



Before: Judge Eleanor Donaldson-Honeywell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

PIEZAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Marco Zunino, OSLA
Jason Biafore, OSLA

Counsel for the Respondent:

Jacob van de Velden, DAS/ALD/OHR, UN Secretariat
Andrea Ernst, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a Risk Management and Compliance Officer at the United Nations Support Office in Somalia (“UNSOS”). She serves on a fixed-term appointment at the P-4 level and is based in Mogadishu.

Procedural History

2. On 13 January 2022, the Applicant filed an application with the United Nations Dispute Tribunal sitting in Nairobi to challenge the Respondent’s decision to impose a written reprimand on her. The administrative measure was imposed on her for “disseminating an unsubstantiated rumour of sexual exploitation involving a senior official.”

3. On 2 February 2022, the Applicant filed a motion seeking leave to adduce evidence of harm in support of her claims for moral and reputational damages which included medical documents.

4. The Respondent filed his reply on 11 February 2022. The Respondent’s case is that there is “sufficient evidence that the Applicant engaged in unsatisfactory conduct by spreading a serious, unsubstantiated rumour of sexual exploitation within the Mission, for no good reason. She thereby contributed to unnecessary damage to the reputation of the staff members implicated in the rumour, and potentially the reputation of the Organization.”

5. The Tribunal held a case management discussion (“CMD”) with the parties on 19 September 2022.

6. On 23 September 2022, the Registry sent the parties an email recording the directions issued by the Presiding Judge. The directions included deadlines for the filing of the parties’ respective witness statements, a notice of hearing and a deadline for the filing of closing submissions. The Tribunal also granted the Applicant’s motion dated 2 February 2022.

7. On 26 September 2022, the Respondent informed the Registry that he would call Ms. X to testify and moved for her testimony to be heard *in camera*.

8. On 28 September 2022, the Applicant objected to the testimony of Ms. X on grounds that it would be “irrelevant and prejudicial.” The Applicant also filed her list of witnesses and a motion for anonymity.

9. On 28 September 2022, the Respondent wrote to the Registry indicating that he will respond to the Applicant’s filings.

10. On 29 September 2022, the Registry issued further directions to the parties.

The Presiding Judge directs that pleadings in this matter are now closed so that there will be no further filings by either party, **except** for the witness statements previously ordered and which are due on **30 September 2022**.

The Respondent is directed to obtain the presence of witnesses ML, DB and EM/Investigator for the hearing.

The Respondent is permitted to call Ms X, whose testimony will be heard *in camera*. Her witness statement should be filed by **30 September 2022**.

Any other housekeeping matters may be raised at the start of the oral hearing and these will be ruled on orally at the time.

11. Despite this direction, on 30 September 2022, the Respondent filed submissions “on the Applicant’s witness list, motion for anonymity and motion objecting to the testimony of JSK.”

12. On 4 October 2022, the Tribunal issued Order No. 141 (NBI/2022) reiterating previous orders made.

Facts and Submissions

13. In February 2018, ML approached the Applicant for advice on a potential case of sexual exploitation and abuse.

14. ML told the Applicant that she had been made aware that a senior UNSOS official was involved with a more junior colleague, and that this relationship was

transactional. The story came to light because it was alleged that the senior official had then refused to pay for the transaction, which in turn caused a commotion.

15. The Applicant's advice to ML was that she was obliged as a staff member of the United Nations to report any incident which may be related to sexual exploitation and abuse ("SEA").

16. As ML's narration of events included details on the commotion, the Applicant asked SM, who lived near where the commotion was said to have happened, if she had heard anything.

17. The Applicant then sought the advice of a fellow staff member, who told her that he would check with the UNSOS Legal Officer. The advice of the Legal Officer, as conveyed by the staff member, was that if all involved had reached an agreement and nobody was ready to file a case against anyone, there would be no case from a legal point of view.

18. Subsequent to that advice, the Applicant sent ML an extract of the Mandatory Leadership Dialogue on Sexual Exploitation and Abuse and advised her to report the case. She never discussed the matter again with anybody.

19. On 17 February 2018, the senior official implicated as the perpetrator in this incident, Mr. Y, called the UNSOS Legal Officer (who was, at the time, also the Officer-in-Charge of the Mission's Conduct and Discipline Unit ("CDU")) and asked that she meet him in his office. He showed her messages pertaining to this incident between DB and someone else. The Legal Officer said

He was visibly upset, and he said we should immediately inform OIOS, an investigation should be conducted, and those circulating the rumour should be held accountable as he said he did not even know the girl mentioned in the messages.¹

20. On 29 May 2018, the Office of Internal Oversight Services ("OIOS") decided to close the matter after its preliminary review showed that "the subject had self-

¹ Respondent's Reply annex R/4, Legal Officer's statement to the Special Investigation Unit ("SIU").

reported the case, the alleged victim had denied any implication and the alleged witnesses all said they did not know where they first heard the rumour.”

21. Months later, on 5 September 2018, the Applicant was interviewed by the UNSOS/SIU.

22. It is the Respondent’s submission that the investigation followed from

a complaint by a UN contractor, who served at the time as Asset Manager at UNSOS. SIU investigated who had spread unsubstantiated rumours within UNSOS that the UN contractor had engaged in transactional sex with [Mr Y] in or around January 2018.

23. On 30 December 2018, SIU issued an investigation report.

24. A subsequent interview took place on 11 July 2019.

25. On 1 October 2019, SIU issued an addendum to the investigation report.

26. The investigation found as follows:

(a) the rumour originated from DB at the United Nations Interim Security Force for Abyei (“UNISFA”) or ML; (ii) ML was the first person known to spread the rumour; and (iii) the Applicant, ML and SM further spread the rumour.

27. On 15 March 2021, the Applicant was given the opportunity to comment on the findings of the SIU investigation report.

28. She provided her comments on 14 May 2021.

29. The impugned decision was handed down on 18 October 2021.

Considerations

Standard of review; burden and standard of proof.

30. In *Yasin*, the Appeal's Tribunal considered the role of the Tribunal in judicial review of a decision to impose the administrative measure of a reprimand after a disciplinary investigation.² The Appeals Tribunal explained as follows:

44. When judging the validity of the Administration's exercise of discretion in administrative matters, as in the present case, the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. It may consider **whether relevant matters were ignored and irrelevant matters considered and examine whether the decision is absurd or perverse**. It is not the role of the first instance tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the first instance tribunal to substitute its own decision for that of the Administration.

45. ... Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. ... due deference is always shown to the decision-maker, ...

47. Further, in compliance with the above stated principles of judicial review, **although the reprimand is not a disciplinary measure but an administrative one**, because of its adverse impact on the concerned staff member's career, it must be warranted on the basis of reliable facts, established to the requisite standard of proof, namely that of "**preponderance of evidence**", and be reasoned". [Emphasis added]

31. In this case, as the imposition of the administrative measure was based on a disciplinary investigation, the evidence adduced, and the procedures utilized must be considered by the Tribunal in reviewing the decision. Questions raised by the Applicant as to whether the decision was reached in a manner that followed due process must be considered. The Tribunal must also consider whether the facts on which the administrative measure is based have been established on the

² 2019-UNAT-915 at para. 47.

preponderance of the evidence; and whether, as contended by the Applicant, there was bias in the decision taken against her and not others.

Whether there were any due process violations in the investigation leading up to the administrative measure imposed on the Applicant.

32. The Applicant claims that the Respondent breached the following provisions which violated her rights *per* ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process):

6.10 A staff member who has been **identified as the subject** of an investigation shall be:

(a) Permitted to be accompanied by a staff member to act as an observer during an interview. ...;

(b) **Informed** in writing, prior to or at the start of the interview, that **the staff member is the subject** of an investigation and of the **nature of the alleged unsatisfactory conduct**; ...

(d) Given a reasonable opportunity, during the interview(s), to provide the staff member's version of the events and circumstances relevant to the allegations against the staff member and any other information that the staff member considers relevant;

(e) Given a reasonable opportunity to provide the investigator(s) with names and contact details of persons who may be in possession of relevant information about the matter under investigation;

(f) Given a reasonable opportunity to submit, **within two weeks of the date of an interview**, a written statement providing further information about the matters under investigation and/or the matters covered during the interview, together with relevant documentary information. [Emphasis added]

33. The Respondent argues that these are not the applicable provisions. He, instead, cites staff rule 10.2:

(b) Measures other than those listed under staff rule 10.2 (a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

(i) Written or oral reprimand;

...

(c) A staff member shall be **provided with the opportunity to comment on the facts and circumstances prior to the issuance** of a written or oral reprimand pursuant to subparagraph (b) (i) above. [Emphasis added]

34. The provision of ST/AI/2017/1 that the Respondent submits is applicable is section 7.5 as follows:

7.5 Where a non-OIOS investigation finds that there is a factual basis indicating that the staff member engaged in unsatisfactory conduct, but that such conduct, in the view of the responsible official, does not amount to misconduct, the responsible official shall:

(a) Decide to take no further action and inform the subject in writing; or

(b) Decide to take managerial action or administrative measures. Before the issuance of a reprimand, a staff member shall be **given an opportunity to provide comments on the facts and circumstances**, as provided for in staff rule 10.2 (c). [Emphasis added]

35. The Tribunal finds that there were severe failures in affording the Applicant due process during the investigation. After first interviewing her as a non-subject, SIU later decided that she would be a subject of the investigation but did not then afford her the due process entitlements under section 10 of ST/AI/2017/1.

36. However, the sole due process entitlement of an Applicant before issuance of a reprimand is that they be allowed to comment on the facts and circumstances. The Applicant was granted that opportunity when the Director of the Administrative Law Division (“ALD”), Office of Human Resources (“OHR”) sent her the 15 March 2021 letter requesting comments. The letter set out all the facts and circumstances being considered and allowed the Applicant to comment.

37. Prior to that point there was, in the SIU investigation, procedural unfairness to the Applicant, inefficiency and a lack of reporting transparency. However, there was no due process failing on the part of the decision-maker since her decision expressly considered not only the SIU investigation report but also the Applicant’s responses to the letter requesting comments.

Whether the facts on which the administrative measure was based were established on the preponderance of the evidence and amounted to conduct “unsatisfactory and unbecoming of a UN staff member”.

38. The reprimand was expressly limited to the Applicant’s re-telling SM the information she heard from ML, about the alleged sexual exploitation incident. Although the Applicant admits that she also spoke with a male colleague, this aspect did not form part of the reprimand.

39. The reprimand letter acknowledges that in speaking to the male colleague about the incident/allegation, the Applicant effectively reported it to the CDU. The Respondent’s position is that the Applicant spoke to that male colleague to “obtain advice on the proper course of action regarding the duty to report possible misconduct within the Mission.”³

40. The imposition of the reprimand was also expressly not made based on any finding of misconduct. The Reprimand said⁴:

Spreading an unsubstantiated rumour of such gravity and with a significant potential to harm the reputation of a colleague and the mission is unsatisfactory and unbecoming of a UN staff member. That being noted, I have decided that pursuing a disciplinary case against you is not warranted, and that the conduct that is found to be established does not rise to the level of misconduct. Indeed, the record establishes that the rumour was contained relatively early by a formal report to OIOS, and that the matter was reviewed and closed quickly by OIOS. However, your conduct displays serious shortcomings in your appreciation of the negative consequences and impact of unsubstantiated rumours, which can pose significant risks to the colleagues and the United Nations. I consider in mitigation that you attempted to convince [ML], to formally report the matter. I consider, however, that your otherwise long positive service with the UN system is not relevant to the conduct at issue and does not amount to a mitigating factor.

³ Respondent’s reply, para. 17.

⁴ Application annex 2; Respondent’s Reply annex R/6.

41. The provisions of the regulatory framework relied on by the decision-maker in the findings against the Applicant are staff regulations 1.2(b) and section 3.4 of ST/AI/2017/1 which underscore that failure to

observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

42. As highlighted by Counsel for the Applicant, there is no specific provision prohibiting the spreading of a rumour *per se*. In making this point, Counsel refers the Tribunal to section 2.3 of ST/SGB/2017/2 on the Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations provides that “the transmission or dissemination of unsubstantiated rumours” is not a protected activity; and that a report that is “*intentionally* false or misleading” constitutes misconduct.

2.3 The transmission or dissemination of unsubstantiated rumours is not a protected activity. **Making a report or providing information that is intentionally false or misleading** constitutes misconduct and may result in disciplinary or other appropriate action. [Emphasis added]

43. The existing regulatory framework does not list every type of activity that may amount to a failure to “*observe the standards of conduct expected of an international civil servant.*” Section 3.5 of ST/AI/2017/1 lists certain types of misconduct but underscores that authority to impose disciplinary measures is not limited to the listed types of misconduct.

44. It is therefore squarely within the Respondent’s discretion to determine whether the act of spreading an unsubstantiated rumour with significant potential for harm to the reputation of colleagues and the Organization is unbecoming within the meaning of staff rule 10.1(a).

45. The devastating, long-lasting repercussions of rumour mongering on the health, well-being and professional advancement of staff members were brought to

the fore in the impactful and well-articulated *in camera* testimony of the female subject of the rumour.

46. There is nothing absurd or perverse about the Respondent's determination that harmful gossip and rumour mongering should be discouraged. The Tribunal agrees with the submission eloquently stated by Counsel for the Respondent as follows:

The notion of not knowing something provokes human instincts to seek the truth among employees by spreading rumours. In so doing, rumour-mills have the potential to penetrate most organizational structures [...]”⁵ In addition to the possible organizational impact, the Respondent is cognizant that rumours can amount to harassment by words, seriously affecting those implicated. Rumour mongering is therefore addressed by the Organization, “ensuring that all staff members and non-staff personnel [...] are treated with dignity and respect and are aware of their role and responsibilities in maintaining a workplace free of any form of [...] harassment [...]”⁶

47. In an era when false information can be instantly and widely disseminated electronically, the harmful potential impact of rumour mongering is a scourge to be protected against in the best interests of the Organization and its staff members.

48. Be that as it may, on the facts of this case, the Respondent has fallen short in establishing that there was any improper spreading of a rumour by the Applicant. This is so because in coming to a finding that the Applicant committed the said act, the Respondent ignored relevant matters.

49. The main relevant matter that was ignored in deciding that the Applicant should be reprimanded was her fully explained and documented reason for consulting with one person, in relation to which she was found to have acted improperly. The Applicant's reason was to seek additional details or evidence that would inform a proper report of the alleged SEA to the relevant authority.

⁵ See e.g., Orlando Rivero, ‘Rumours in the Workplace Affecting Organizational Change Readiness’, *Global Journal of Management and Business Research Administration and Management* (2013) Vol. 13, Issue 12, p. 51-53.

⁶ Sections 1.3-1.4 and the Preamble of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

50. The Applicant was well aware of her obligation to report cases of SEA, *per* staff rules 1.2(c) and (e) and section 3.2 of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse), and was trying to persuade the person who told her about it to do so.⁷ Additionally, it is implicit in ST/AI/2017/1 that the staff member thinking of reporting such a matter ought to have details as follows:

4.5 Information received from either a staff member or a non-staff member alleging unsatisfactory conduct should contain sufficient details for it to be assessed under the present instruction, such as:

- (a) *A detailed description* of the unsatisfactory conduct;
- (b) The names of the implicated staff member(s);
- (c) *Where and when* the unsatisfactory conduct occurred;
- (d) The names of potential witnesses to the unsatisfactory conduct; *and*
- (e) All available supporting documentation. [Emphasis added]

51. The Applicant was aware of her duties and obligations but did not have the required information.

52. The Applicant, therefore, purported to further the regulatory reporting obligations by seeking further information. She did so in keeping with the obligation to “*submit information or evidence to support a reasonable belief that misconduct has occurred.*” The Respondent ignored the fact that this was a reasonable action by the Applicant in furtherance of the regulatory requirements.

53. In his closing submissions, Counsel for the Respondent stated that “[t]he Applicant even admitted to insinuating that Ms. X was a “*hooker.*” This misstates

⁷ 3.2 In order to further protect the most vulnerable populations, especially women and children, the following specific standards which reiterate existing general obligations under the United Nations Staff Regulations and Rules, are promulgated:

...

(e) Where a United Nations staff member develops concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker, whether in the same agency or not and whether or not within the United Nations system, he or she must report such concerns via established reporting mechanisms.

the evidence. The Applicant made no such admission. She was resolute and credible in her testimony that she had no knowledge of the identity of the female subject of the rumour until long after she commented on the involvement of a person who could meet the description of a person engaged in transactional sex for monetary gain. She described the person as such in her native language which is not English and did not actually use the word “hooker”. This was in the context of urging the initial recipient of the reported sexual exploitation to report it.

54. The Respondent failed to consider that alternate courses of action, after receiving the information, may have put the Applicant at risk of disciplinary investigation for misconduct. If the Applicant did nothing and kept the information about the alleged SEA to herself, she could face investigations leading to dismissal for failing to report SEA.⁸ If she reported the matter without any evidence she could be investigated and sanctioned for *“making a report or providing information that is intentionally false or misleading.”*⁹

55. The evidence before the Tribunal, including the testimony heard from witnesses at the hearing established a preponderance of evidence that the Respondent’s reprimand of the Applicant was based on the irrelevant factor of bias.

56. Although the SIU investigator was not the decision maker, his report was taken into consideration in deciding on the reprimand. In that report, the investigator concluded that three female staff members were “involved in the spreading of the malicious sexual exploitation rumour.”¹⁰ Amongst them, the Applicant only discussed the matter with two persons for reasons related to getting the matter reported.

57. Incongruously, the SIU report concluded that “there was no malice or bad faith” on the part of a male staff member who spread information about the rumour to four persons¹¹; verbally to three and by WhatsApp to another.

⁸ See *Loto* UNDT/2022/081.

⁹ Section 2.3 of ST/SGB/2017/2.

¹⁰ Respondent’s Reply Annex R/2 at para. 7.1.

¹¹ Respondent’s Reply Annex R/9 at page 147.

58. The SIU investigator, when cross-examined, confirmed that there were four re-tellings by the male staff member. The SIU report explained his re-telling was considered “not to be in breach of any UN Rules or Regulations”¹² because he told two senior United Nations managers and in the WhatsApp messages, he just sought to confirm information.

59. The latter was the same reason given by the Applicant for speaking with SM. When cross-examined on whether the adverse conclusion made regarding the three female staff members and not the male staff member was based on bias against women, the investigator denied it. He was not credible.

60. The reprimand letter, in setting out reasons, omitted to consider the implications of the difference in findings *vis a vis* the one man involved and the three women. If there was no bad faith on the male staff member’s part for having related the rumour for reasons similar to the Applicant’s, likewise the Applicant who consulted (fewer) others for purposes of complying with the reporting requirements for SEA ought to have been fully exonerated.

61. This would more probably than not have been the outcome if the apparent bias in the SIU report had been analysed. In failing to do so, another relevant matter was ignored. It is unclear from the facts that unfolded, why the Applicant could best be described as engaged in ‘gossiping’.

62. In deciding to reprimand the Applicant, the Respondent ignored the fact that the Applicant’s intent was to abide by her duties as an international civil servant, in good faith and without malice. They failed to consider that her queries in respect of what she was told was with a view to confirming it and getting the information required under the regulatory framework for a formal report.

63. The Tribunal agrees with the Applicant’s submission that

[c]asting her actions in the light of unsatisfactory conduct will have a chilling effect on staff who find themselves in a similar position

¹² Respondent’s reply Annex R/2 at paras. 6.14 and 7.4.

and will cause them, when they see or hear something, to opt to say nothing.

64. In all the circumstances, the reprimand decision was not justified and is rescinded with a direction that it be removed from the Applicant's Official Status File.

Anonymization

65. The sole reason for the Applicant's request for anonymization is that the case file includes confidential medical information. These confidential documents were filed under seal, and the information is not referred to in this Judgment. The motion for anonymization is rejected.

Compensation for Harm

66. The Applicant seeks compensation for the moral harm and reputational damage resulting from the impugned decision.

67. The Applicant has not presented documentary evidence to prove how her reputation was affected by the reprimand. However, as it relates to moral harm, the claim is supported by evidence under seal at A/23 and A/24 to the application.

68. The history of the matter lends credit to her claim that she would have suffered moral harm in the manner reported in her evidence. The evidence on record reflects that the Applicant was a passionate advocate of the Organization's zero-tolerance policy on SEA. She was also a stickler for compliance with the rules on reporting of such matters. The actions which led to her being reprimanded were clearly part of her zealous efforts to ascertain whether what she was told was credible enough to be reported.

69. In her written communications¹³ the Applicant relentlessly advocated on the obligations of a staff member to report SEA. She especially referred to the Mandatory Leadership Dialogue and shared passages from documents distributed

¹³ Email dated 31 January 2018 – attached as annex 1 and Messenger text message attached as annex JK1 to Applicant's response to request for comments at Annex R/5.

at that forum on the zero-tolerance policy and the obligation to speak up and report any SEA.

70. The Applicant took no pleasure in the misfortune of the persons who were the subjects of the rumour. She was clearly unaware of the identity of the female involved. Her only concern on hearing the report was that there was a burden that someone had to fulfil to report it to the relevant authorities. In fact, her testimony under re-examination when asked how she felt when the security officer ML told her about it was that she would have preferred that the conversation never happened because “now the burden was on me.”¹⁴

71. The Applicant’s evidence of the harm suffered is credible. She clearly suffered when, instead of her efforts in furtherance of the Organization’s policies being acknowledged, she was reprimanded. The record of documented complaint¹⁵ and the testimony of the Applicant further reflect that she genuinely feared retaliation from one of the subjects of the rumour.

72. The Applicant will be awarded compensation for the harm suffered. As to the quantum to be awarded, the Applicant herself made no submission. The Respondent’s submission is that if an award is to be made it should be in line with the quantum of USD1,000 awarded in *Kings*¹⁶ for the stress, worry, uncertainty and concomitant anxiety endured by a staff member due to the Organization’s delayed payments.

73. In all the circumstances of this case, in particular the fact that the primary relief of rescinding the reprimand will provide some satisfaction to the Applicant, the Tribunal will award her USD1,000 as moral damages.

JUDGMENT

74. In view of the foregoing the Tribunal DECIDES as follows:

¹⁴ Applicant’s oral testimony, 2 November 2022, at approx. 1:03:00.

¹⁵ Annex R/5 -Applicant’s response to request for comments at para 19 and the attached email at Annex 2 thereto.

¹⁶ 2017-UNDT-043 at paras. 52-54.

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a. The administrative measure of a reprimand issued against the Applicant is rescinded. The Respondent is directed to remove the reprimand from the Applicant's Official Status file.

b. The Respondent shall pay moral damages to the Applicant in the amount of USD1,000.

c. The compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date the Judgment becomes executable

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 6th day of December 2022

Entered in the Register on this 6th day of December 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi