



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

CATEAUX

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Miles Hastie, OSLA

Counsel for Respondent:

Melissa Bullen, ALS/OHRM, UN Secretariat

Jerome Blanchard, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a former staff member of the then United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)¹. He is challenging the administrative decision of the Under-Secretary-General of the Department of Management (USG/DM) to separate him from service with compensation in lieu of notice and without termination indemnities due to misconduct.

Facts

2. The Applicant joined MONUC on 10 June 2006 and was stationed in Kikwit, Democratic Republic of the Congo (DRC), as an International Security Officer (FS-3/1). He had previously served as a police officer for 22 years before joining the United Nations. In Kikwit, the Applicant was a first-line supervisor and one of his supervisees was Ms. M.

3. On or around July of 2007, the Applicant, a married man, started a romantic and/or sexual relationship with Ms. M. This relationship developed and continued when the Applicant was re-deployed to the Security Office in Bunia, DRC, in November of 2007. In the course of 2008 the couple went twice to Uganda on annual leave.

4. In September 2008, the relationship between the Applicant and Ms. M deteriorated. Ms. M informed the Applicant that she would leave him if he did not provide her with a house and a car, and she purposely made the Applicant believe she was engaging in sexual relationships with other men. It also appears that Ms. M herself was posing as her fictional fiancé.

5. The Applicant responded to Ms. M with a number of unpleasant and accusatory emails and text messages. The first email was sent on 1 November 2008 from the Applicant's wife's email account, to seven United Nations email

¹ MONUC was renamed the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO") on 1 July 2010.

accounts, including the Applicant's account. The second email was sent on 1 November 2008 at 11.57 am from the Applicant's wife's email account, to six private non-United Nations email accounts. The third email was sent on 1 November 2008 at 1.36 pm from the Applicant's wife's email account to seven United Nations email accounts and two private non-United Nations email accounts.

6. The recipients of the above emails were the mother of Ms. M, her cousin, a nun, a friend, seventeen United Nations colleagues and one person unknown to Ms. M.

7. The emails purported to come from the Applicant's wife. These emails also included two nude photographs of Ms. M. The emails contained graphic and explicit details of Ms. M's supposed sexual life with the Applicant. There were crude, insulting and offensive remarks about Ms. M. Many epithets in French were used to describe her. Translated they boil down to calling Ms. M "jealous", "greedy", "pretentious", "nasty", a "whore", a "sorcerer", a "bitch", a "hypocrite", a "thief", a "liar", a "thirsty man-eater", a "viper", a "malediction" and a "gold digger". There were also allegations that she had had sexual relations with "four fifths of all men". She had "evil spirits: bad intentions", a "black and dirty heart" and was a "first/high class bitch."

8. The emails stated that "[a]ll MONUC will have to know your dirty game" and "I also have your photos (naked) (...) I am going to forward them, the men will like that a lot." The emails went on to state, inter alia, "[y]ou can complain to Human Rights or to Personnel, I do not care. You cannot do anything. You're a whore and you'll stay a whore all your life. The truth hurts you. It is a small world, the mission is smaller. You must go to another mission." The emails concluded that it would "serve as a lesson" to others. I'll show you how to play with men in a mission. You deserve it. The game stops you dirty WHORE".

9. Initially the Applicant claimed that his wife sent the emails, however during the course of and subsequent to the investigation, he accepted that he wrote and sent the emails and attached the photographs of Ms. M.

10. The fifth email was sent by the Applicant on 4 December 2008 at 11.18 am from his wife's email account, addressed to Ms. M's private Yahoo email. In the email the Applicant made reference to the photographs of Ms. M, which he had attached to his earlier emails. He also claimed that men in MONUC had requested further nude photographs of Ms. M for their sexual gratification. It stated "[y]our photo will follow you in any mission you go to. I will follow you to your grave. Even your soul won't rest in peace. Slut." The email concluded with the statement that Ms. M had "not merely played with fire" but had "played with a nuclear bomb and must suffer".

11. The Applicant also sent several text messages to Ms. M from his private mobile telephone number as well as his official MONUC number between 19 October and 3 November 2008. Ms. M transcribed the text messages and they vary in terms of content. Most of them however contained insulting, offensive and sexually vulgar language, including a constant reference to Ms. M as a "whore". In a text sent on 3 November 2008 from his official MONUC number, two days after the first email was sent, the Applicant stated that in order to "repair the damage and recover" Ms. M's reputation, he was going to send \$800 to her parents and would email "all those people" to tell them that Ms. M was his "woman".

12. On 14 November 2008, the Applicant forwarded an email message entitled *Mes excuses les plus sincères* to several of his contacts excluding Ms. M. The message did not pertain to Ms. M. The message attached a photo of a woman in a short skirt or shorts bending over in front of a bridge, in a revealing fashion. This was labeled "the Bridge Email" by the Applicant. Ironically, the text of the message purports to be of educational value, speaking of the history of the bridge. According to the Applicant, this email was intended to be humorous and was not intended or expected to offend. He claimed that the sending of this picture by email did not contravene ST/SGB/2004/15 (Use of information and communication technology resources and data).

13. Following the Applicant's communications, Ms. M filed a complaint with their mutual employer, the United Nations, accusing the Applicant of sexual exploitation, harassment, and the abuse and distribution of pornographic materials, even going so far as to claim, untruthfully though, that her relationship with the Applicant had not been consensual.

14. On 3 December 2008, the Office of Internal Oversight Services (OIOS) rejected consideration of the matter, considering it to be a category II allegation, in the absence of further facts which would elevate it to a category I allegation. It was therefore referred back to MONUC.

15. An *ad hoc* Investigation Panel was duly appointed to investigate and it issued a report of its conclusions on 5 March 2009. The Investigation Panel concluded that "[the Applicant] deliberately intended to humiliate Ms. M. The Panel felt that [the Applicant], in full knowledge of the UN staff rules prohibiting pornographic materials, harassment and threatening behaviour, defiantly believed that he was above the rules. Therefore the Panel felt that he had violated the UN core values and that disciplinary measures should be applied to him."

16. On the basis of the evidence and findings contained in the Investigation Report and supporting documentation, by memorandum from the then Officer-in-Charge, Human Resources Policy Service, Office of Human Resources Management (OHRM), dated 8 June 2009, the Applicant was charged with:

- a. Having prepared and sent offensive and/or threatening emails and text messages to Ms. M between 19 October and 3 November 2008;
- b. Using his official MONUC number to send personal and/or offensive text messages to Ms. M between 19 October and 3 November 2008;
- c. Having sent the offensive and threatening emails, with pictures of Ms. M naked, to several persons, including MONUC staff, family, friends and colleagues of Ms. M; and
- d. Having sent an email of a partly naked woman to other MONUC staff members' Lotus Notes email accounts using his Lotus Notes email account.

17. The Applicant was informed that, if established, his behaviour would constitute a violation of former staff regulation 1.2(f), former staff rules 301.3(d) and 301.3(e), ST/SGB/2004/15 and ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

18. By memorandum dated 27 June 2009, the Applicant provided comments on the allegations against him. He admitted that he used "harsh words" toward Ms. M and "exchang[ed] violent text messages" with her, but claimed that he never threatened or humiliated her. The Applicant admitted that he sent consecutive emails concerning Ms. M as follows "You are only interested about money; you are cheating on me with another man and are using it to steal money from me. You are acting like a whore and you should be ashamed of yourself". The Applicant admitted that he sent an image of a naked woman to "some of [his] friends" but stated that it was a "joke with no sexual implication."

19. By a letter dated 5 May 2010, the Assistant Secretary-General, Office of Human Resources Management (OHRM), informed the Applicant that all the charges against him had been substantiated and that the USG/DM, on behalf of the Secretary-General, had decided to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity. The Applicant was subsequently separated from service in May 2010.

Procedural history

20. In view of the disciplinary nature of the case a hearing was held pursuant to Article 16 of the Dispute Tribunal's Rules of Procedure (UNDT Rules). The Applicant and Ms. M gave evidence after they were administered the declaration in compliance with art. 17.3 of the Rules of Procedure and were cross examined.

Applicant's submissions

21. The Applicant submits that his conduct did not amount to a case of harassment in connection with the workplace and therefore there was no violation of staff rules 301.3(d) and 301.3(e).

22. The Applicant does not deny that he sent all the emails and text messages to Ms. M but argues that given the nature of the private relationship he had with her and his own emotional state of mind at the material time the ultimate sanction of dismissal from service was disproportionate to his misconduct.

23. The Applicant also submits that the USG/DM had no authority to impose the disciplinary measure on him on the ground that the power to impose disciplinary sanctions granted to the Secretary-General had not been properly delegated to the USG/DM who purported to exercise the power in his case.

24. In regard to the email to which a picture of a partly naked woman was attached the Applicant claims that this did not violate ST/SGB/2004/15.

Respondent's submissions

25. It was reasonable for the Respondent to conclude that, by virtue of his threatening and intimidating emails to Ms. M, and to several persons, including United Nations staff and family, friends and colleagues of Ms. M, the Applicant engaged in harassment of Ms. M, in that his conduct was improper and unwelcome and might reasonably have been expected or be perceived to cause offence or humiliation to another person.

26. The Respondent properly concluded that while the Applicant's actions may have arisen out of an intimate and private relationship, his misconduct was "in connection with work" insofar as his emails and text messages were sent to Ms. M, a United Nations staff member; emails were sent to United Nations staff members at their official United Nations email addresses and to friends and relatives of Ms. M and to her United Nations "work colleagues at their private email addresses; and the emails sought to humiliate Ms. M and to compromise her reputation in a professional context".

27. The Applicant deliberately sent his communications to United Nations staff members in various field offices and to Ms. M's colleagues at their private

email addresses. The purpose of this conduct was to humiliate her, and compromise her reputation and, thus, to interfere with her ability to discharge her official duties.

28. Further, the Applicant's communications that were sent to Ms. M and to non-United Nations staff members, namely her friends and family, were properly considered as an indivisible part of the Applicant's larger campaign of humiliation, abuse and intimidation of Ms. M.

29. In relation to the Applicant's claim that his communications were "personal and private" in nature the Respondent submitted that ST/SGB/2002/13 (Status, basic rights and duties of United Nations staff members) provides that "[t]here can be situations [...] in which the behaviour of an international civil servant can reflect on the Organization. International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organization."

30. In regard to the email to which was attached a picture of a girl on a bridge the Respondent submitted that Section 4 of ST/SGB/2004/15 permits limited personal use of information and communication technology (ICT) resources provided such use is, inter alia, consistent with the highest standard of conduct for international civil servants and would not reasonably be expected to compromise the interests or the reputation of the Organization. Section 4.1(a) provides that among the uses which would clearly not meet this standard is the "use of ICT resources for purposes of obtaining or distributing pornography, engaging in gambling, or downloading audio or video files to, which a staff member is not legally entitled to have access." Section 5 prohibits knowingly using ICT resources or ICT data in a manner contrary to the rights and obligations of staff members.

31. On the proportionality of the sanction of dismissal from service the Respondent submits that the nature of the conduct of the Applicant when he sent

the emails and the improper use of United Nations ICT resources fully justified the decision.

Issues

32. The Tribunal considers that the following are the issues that should be addressed.

- a. Whether the acts complained of amount to misconduct;
- b. Whether the sanction was proportionate to the acts complained of;
- c. Whether there had been a proper delegation of authority to the USG/OHRM to impose the sanction.

Whether the acts complained of amount to misconduct

33. The United Nations Appeals Tribunal (UNAT) held in *Molari* 2010-UNAT-164 that “...when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable”.

Did the Applicant’s actions in sending the emails and nude photographs of Ms. M constitute harassment within the meaning of ST/SGB/2008/5?

34. ST/SGB/2008/5 was promulgated for the purpose of “ensuring that all staff members of the Secretariat are treated with dignity and respect and are aware of their role and responsibilities in maintaining a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority [...]”. Under this Bulletin, discrimination, harassment, including sexual harassment, and abuse of authority are classified as “prohibited conduct”.

35. Pursuant to section 1.2 of ST/SGB/2008/5, harassment is defined as:

[...] any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to

another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents.

36. Pursuant to section 3.1, “all staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations”.

37. Having reviewed the contents and nature of the emails this Tribunal takes the view that the conduct of the Applicant in creating these emails and sending them to Ms. M, as well as distributing to other recipients, some of whom were working in the same unit as Ms. M was certainly conduct not befitting a staff member of the Organization. Matters were made worse when the Applicant attached a picture of Ms. M in the nude, a picture that he falsely alleged he had deleted from his camera.

38. The sending of the crude and offensive emails and the pictures amount to harassment by the use of words and gestures and were calculated to demean, humiliate and embarrass Ms. M in her work place in that they tended to depict her as a sort of heartless monster, a woman bent on exploiting men for monetary gains, a woman who would just offer herself to men for money. Ms. M in her testimony given on 22 March 2012 described her reaction as follows:

When I received the emails they demoralised me. I was very emotional and surprised. I even considered suicide. . . I did not think such a thing could happen.

39. She described the effect on her work environment: “[It] meant that I could no longer work or be with [my] colleagues or look them in the eye.... I locked myself in the office for the whole day, crying.... It affected me very badly. Everyone was looking at me in an embarrassed (sic) way. I stayed in the office. I did not want to speak to anyone”.

40. Ms. M described how she felt about the emails being sent to her friends and family: “I was shocked. I really lost my mind. This was overwhelming. I was completely demoralised. The only solution was to commit suicide. I did not see people. Everyone called to ask me what kind of problem you could have with someone like this. I was not myself. I did not know what to do”.

41. On the naked photograph that was sent to her, her colleagues in the Organization, family and friends she stated that she became very emotional. She did not even know that the photograph existed and she was surprised to see it. She explained: “I felt very embarrassed ... It was difficult go to work every day ... [E]veryone was looking at me. I stayed indoors the whole time. I did not speak to anyone”.

42. There is no dispute that the Applicant sent the offensive emails to Ms. M and to other recipients. On the one hand, the Applicant declares that the emails were “damaging and borderline violent” and that they were “personal and private”. On the other hand, he acknowledges that his acts were “unethical” and that he engaged in conduct unbecoming of an international servant, mindful of the adverse consequences for the reputation of Ms. M”.

43. As a matter of law the Applicant has made a statement akin to a confession in criminal law. Though a court of law is faced with an admission of guilt by a party who is charged, the court still has to look at the overall circumstances in which the confession was made and whether the facts admitted to amount to a criminal act. The same approach must, in the view of this Tribunal, be taken in disciplinary matters in view of the presumption of innocence in disciplinary proceedings as observed by the United Nations Appeals Tribunal (“the Appeals Tribunal”) in the case of *Liyanarachchige* 2010-UNAT-087 that: “The Appeals Tribunal recalls that in a system of administration of justice governed by law, the presumption of innocence should be respected”.

44. The evidence shows that the Applicant readily made the confessions in regard to his conduct without any prompting or oppressive conduct by the investigators. Though the Tribunal would urge the investigators to tread with

caution when faced with such a situation. But even if no caution or warning was administered to the Applicant, this flaw was cured by subsequent proceedings as the Applicant had full latitude to give his side of events in answer to the charges and to the Tribunal where he was assisted by counsel.

45. The defence of the Applicant is that the whole incident is related to his private life in view of the intimate relationship with Ms. M and can therefore not be deemed to be harassment in connection with the workplace. He gave evidence that he found Kikwit and Bunia to be very difficult duty stations and that this affected his emotional fortitude. He considered his relationship with Ms. M to be both consensual and serious, having met her mother, travelled on holiday with her, and it being a matter of public knowledge. In his evidence, the Applicant apologized for his conduct and admitted that he had acted in a stupid way. He asked Ms. M to forgive him. He also expressed shame about his conduct.

46. This defence is lame and does not hold water. It was the Applicant who brought what he considered his private life into the public domain by sending emails to many recipients, including United Nations colleagues, who surely were not interested in his private life and this he did, as rightly pointed out by the Respondent, with a view to humiliating Ms. M and to placing her in a very embarrassing situation in her status as a staff member and to compromise her ability to discharge her duties. Further, the Applicant was very much aware that he had damaged Ms. M's reputation because in a text sent on 3 November 2008 from his official MONUC number, he stated that in order to "repair the damage and recover" Ms. M's reputation, he was going to send \$800 to her parents and would email "all those people" to tell them that Ms. M was his woman.

47. However the Tribunal cannot help observing that Ms. M is partly to blame for what is no doubt reprehensible conduct on the part of the Applicant. At a time when she was intimately involved with him she led him to believe that she was having one or more affairs with other men. The Tribunal can justifiably understand the human reaction of the Applicant to this fact without condoning his overall conduct.

48. Even if it is assumed that all the communications related to the private life of the Applicant he still cannot be absolved of blame. ST/SGB/2002/13 (Status, basic rights and duties of United Nations staff members) provides that "[t]here can be situations, in which the behaviour of an international civil servant can reflect on the Organization. International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organization." By acting as he did the Applicant exhibited sordid conduct that would certainly tarnish the image of the Organization.

49. The Tribunal finds that the Applicant's actions in sending the caustic emails and nude photographs of Ms. M to United Nations staff members at their official United Nations email addresses and to their private email addresses constitute harassment within the meaning of ST/SGB/2008/5 in that the emails sought to belittle, humiliate and embarrass Ms. M and to compromise her reputation in a professional context. Accordingly, his actions in this respect amounted to misconduct.

Did the Applicant violate ST/SGB/2004/15 by sending the Bridge Email?

50. Section 4.1 of ST/SGB/2004/15 reads as follows:

Section 4 – Limited personal use

4.1 Authorized users shall be permitted limited personal use of ICT resources, provided such use:

(a) Is consistent with the highest standard of conduct for international civil servants (among the uses which would clearly not meet this standard are use of ICT resources for purposes of obtaining or distributing pornography, engaging in gambling, or downloading audio or video files to which a staff member is not legally entitled to have access)

51. The relevant part of Section 5.1 reads as follows:

Section 5 - Prohibited activities

5.1 Users of ICT resources and ICT data shall not engage in any of the following actions:

[...]

(c) Knowingly, or through gross negligence, using ICT resource or ICT data in a manner contrary to the rights and obligations of staff members.

52. As pointed out earlier, the Applicant sent an email on 14 November 2008 from his Lotus Notes email account to the Lotus Notes accounts of several MONUC staff members with a picture attached to it that depicts a woman in a short skirt or shorts bending over in front of a bridge.

53. According to the *ad hoc* Investigation Panel, there was concrete evidence that the Applicant distributed pornographic materials (two pictures of a naked female colleague and one of a half-naked woman by a Paris bridge) using Lotus Notes and MONUC computer resources. The Tribunal notes however that while the Investigation Panel's finding on the improper use of the Organization's ICT resources includes the pictures of Ms. M, the Applicant was charged by OHRM with "[h]aving sent an email of a partly naked woman to other MONUC staff members' Lotus Notes email accounts using his Lotus Notes email account". He was not charged with using his Lotus Notes email account to send the nude pictures of Ms. M to other MONUC staff members.

54. Consequently, the Tribunal will focus solely on whether the Applicant's sending of the Bridge Email was consistent with the limited personal use allowed by sec. 4.1 of ST/SGB/2004/15. Or was it among the uses prohibited by sec. 4.1, specifically obtaining or distributing pornography.

55. In *Liyanarachchige* the Appeals Tribunal observed: "The onus should therefore be on the administration, which is charging a staff member with misconduct, to establish the factual basis for the disciplinary measure taken against the staff member".

56. The standard of proof in disciplinary matters is lower than the beyond reasonable doubt obtaining in criminal matters but higher than the balance of probabilities approach applicable in civil cases and the act of misconduct must therefore be established by clear and convincing evidence. That standard cannot

however be applied in a total vacuum. A measure of common sense, logic and human experience will necessarily come into as the standard is used to evaluate concrete facts.

57. The Tribunal reiterates what it stated in the case of *Massah* UNDT/2011/218:

It has never been easy to define what pornography is. “Pornography” is not defined in the Bulletin, or in the Commentary annexed thereto. It is not defined in any of the existing Staff Rules and Regulations or Secretary-General’s Bulletins or Administrative Instructions or Information Circulars. The Tribunal must therefore resort to the ordinary dictionary meaning of the word, which is given as: “The explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc. containing this”.²

“At times pornography is confused with, or not differentiated from, obscenity. A distinction must also be made between materials which may be artistic in nature and value, and those which may be considered pornographic. In the case of *Miller v. California*, 413 U.S. 15 (1973), Chief Justice Warren Burger of the United States Supreme Court laid down a test for obscene or pornographic materials as follows:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, supra, at 230, quoting *Roth v. United States*, supra, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value”.

“In the United States case of *Jacobellis v. Ohio* 378 U.S. 184 (1964), Justice Potter Stewart stated, of the term “hardcore pornography”:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...”

58. In the present case, the Tribunal finds that although the Applicant was trying to pass off the picture attached to the Bridge Email as having educational

² Shorter Oxford English Dictionary, (Oxford University Press, 2007).

value, it in fact lacked any serious literary, educational or even artistic value. Nevertheless, the Tribunal finds that the picture did not depict sexual conduct in a patently offensive way.

59. The Tribunal finds also that while the picture is tactless and improper and should not have been sent to anyone using the Organization's ICT resources, it does not amount to pornography. The Tribunal concludes therefore that the *ad hoc* Investigation Panel was wrong to find as it did on this issue.

Was the sanction proportionate to the misconduct?

60. In relation to the pictures sent by the Applicant the Tribunal has examined the "Practice of the Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2011 to 30 June 2012."³

61. The Applicant's case would fall under section J (Misuse of information and communications technology resources). This section includes two cases of pornography being stored, received and/or distributed on or via official computers. The relevant paragraphs read as follows:

A staff member received e-mails containing pornographic material on United Nations e-mail on at least 20 occasions; failed to report to the proper authority the receipt of the e-mails from other United Nations staff members and sent e-mails containing pornographic material using United Nations e-mail on at least 130 occasions.

Disposition: censure and loss of two steps in grade with deferment, for two years, of eligibility for salary increment.

A staff member received e-mails containing pornographic material, on United Nations e-mail on at least 24 occasions; failed to report to the proper authority the receipt of the e-mails from other United Nations staff members and sent e-mails containing pornographic material using United Nations e-mail on at least 24 occasions.

Disposition: censure.

62. The "Practice of the Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2010 to 30 June 2011"⁴, included the following under section C (Computer-related misconduct):

³ ST/IC/2012/19.

Two staff members received and distributed a relatively small number of e-mails containing pornography using their official Lotus Notes e-mail accounts.

Disposition: censure.

Thirty-two staff members received and distributed a relatively small number of e-mails containing pornography using their official Lotus Notes e-mail accounts.

Disposition: censure.

Eight staff members received e-mails, distributed and stored a relatively large number of e-mails containing pornography using their official Lotus Notes e-mail accounts.

Disposition: censure, loss of two steps within grade and two years deferral of consideration for promotion.

63. As found above, the picture of the woman on the bridge was not of a pornographic nature thus the Applicant should not and cannot be sanctioned on that account. Even if the materials were pornographic in nature the ultimate sanction of dismissal on that charge alone would not in the light of the practice obtaining in such cases be justified. However, in this particular case the Tribunal has previously concluded that the Applicant harassed Ms. M by sending pictures of her in the nude along with defamatory emails to United Nations staff members and her family and friends.

64. Whether a sanction imposed for misconduct is proportionate to the misconduct must be “analysed in the light of the evidence establishing the misconduct, the manner in which the act was perpetrated, the attitude of the wrongdoer and the need to protect the integrity of the Organisation”.⁵ The case law on proportionality of disciplinary measures is well-settled. “The Tribunal will give due deference to the Secretary-General unless the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary.”⁶

65. In the light of these factors the Tribunal concludes that the sanction imposed by the Respondent was not disproportionate to the serious misconduct of harassment that was established. Indeed the conduct of the Applicant all through

⁴ ST/IC/2011/20.

⁵ *Diakite* UNDT/2010/024.

⁶ *Perelli* UNDT/2012/034.

was aimed at demeaning a staff member. At the time of the incident the Applicant was a security officer with MONUC. He held managerial and supervisory responsibilities. He admitted that his position was a serious one of responsibility and authority. In the light of the position he held and the responsibilities he was entrusted with the misconduct is even more serious.

66. The Applicant's misconduct was egregious and it had a devastating effect on another United Nations staff member and her work environment. The Applicant failed to respect the high level of trust placed in him. It was the duty of the Respondent to take the appropriate action and the Secretary-General cannot be faulted for concluding that the Applicant was no longer fit to be a member of the Organisation. It is the duty of the Secretary General to maintain and limit damage that may be done to the Organisation's reputation.

Was the USG/DM properly delegated to sanction the Applicant?

67. The Applicant avers that the USG/DM lacked the necessary authority to make the decision.

68. Provisional staff rule 10.1(c)⁷, which is applicable in the current case, stipulated, *inter alia*, that the decision to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

69. Paragraph 9 of ST/AI/371 as amended on 11 May 2010 provides that "decisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary General for Management on behalf of the Secretary-General" and that "[s]taff members shall be notified of a decision to impose a disciplinary measure by the Assistant Secretary-General for Human Resources Management".

⁷ ST/SGB/2009/7 of 16 June 2009 and 21 October 2009.

70. Further, the Secretary-General indicated to the General Assembly on 23 August 2007 that under the new system of administration of justice, the USG/DM would make all decisions as to the imposition of disciplinary measures.⁸

71. Based on the foregoing, the Tribunal finds that the responsibility for making decisions to impose disciplinary measures and to dismiss staff members was delegated to the USG/DM effective 1 July 2009.

72. Accordingly, the Tribunal concludes that the USG/DM was vested with the proper delegation of authority to sanction the Applicant.

Conclusion

73. The Tribunal finds that that the Applicant's actions in sending the emails and nude photographs of Ms. M to United Nations staff members at their official United Nations email addresses and to their private email addresses constituted harassment within the meaning of ST/SGB/2008/5 and as such, his actions amounted to misconduct.

74. The Tribunal finds that the sanction was proportionate to the misconduct.

75. The Tribunal finds that the USG/DM had been vested with the requisite delegation of authority to sanction the Applicant.

⁸ A/62/294.

76. The Tribunal finds that the disciplinary proceedings against the Applicant were conducted according to appropriate due process standards as set out in ST/AI/371.

77. The Tribunal finds that no compensation is owing to the Applicant.

Judgment

78. Accordingly, the Application is dismissed in its entirety.

Signed

Judge Vinod Boolell

Dated this 21st day of February 2013

Entered in the Register on this 21st day of February 2013

Signed

Jean-Pelé Fomété, Registrar, Nairobi