be made to an immediate supervisor and this should be followed up by an investigation. Depending on the nature of the feedback, and assuming that the behavior has had an impact on administrative decisions, the Applicant would be well placed to make an application to the Tribunal for an appropriate remedy.

35. Based on the nature of the allegations made and the absence of follow-up, the Tribunal finds it impossible to address the allegation as expressed, since it lacks clarity, points to no specific perpetrator, administrative decision or history of steps taken and assessments of impact on the Applicant's work that the Tribunal would have to treat the allegation as not receivable.

36. The Applicant has the right to file an application to the Tribunal for redress. But the application has to be pursuant to the Statute and Rules of Procedure of the Tribunal. A generalized complaint alleging harassment, unfair treatment and abuse of authority is not made pursuant to any Statute or Rule of the UNDT.

37. The Tribunal notes however that the application can be seen as a unified whole in which dissatisfaction with non-selection, and the response of the Respondent to the allegation of sexual harassment are seen as part of a pattern of behavior which has had an impact on the Applicant.

38. In the circumstances presented in the submissions before it, the Tribunal has decided to address the application based on the latter interpretation.

39. The Applicant applied for appointment to the FS-5 post and was not selected. This matter of the non-selection for a position properly arises pursuant to the Statute and Rules of Procedure of the Tribunal. However, the Applicant must show that the presumption in favour of the Administration (that administrative acts have been

properly performed) has been rebutted by facts and procedural errors so as to make the impugned decision unlawful.

40. Indeed, as long as the Respondent can minimally show that the proper procedures were followed and the Applicant was fairly considered for the position, the burden shifts to the Applicant to show that the selection process was not properly carried out.

41. In the matter of non-selection, it is evident that the Applicant was required to take a test but did not. The Applicant has not explained why she failed to take the test in any terms which show that the Administration must take responsibility for this failure. The Tribunal therefore concludes that the Applicant must take responsibility for this failure and therefore can blame no-one other than herself for the non-selection.

42. This aspect of the application is therefore dismissed.

43. Turning now to the Applicant's application in relation to the treatment meted out to her in relation to her sexual harassment complaint.

44. The complication arises because the Applicant's complaint took an inordinate amount of time to be addressed during which time the Applicant applied for management evaluation on two occasions. The second management evaluation concluded that the request was not receivable because the Applicant had failed to file it within the prescribed time. However, MEU failed to take into account that at the time of the first management evaluation request, the Applicant had received no response in relation to her report of sexual harassment. Indeed, at that time the OIOS had not yet reported on their investigation to the UNDP.

45. UNDP, for its part, never informed the Applicant of the outcome of her complaint. It transpires that OIOS itself only informed the Applicant of UNDP's decision on the Applicant's complaint following the filing of her application to the Tribunal. UNDP had closed the complaint having concluded that there was insufficient evidence to pursue the matter. This occurred four years after the Applicant had made



the complaint and two years after it had been delegated to the OIOS for investigation.

46. But the Applicant had already filed her application on the basis that she had received no response to her complaint. The Tribunal therefore finds that at the time the application was made, she accurately stated that there was no response to her complaint that she had been made aware of; thus, making this application receivable.

47. The Tribunal also finds that it is unsatisfactory for MEU to have found the request for review not receivable on grounds that the Applicant failed to make an application after her first request for management evaluation, even though the Applicant up to that point faced the situation where there had been no satisfactory response to her complaint of sexual harassment.

48. Under ordinary circumstances, it would be with the input of the investigators being provided that either the complainant takes action, or the Administration takes action against the perpetrator of the sexual harassment. The Applicant cannot be blamed for having proceeded on the basis that no report had been issued up to the time that the application was filed.

49. Indeed, the timing of the OIOS report and the decision being taken not to pursue the complaint appears almost retaliatory in the circumstances, and if not retaliatory in some way intended to ensure that the application would fail without any proper assessment.

50. The Tribunal is aware that the Administration may have some discretion with regard to taking action in cases of allegations of sexual harassment. But the seriousness of such a charge requires that the Administration at the very least shows that there was a process involved in which the Applicant was properly informed and able to comment to correct perceptions of fact or interpretations of staff rules. In this case it appears that after the Applicant filed her complaint, little was done if anything to keep her informed of the advancement of the case, taking into consideration any evidence of witnesses who may be called upon to comment on her complaint.

51. The Applicant should also have been afforded the opportunity to assess the report of OIOS and the reasons given for the decision made to discontinue the complaint against the officer who allegedly committed the sexual harassment.

52. The Tribunal finds it particularly curious that despite OIOS finding that the Applicant's complaint was founded and substantiated, UNDP went on to close the matter without so much as speaking to the Applicant!

53. The Tribunal is of the view that the Respondent should have followed the provisions of 5.18 (b) of ST/SGB/2008/5 on Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken.

54. The Tribunal also finds that the Respondent must act in a transparent manner. Considering the history of this matter including the inordinate delay, and the OIOS finding that the complaint was substantiated, the Respondent owes the Applicant an explanation for the determination that there was insufficient evidence of sexual harassment. Such an explanation should set out the legal requirements to be met to substantiate a case of sexual harassment and the reasons why the Administration thinks that there was insufficient evidence to support such an allegation.

55. The Tribunal cautions the Respondent to carefully consider the propriety of his actions. Under no circumstances is it acceptable for the Respondent to ignore an investigation report that he does not like the findings of, without more. The Respondent's actions in this case represents an unacceptable waste of the

Organization's time and resources, which this Tribunal cannot condone.

56. In the circumstances the Tribunal finds that the finding that there was insufficient evidence to pursue the matter of sexual harassment, without more, tantamounts to abuse of authority on the part of the Respondent.

57. The Tribunal orders the Respondent to provide the Applicant with a clear explanation for the decision not to pursue the allegation of sexual harassment in one month.

58. The required evidence needed to support the imposition of other remedies sought by the Applicant has not been provided and the claim for moral damages is therefore dismissed.

59. The application therefore succeeds in part.

*(Signed)*

Judge Francis Belle

Dated this 31<sup>st</sup> day of December 2020

Entered in the Register on this 31<sup>st</sup> day of December 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi