



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TOKHI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Matthias Schuster, UNICEF

Alister Cumming, UNICEF

Introduction

1. At the time of the application, the Applicant served as an Operations Officer, on a fixed-term appointment at the P-4 level with the United Nations Children's Fund ("UNICEF"). He was based in Maiduguri, Nigeria.

Procedural History

2. On 20 April 2021, he filed an application before the United Nations Dispute Tribunal sitting in Nairobi to challenge the Respondent's finding of misconduct (for violation of staff regulation 1.2(a), staff rule 1.2(f), (and the provisions of UNICEF's policies in the matter) and the consequent decision to separate him from service pursuant to staff rule 10.2(a)(xix).

3. The Respondent filed his reply on 24 May 2021 stating the impugned decision was lawful.

4. On 24 January 2022, the Tribunal issued Order No. 007 (NBI/2022) to advise the parties that this matter would be adjudicated on the basis of the parties' written submissions and inviting them to file their closing submissions.

5. The parties filed their closing submissions, as directed, on 31 January 2022.

Facts and Submissions

6. The Applicant joined UNICEF as an Operations Manager at the P-4 level in Mogadishu, Somalia on 11 June 2017. On 9 November 2019, he was reassigned to the Maiduguri Field Office (MFO), Nigeria.

7. On 1 April 2020, the Applicant was called by the Chief of the Field Office, to inform him that a colleague had lodged an official complaint against him which was going to be forwarded to the Country Office and from there to the Office of Internal Audit and Investigations ("OIAI").

8. According to the Applicant, on 31 March 2020, he got into an argument with V01 at an evening gathering of colleagues at a guest house in the Mission. V01 was also a colleague, and with whom he and other colleagues frequently disagreed/had

arguments with. On this particular evening, the Applicant tells the court, the argument between them “reached to a level” where both V01 and he used “bad” and “demeaning language.” Although theirs had been a “normal working relationship,” the argument that evening included accusations of sexual harassment of her by him; which accusations he was hearing of for the first time.

9. The Applicant was not aware that a fellow colleague who was at the gathering had recorded the argument between him and V01.

10. On 15 April 2020, OIAI informed the Applicant that it was conducting an investigation into allegations that:

a) On 16 November 2019, in a Maiduguri guesthouse whose bedrooms were occupied by the Applicant, V01 and other UNICEF personnel, the Applicant grabbed V01 behind her head/neck, pulled her face to his and kissed her on the lips and face without her consent;

b) On 31 December 2019, during a party, the Applicant kissed V01 on her mouth without her consent and tried to force a kiss on her on two other occasions;

During the same party, he kissed another colleague on her mouth in addition to kissing and grappling her breasts while she was visibly drunk;

c) On 8 February 2020, the Applicant unlocked the door to V01’s room and without her consent entered, jumped in to her bed and touched her under her waist and all over her body;

d) On 31 March 2020, he spoke to V01 in the presence of Maiduguri Office staff using very derogatory, demeaning and abusive words.

11. The Applicant responded to the allegations on 16 April 2020.

12. On 17 April 2020, OIAI interviewed him.

13. On 13 October 2020, OIAI completed its investigation and transmitted its Investigation Report to the Deputy Executive Director, Management (DED/M) for appropriate action.

14. On 30 November 2020, the DED/M charged the Applicant with misconduct on the following allegations:

- a. On 16 November 2019, he entered V01's room and touched and forcibly kissed her without her consent;
- b. On 31 December 2019, he touched and forcibly kissed V01 without her consent;
- c. On 8 February 2020, he entered V01's room, entered her bed, and touched her without her consent; and
- d. On 31 March 2020, he directed verbally abusive language, including language of a sexual nature, toward V01 in the presence of UNICEF colleagues.

15. On 31 December 2020, with the assistance of the Office of Staff Legal Assistance, the Applicant provided his response to the allegations.

16. On 22 January 2021, the DED/M found that the Applicant had engaged in misconduct. The Applicant was disciplined with dismissal *per* staff rule 10.2(a)(xix).

17. It is the Applicant's case that there was bias and bad faith in the investigation process, and that the report was riddled with inconsistencies.

18. The Applicant argues that the gravity of the three allegations before 31 March 2020 (in November and December 2019, and February 2020) should have caused V01 to report them as it happened, or any in case before their argument in March. The fact that there were no complaints before the 31 March 2020 argument is clear evidence that the complaint was tainted and made in bad faith.

19. The Respondent submits that the Applicant was afforded his due process rights throughout the disciplinary process, which process led to the facts being established clearly and convincingly. The sanction meted out to the Applicant was appropriate and proportionate.

Considerations

20. 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; (c) whether the disciplinary measure applied was proportionate to the offence; and (d) whether the accused staff member was awarded due process in the disciplinary proceedings (see, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT-523, *Wishah* 2015-UNAT-537). The Tribunal will consequently follow this standard in the review of the present case.

21. The Appeals Tribunal has consistently held that when the disciplinary sanction results in the staff member's separation from service, the alleged facts must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable (*see Molari* 2011-UNAT-164).

22. According to the evidence on the record, the Applicant perpetrated four incidents at the Maiduguri Field Office, Nigeria. On 16 November 2019 he entered V01's bedroom, grabbed her and kissed her without her consent; on 31 December 2019, touched and forcibly kissed V01 without her consent during a party; on 8 February 2020 the Applicant entered V01's room, entered her bed and touched her without her consent; on 31 March 2020 the Applicant directed offensive demeaning language with sexual connotations toward V01 in the presence of UNICEF colleagues.

23. All these facts were established by clear and convincing evidence, gathered in the Investigation Report on the record.

24. All incidents are recollected by V01, who provided a credible and reliable evidence. This Tribunal (*see Hallal* UNDT/2011/046, at para. 55, affirmed by the Appeals Tribunal in *Hallal* 2012-UNAT-207; see also, *Applicant* UNDT/2021/043, para. 41) has held that in sexual harassment cases, credible oral victim testimony alone may be fully sufficient to support a finding of serious misconduct, without further corroboration being required. This principle can be applied to the case at hand, finding that the statements by V01 are able to identify the author and his responsibility.

25. In this case, the statements by V01 are detailed and consistent; they are also corroborated by other witnesses, and there is nothing on the record that suggests they are untruthful.

26. Examining in detail the defence raise by the Applicant for each incident, the Tribunal notes, as to the first one, that the Applicant contest the identification by the husband of the victim but does not consider that the latter herself identified the Applicant.

27. As to the incident of 8 February 2020, it results clearly from V01's recollection and from Ms. N's statements too, it is confirmed also by the statements of the Applicant himself and by the audio recordings lodged among the documents, where the Applicant admitted to having gone to V01's room (although with a different narrative of the events).

28. The fact that the recordings have been taken without consent does not lower their evidentiary value (*see Asghar* 2020-UNAT-982 para. 51); the evidence is clear and does not need any forensic examination.

29. In both cases, the Applicant's conduct amounts to misconduct, displaying - also for the modality of the conduct (directly entering the room, forcibly attempting to kiss the victim, or direct entering her bed trying to touch her) a serious attack to the dignity of the victim; even when she was on a videocall with her husband.

30. As to incident on 31 December 2019, also resulting from the investigation report, the fact that the victim was generally provocative or drunken is totally irrelevant.

31. These first three incidents amount to sexual harassment as set out in CF/EXD/2012-007 (UNICEF's Prohibition of discrimination, harassment, sexual harassment and abuse of authority):

Sexual harassment is any unwelcome sexual advance, request for sexual favor, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile, or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either victims or offenders.

32. The Tribunal finds that the Administration properly qualified the Applicant's conduct towards V01 as sexual harassment. Indeed, the Applicant's actions as indicated above constitute physical conduct of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to the complainant. In the present case, there is no doubt that the Applicant's conduct in relation to V01 was unwelcome.

33. The Tribunal also notes that staff members' obligations under staff regulations 1.2(a), (b) and (f) are not limited to the work environment but also apply in a certain way to their private lives.

34. Indeed, in *Applicant* 2013-UNAT-302 (para. 54), the Appeals Tribunal referred to the prohibition of harassment in the Standards of Conduct and held that

[t]his prohibition clearly applies to all kinds of harassment; thus, it encompasses sexual harassment. And this prohibition clearly is not limited to harassment in the workplace; thus, it includes harassment outside the workplace.

35. As to the fourth incident, the record shows that it happened as indicated in the sanction letter. In particular, it results from the Investigation Report that the

Applicant referred to alleged sexual habits of the victim (V01 was in sum repeatedly and publicly referred to by the Applicant of being a woman of loose morals who was “sleeping around”) and that took place on the UNICEF compound in the presence of multiple colleagues, so interfering with work and violating para. 2 of the POLICY/DHR/2020/002.

36. The incident, which confirms the attitude of the Applicant toward V01, caused mental distress to her, as a result of verbal offenses and attacks; it was the final straw that entailed the recollection of the previous incidents and caused the report of misconduct.

37. The Tribunal considers that the testimonies on this incident too, as collected in the Investigation Report, are very detailed, reliable and credible; they are confirmed too by the audio files in the records.

38. The fourth incident shows that the Applicant violated staff regulation 1.2(a) and staff rule 1.2(f), which provides that every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination or harassment, including sexual harassment.

39. In particular, staff regulation 1.2(b) provides that

staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but it is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

40. Under staff rule 10.1, a staff member commits misconduct when he or she fails to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant, and such failure may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

41. The principle of proportionality in a disciplinary matter is set forth in staff rule 10.3(b), which provides that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.”

42. The Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behaviour of the staff member involved. The Tribunal is not to interfere with administrative discretion unless “the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity” (*Nyawa* 2020-UNAT-1024, para. 89 and *Portillo Moya* 2015-UNAT-523, paras. 19-21).

43. As to the proportionality test, the Tribunal believes that it must be based on objective criteria. Therefore, it is necessary to refer to the administrative practice in the disciplinary field and, moreover, to the evaluation of the proportionality made by the Tribunals in their case law.

44. The Tribunal is aware of the practice in disciplinary matters, where cases similar to this have in recent years resulted in sanctions ranging from separation to demotion. The Administration often applied the sanction of dismissal or separation from service with compensation *in lieu* and without termination indemnity for cases of sexual harassment that entailed touching intimate parts of a person’s body, or for inappropriately touching colleagues in different occasions outside working hours, especially when the behaviour is repetitive or connected with other facts of misconduct (such as discriminatory or insulting comments, comments on physical appearance or abuse of authority).

45. The said practice is consistent with UNAT and UNDT case law: in *Conteh*, 2021-UNAT-1171 - repeated sexual contact was sanctioned by separation without termination indemnity; in *Karkara*, 2021-UNAT-1172 - repeated sexual contact, abuse/exploitation were sanctioned by dismissal; in *Nadasan*, 2019-UNAT-918 - the sending of hundreds of unwanted sexual messages was disciplined by separation with termination indemnity; in *Andry Adriantseho* 2021-UNAT-1146 - multiple sexual advances and unwanted physical contact of a sexual nature were punished by separation with termination indemnity; in *Ramos* UNDT/2021/082 - repeated sexually suggestive comments were disciplined by separation with termination indemnity.

46. As highlighted by the Respondent, some of the incidents alone definitely suffice for the sanction of dismissal. No doubt, therefore, that the disciplinary sanction is proportionate when all four incidents are considered together.

47. Therefore, the Tribunal finds no grounds to review the level of the sanction imposed on the Applicant.

48. The Tribunal is satisfied that the key elements of the Applicant's due process rights were respected as per staff rule 10.3(a).

49. OIAI conducted a thorough investigation, which included interviews with all relevant witnesses and gathering all the relevant documentary evidence. The Applicant's due process right were respected throughout the investigation and disciplinary process: he was informed of the allegations against him and was given an opportunity to respond to them.

50. The Tribunal also notes that neither party objected to this matter being adjudicated on the papers.

Conclusion

51. In view of the foregoing, the Tribunal **DECIDES** that the application is **DISMISSED** in its entirety.

(Signed)

Judge Francesco Buffa

Dated this 14th day of March 2022

Entered in the Register on this 14th day of March 2022

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi