



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

YAMEOGO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Emmanuel Yonli

Counsel for Respondent:

Matthias Schuster, UNICEF

Alister Cumming, UNICEF

Introduction

1. The Applicant, a former staff member in the Field Office of the United Nations Children's Fund ("UNICEF") appealed the decision to impose on him the disciplinary measure of dismissal.
2. The Respondent replies that the application is without merit and should be dismissed.
3. For the reasons stated below, the application is rejected.

Relevant facts and procedural history

4. UNICEF's Office of Internal Audit and Investigations ("OIAI") initiated an investigation on allegations of misconduct concerning the Applicant.
5. On 16 June 2020, OIAI completed its investigation and referred the matter to the Deputy Executive Director, Management for appropriate action.
6. On 21 July 2020, the Deputy Executive Director, Management, charged the Applicant with misconduct concerning the allegation that on 24 August 2019 the Applicant attempted to kiss V01 against her will and then grabbed her, lifted her off the ground and kissed her ("charge letter"). The Applicant was notified of the opening of a disciplinary process against him and was given a deadline to submit his response to the allegations.
7. By letter dated 18 September 2020, the Deputy Executive Director, Management, notified the Applicant that, at the completion of the disciplinary process, it was determined that the charges against him had been established by clear and convincing evidence and that he would be imposed the disciplinary measure of dismissal in accordance with staff rule 10.2(a)(ix) ("sanction letter").
8. The Applicant was separated from service on 20 October 2020.

9. The Applicant filed his application with the Nairobi Registry of the Dispute Tribunal on 8 January 2021.

10. This case was transferred to the New York Registry on 20 October 2021.

11. By Order No. 110 (NY/2021), the Tribunal directed the parties to submit any requests for additional evidence, including testimonial evidence.

12. On 8 December 2021, the Applicant informed the Tribunal that he did not wish to request the production of any additional evidence.

Consideration

Standard of review in disciplinary cases

13. The general standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain: (a) whether the facts on which the disciplinary measure was based have been established; (b) whether the established facts legally amount to misconduct; and (c) whether the disciplinary measure applied was proportionate to the offence (see, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT-523, *Wishah* 2015-UNAT-537, *Turkey* 2019-UNAT-955, *Ladu* 2019-UNAT-956, *Nyawa* 2020-UNAT-1024). When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, for instance, *Molari* 2011-UNAT-164, and *Ibrahim* 2017-UNAT-776).

The Applicant's case

14. The Applicant challenges the contested decision on the sole ground that the facts have not been established by clear and convincing evidence.

15. He argues that the Administration relied only on V01's testimony which had no corroboration while it was contradicted by his own testimony.

16. The Applicant avers that the testimony of V01's colleague, to whom she had reported the incident at the time, does not constitute evidence.

17. The Applicant contests the fact that V01's statements were deemed credible and persuasive while his own were not. He claims that the fact that V01's statements do not show any apparent indication of falsehood does not make them true.

18. In this respect, the Applicant argues that some aspects of V01's statement lack credibility. He claims in this regard that had V01 cried out when trying to release herself from his embrace at the Applicant's apartment, his neighbours would have heard her. However, the Applicant points to the fact that OIAI did not seek the testimony of his neighbours.

19. Moreover, the Applicant challenges V01's credibility with the fact that after having endured what she termed as unwelcome conduct by the Applicant, she kissed him goodbye. According to the Applicant, if his conduct had indeed been unwelcome, V01 would instead have tried to flee as soon as possible.

20. The Applicant further argues that as V01's statement is contradicted by his own, it cannot be considered, in itself, to amount to clear and convincing evidence. He states that his own credibility is not in doubt because he has an untarnished record of service with UNICEF spanning more than 14 years. Therefore, he concludes that there is no reason to believe V01's account of the events over his own.

The Respondent's submissions

21. The Respondent replies, citing *Applicant* UNDT/2021/007 and *Hallal* UNDT/2011/046, that the testimony of a complainant in a sexual harassment case alone may be sufficient to support a finding of serious misconduct without further corroborating evidence. He further recalls that in *Haidar* 2021-UNAT-1076, the Appeals Tribunal affirmed *Haidar* UNDT/2019/187 where the Tribunal concluded that "[t]he evidentiary question in [sexual harassment cases] centres on the credibility of the complainant's testimony, both in the aspect of internal consistency and probability in the circumstances".

22. In such cases, the Respondent relies on *Ekofo* UNDT/2011/215 to conclude that the complainant's evidence is sufficient absent evidence of ill-motivation or any other evidence that may cast doubt on the complainant's account.

23. The Respondent states that V01's evidence was clear, detailed and internally consistent. Moreover, she reported the incident to a colleague shortly after it occurred.

24. The Respondent recalls that the Appeals Tribunal has held in *Mbaigolmem* 2018-UNAT-819 that in misconduct of sexual nature, immediate reporting is considered to hold considerable evidentiary weight.

25. The Respondent goes on to refute the Applicant's argument that his neighbours would have been able to hear V01's cries as she tried to release herself from the Applicant's embrace in his apartment as purely speculative.

26. The Respondent also deems the Applicant's argument that had V01 been uncomfortable with the Applicant's conduct, she should have fled at the first opportunity, rather than kiss him goodbye on the cheek, to be purely speculative.

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

27. The sanction letter states:

There is clear and convincing evidence that, on 24 August 2019, you attempted to kiss V01 in your apartment in Bamako, Mali, and then, against her will, grabbed her, lifted her off the ground and kissed her.

28. The Applicant's main contention with respect to the evidence relied on to impose the contested disciplinary measure on him is the lack of corroboration of V01's testimony, which he refutes.

29. The Tribunal notes that to determine that the facts are established to the required standard, the Administration relied on V01's account as stated in her 23 September 2019 complaint of harassment which she then corroborated during her interview with OIAI of 28 February 2020.

30. The Administration further relied on the account by a colleague of V01 to whom she had reported the incident on 4 September 2019 and who, in turn, reported this incident to OIAI shortly thereafter. V01's colleague was interviewed by OIAI on 13 March 2020, where she corroborated her original statement, which was generally consistent with V01's description of the events.

31. The Applicant was also interviewed by OIAI on 17 March 2020. During his interview, he admitted having welcomed V01 in his apartment on 24 August 2019 in Bamako but denied having attempted to kiss her or made any unwelcome advance on her.

32. The Tribunal notes that, as the Respondent avers, in *Haidar* 2021-UNAT-1076 (para. 43), the Appeals Tribunal confirmed that in cases of sexual harassment, the alleged conduct often takes place in private, without direct evidence other than from the complainant. The Appeals Tribunal found that the Dispute Tribunal had been correct in finding the complainant's testimony of high probative weight when it is detailed, coherent and consistent and where there is no evidence that the complainant had an ulterior motive to wrongly accuse the applicant.

33. The Appeals Tribunal further accepted that evidence from persons to whom the complainant reported the incident promptly can be considered as indirectly corroborative of the complainant's statement.

34. The Tribunal finds that *Haidar* applies squarely to the case at hand.

35. In this case, the Applicant did not request V01's testimony and therefore waived his right to cross-examine her despite being allowed the opportunity to make such request in due course during these proceedings. Notwithstanding this, the Tribunal notes that V01's account remained detailed, coherent and consistent in her complaint and in the interview with OIAI. It was also largely corroborated by the statement of the colleague to whom she promptly reported the incident.

36. The Tribunal also notes the absence of any evidence suggesting ill-motive on the part of V01.

37. In this respect, in his interview with OIAI, the Applicant suggested that V01's complaint may have been made in retaliation for the Applicant having reported irregularities in the selection of a post while he was posted in Bamako.

38. The Tribunal does not find this argument credible. As noted in the investigation report, by his own account, the Applicant submitted his report of recruitment irregularities on 9 December 2019. As both V01's and her colleague's reports of harassment were filed in September 2019, it cannot be concluded that they were intended to retaliate against the Applicant's report, which had not yet been filed by then.

39. The Tribunal also finds the Applicant's argument that his neighbours would have heard V01's cries when trying to release herself unfounded and speculative.

40. The Applicant's argument that had V01 really felt uncomfortable by his conduct, she would have fled at the first opportunity rather than kissing him goodbye on the cheek is equally unfounded. As the Respondent points out, there is no rule as to how a victim of sexual harassment is meant to behave following the incident.

41. Moreover, the Tribunal notes that V01's colleague stated that V01 appeared upset when she reported the incident to her shortly after it occurred.

42. In sum, the Tribunal accepts that V01's statement meets the required standards to be deemed credible and probative. The Tribunal is further satisfied that the evidence of V01's colleague, to whom she reported the incident days after it occurred, serves as indirect corroboration as accepted by the Appeals Tribunal.

43. Finally, the Tribunal finds no evidence to indicate that V01 may have been untruthful or harboured bad faith against the Applicant.

44. Accordingly, the Tribunal is satisfied that the facts upon which the contested decision is based were established by clear and convincing evidence.

Whether the established conduct amounts to misconduct

45. While the Applicant, who is represented by professional counsel in these proceedings, makes no arguments under the remaining tiers of the judicial review, the Tribunal deems it fit to undertake a complete review of the contested decision.

46. In so doing, the Tribunal is satisfied that the Applicant's conduct was of sexual nature and unwelcome by the victim. It therefore amounts to sexual harassment within the meaning of sec. 1.1(c) of CF/EXD/2012-007, Amend.1 (Prohibition of discrimination, harassment, sexual harassment and abuse of authority) and constitute a violation of staff rule 1.2(f).

47. Therefore, the Applicant's conduct amounts to misconduct.

Whether the disciplinary sanction imposed was proportionate

48. In imposing the sanction of dismissal, the Administration considered its long-standing policy of zero-tolerance for sexual harassment. It further considered the violation of V01's physical integrity as an aggravating factor, as well as the Applicant's 14 years of service with UNICEF as a mitigating factor.

49. The Tribunal finds no evidence that the Administration exceeded its authority in choosing the appropriate sanction.

Whether the Applicant's due-process rights were respected

50. The Tribunal notes that the Applicant was interviewed by OIAI in the course of the investigation as the subject of a complaint of sexual harassment. At the completion of the investigation, the Applicant was served with a charge letter in which he was notified of the specific conduct alleged against him and the subsequent initiation of a disciplinary process against him. The Applicant was provided with the opportunity to respond to the allegations and informed of his right to be represented by counsel.

51. The Applicant was provided with the OIAI report and supporting material.

52. At the conclusion of the disciplinary process, the Applicant was duly notified of the contested decision in writing.

53. In light of the above, the Tribunal is satisfied that the applicable procedure was followed to ensure that the Applicant's due-process rights were respected.

Conclusion

54. In light of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Joelle Adda

Dated this 18th day of January 2022

Entered in the Register on this 18th day of January 2022

(Signed)

Nerea Suero Fontecha, Registrar, New York