



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/030

Judgment No.: UNDT/2020/121

Date: 16 July 2020

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GISAGE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Abbe Jolles

Counsel for the Respondent:

Susan Maddox, AAS/ALD/OHR, UN Secretariat

Background

1. This is an application filed by the Applicant contesting the Under-Secretary-General for Management's ("USG/DM") decision to impose on him the disciplinary sanction of dismissal from service for serious misconduct in accordance with staff rule 10.2(a)(ix). In his reply, the Respondent argues that the Applicant's actions amounted to serious misconduct justifying the imposed sanction and that his application should be dismissed. The Tribunal dismisses the application in its entirety.

Facts and Procedure

2. At the time of the contested decision, the Applicant held a fixed-term appointment at the FS-4 level, as a Security Officer with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO").

3. On 23 February 2018, he filed an application contesting the USG/DM's decision to impose on him the disciplinary sanction of dismissal from service for serious misconduct in accordance with staff rule 10.2(a)(ix) for the following acts:

- a. transporting up to five Congolese women in his service vehicle, UN 24342, after having consumed alcohol;
- b. having sexual intercourse with up to three of these women; and
- c. paying each woman 40,000 Congolese Francs ("FC") through an intermediary.

4. The Respondent filed a reply on 24 October 2019¹.

¹ To replace the earlier reply filed on 28 March 2018 which the Tribunal ordered was not in conformity with Practice Direction Number 4, para. 19 regarding appropriate and current UNDT forms.

5. The Applicant commenced service with the Organization in 2005 as a Security Officer with the United Nations Operation in Côte D'Ivoire and served until 2013. He was reappointed in 2016.²

6. He was dismissed from service on 25 January 2018. According to the sanction letter³, the decision was arrived at after the Applicant was informed through a memorandum, dated 17 August 2017, from the Office of Human Resources Management, setting out allegations of misconduct against him, in particular that he had transported up to five Congolese women in his service vehicle, registration number UN 24342, after having consumed alcohol, he then had sexual intercourse with up to three of these women and that he paid each woman FC40, 000 through an intermediary.

7. In the said memorandum he was informed that if the above allegations were established, his conduct would constitute a violation of staff regulations 1.2(b), 1.2(f) and 1.2(q), staff rule 1.2(e), and section 3.1 of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse).

8. He was also asked to provide, within two weeks of his receipt of the memorandum containing the allegations, any written statement or explanation that he wished to provide in response to the allegations. He was advised that he was free to request at the earliest time possible for any extension of time to submit his response if he needed more time.

9. The Applicant was also advised that he could avail himself of the assistance of the Office of Staff Legal Assistance and that he could seek the assistance of any counsel at his own expense [to assist him prepare his case in response].

10. After a thorough review of the entire dossier, including his comments, the USG/DM concluded that the allegations against the Applicant were established, by

² Revised reply, para. 5.

³ Revised reply, annex 4.

clear and convincing evidence, hence the dismissal.

Submissions

The Applicant

11. The Applicant states that the dismissal is illegal. He argues that the alleged conduct does not violate the Organization's Sexual Exploitation and Abuse ("SEA") rules. He avers that acts of transporting Congolese women in his service vehicle, having sex with up to three of these women and eventually paying each woman do not violate SEA rules.

12. He argues that there is no clear and convincing evidence that these acts occurred. However even if these acts occurred, they are not in violation of SEA rules.

13. Further, the Applicant argues that he was targeted for dismissal based on his race, national origin and his low rank in the service. He was targeted because he was "low hanging fruit".⁴

14. The Applicant avers that "UN executives actually patronise prostitutes and worse, in illegal often heart-breaking scenarios, without consequence".⁵

15. He submits that it is well documented that United Nations Staff participated in a sex slave/prostitution operation in Bosnia and no participants were dismissed, prosecuted or even disciplined.⁶

16. The Applicant states that a former investigator, Ms. Kathryn Bolkovac, found "young women huddled together" in a nightclub "on filthy mattresses alongside a bin full of used condoms".⁷

17. He goes on to argue that,

⁴ Application, para. 4.

⁵ Ibid.

⁶ Ibid., para. 5.

⁷ Ibid., para. 6.

the majority of the reports were of staff perpetuating the trade by using the brothels, but there were those very specific incidents where people were caught purchasing women outright from the bars, not just going there and buying an hour's worth of use. Ms. Bulkovac reported many high-level UN staff. No one was dismissed, prosecuted or even disciplined. From time to time handwritten notes came from UN high level officials "this matter has been dealt with..."⁸

18. The Applicant argues further that,

there were crimes and direct violations of SEA Rules proven by clear and convincing evidence and yet no participants suffered any consequences. Yet Applicant is dismissed for transporting Congolese women in his UN vehicle? This is clear discrimination.⁹

19. He asserts that Under-Secretary-Generals or Assistant Secretary-Generals who commit sexual assault, abuse or harassment are protected and that he has been terminated because he is a low-level staff member from black Africa.¹⁰

20. In conclusion, the Applicant argues that dismissing him for the said reasons is illegal. Selective discriminatory dismissal under the guise of zero tolerance is illegal.

21. Consequently, the Applicant seeks immediate reinstatement with back pay, an award of 36 months' net base pay; moral damages; and an apology for differential treatment based on race and national origin.

The Respondent

22. The Respondent urges the Tribunal to reject the application because there is clear and convincing evidence that, between 7 and 10 December 2016, the Applicant transported up to five Congolese women in his service vehicle, registration number UN 24342, after having consumed alcohol; had sexual intercourse with up to three of the women; and eventually paid each of them FC40,000 (approximately USD25) through an intermediary.

⁸ Ibid., para. 7.

⁹ Ibid., para. 8.

¹⁰ Ibid., para. 9.

23. The Respondent avers that the record contains the Applicant's statements as well as sworn statements by the women and other witnesses. That there is no indication that the Applicant was extorted; the evidence is unequivocal that the Applicant paid money in exchange for sex.

24. He states that the Applicant's actions amounted to serious misconduct in violation of the Staff Regulations and Rules and ST/SGB/2003/13, warranting his dismissal. That the prohibition of sexual exploitation and abuse is a core provision regulating the behaviour of all United Nations personnel. That the Applicant's unspecified assertion that his conduct is not a violation of SEA rules is baseless.

25. The Respondent argues further that given the seriousness of the misconduct and the Organization's zero tolerance policy towards sexual exploitation and abuse, which aims to safeguard local populations that the United Nations serves, the imposed sanction of dismissal from service was proportionate to the Applicant's misconduct.

26. The Respondent argues further that all relevant circumstances were considered in making the decision and that the Applicant's due process rights were respected throughout the investigation and disciplinary process. That the Applicant's assertions that he was discriminated against on the basis of his race and origin is frivolous.

27. He submits that the reliefs sought by the Applicant should be dismissed.

Considerations

Preliminary issue: Motion for confidentiality

28. In his closing submissions¹¹, the Respondent requested the Tribunal to preserve the privacy of the victims in this matter, and to protect them from any negative repercussions., The Respondent requests to redact their names from any

¹¹ Respondent's closing submissions, para. 8.

public filings in this case. The Tribunal grants the motion based on UNAT authority that victims of misconduct need anonymity. As the purpose of anonymity is to protect the privacy of victims of misconduct and to ensure their safety”.¹²

Merits

29. It is now well established that;

In disciplinary cases, the Tribunals will examine the following: (i) whether the facts on which the disciplinary measure is based have been established (where termination is the sanction imposed, the facts must be established by clear and convincing evidence; in all other cases preponderance of the evidence is sufficient); (ii) whether the established facts amount to misconduct; (iii) whether the sanction is proportionate to the offence; and (iv) whether staff member’s due process rights were respected.¹³

Whether the facts on which the sanction is based have been established

30. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. 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.¹⁴ In the instant case the Respondent charged the Applicant with three acts of misconduct as follows:

i. Procurement of sexual services

31. In determining that the Applicant had committed this act, the Respondent relied on the evidence of the Applicant; sworn statements of the woman that the Tribunal shall call “V0”; her colleagues Ms. FMN and Ms. NL and a note in the

¹² *Oh* 2014-UNAT-480 para. 23.

¹³ *Suleiman* 2020-UNAT-1006, para. 10, citing *Nadasan* 2019-UNAT-917, para.38; *Siddiqi* 2019-UNAT-913, para. 28.

¹⁴ *Bagot* 2017-UNAT-718 at para. 46 citing *Mizyed* 2015-UNAT-550, para. 18, *Applicant* 2013-UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; *Molari* 2011-UNAT-164, paras. 29 and 30.

security book at the Applicant's house, that on Wednesday, 7 December 2016, the Applicant had visited Mak Ledy Bar in Matadi, where he met these three women. At around 2.00 a.m. the following morning, on Thursday, 8 December 2016, the Applicant drove the women to his house in his official vehicle. His arrival with unauthorised passengers was recorded in the security log book. The women were in and out of the Applicant's house up to 10 December 2016. While at his house, the Applicant was alleged to have had sexual intercourse with at least three women but he admitted having sexual intercourse only with Ms V0 whom he later paid FC40,000 for sex.

32. UNAT had occasion in the case of *Oh*¹⁵ to decide on a staff member's admission during investigations. In that case, Mr. Oh denied having made any admission to the OIOS investigators that he had paid prostitutes for sexual services and contested the record of the interview. He claimed that his OIOS statements were fabricated. UNAT found that "the burden of proving improper motivation lies with the staff member raising such claims"¹⁶ and that Mr Oh presented no such evidence.

33. In the case at bar, based on his own admission in the investigation report which he has not challenged and the evidence of other witnesses that were interviewed, the Tribunal finds that there is clear and convincing evidence that between 7 and 10 December 2016, at his residence, the Applicant had sexual intercourse with one Congolese woman, V0. By his own admission during the investigation, the Applicant procured sexual services of V0 whom he had picked up from a bar where he had been drinking and paid her FC40,000 through an intermediary, Francois. The relevant parts of the evidence come through from the annex to his letter of sanction and it says:

You admitted that you had sexual intercourse with V0, but denied having had sexual intercourse with Ms NL. You stated that when you asked V0 to leave, she requested 40.000 FC for the sexual intercourse.

¹⁵ 2014-UNAT-480, para. 50.

¹⁶ *Ibid.*, citing *Assad* 2011-UNAT-123, para.36.

You stated that you wanted to pay, but you realised that you did not have the money. You explained that you suspected that the woman, who had left earlier that morning, might have stolen your money. You stated that you asked V0 to wait while you obtained the money.¹⁷

34. The Tribunal notes that the sanction letter was filed by the Applicant as part of his application and that he has not anywhere disputed the contents of the letter, in particular, the quoted paragraph. The Applicant filed closing submissions and even in these he did not dispute the correctness of his admission. He did not allege that it was obtained under duress or coercion or through any unlawful means or that it was fabricated.

35. In the Tribunal's view and based on strict interpretation of the provisions below, in particular, staff rule 1.2(e), it does not make any difference that money was requested and paid after the sexual intercourse¹⁸ or whether or not the women were prostitutes. The wording used in the provision is "exchange of money" and this is exactly what has been proved through unequivocal admission by the Applicant and evidence of several other witnesses who were interviewed during investigations¹⁹.

36. In *Oh*, UNAT held that the UNDT had properly relied on the record of Mr. Oh's statement to the OIOS investigators, which corroborated the statements of VO3 and VO4 that he had paid them for sexual services.²⁰

Whether exchanging money for sex qualifies as misconduct under the Staff Regulations and Rules

37. To answer this question, the Tribunal had recourse to section 3.1 of ST/SGB/2003/13:

Sexual exploitation and sexual abuse violate universally recognized international legal norms and standards and have always been

¹⁷ Application, annex 4, para. 14.

¹⁸ Applicant's closing submissions, para. 12.

¹⁹ Revised reply, paras. 30 and 40.

²⁰ Ibid, para. 54.

unacceptable behaviour and prohibited conduct for United Nations staff. Such conduct is prohibited by the United Nations Staff Regulations and Rules.

38. The specific staff rule, staff rule 1.2(e) that the above section refers to and which the Applicant violated provides that:

Sexual exploitation and abuse is prohibited. Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or the age of consent locally, except where a staff member is legally married to a person who is under the age of 18 but over the age of majority or consent in his or her country of citizenship. Mistaken belief in the age of a child is not a defence. The exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. United Nations staff members are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse.

39. The Applicant states that the dismissal is illegal. He argues that the alleged conduct does not violate the Organization's SEA rules. He avers that acts of transporting Congolese women in his service vehicle, having sex with up to three of these women and eventually paying each woman do not violate SEA rules²¹. The Tribunal finds that the Applicant's assertion is wrong. The acts that he describes constitute violations of the SEA rules as provided above.

ii. Transporting Congolese women in a United Nations vehicle

40. The Applicant admits that he transported four Congolese civilian women in his United Nations service vehicle without authorization and after having consumed alcohol. This admission is corroborated by the testimonies of V0, FMN and NL to the effect that the Applicant drove them to his residence using his service vehicle. This fact was confirmed by a note in the logbook of the "New Eskokin" security company, which oversaw security at the Applicant's residence, providing that the Applicant "arrived at 2.40 AM in the night from Wednesday to Thursday (7 to 8 December

²¹ Application, para. 1.

2016) in his service vehicle, UN 24342, together with “four girls”²². This piece of evidence has not been contradicted.

Whether the established facts qualify as misconduct under the Staff Regulations and Rules

41. In dismissing the Applicant, the Respondent argued that the Applicant had violated staff regulation 1.2(q) which stipulates that:

staff members shall use the property of the Organisation only for official purposes and shall exercise reasonable care when utilizing such property and assets.

42. It goes without saying that the Applicant violated staff regulation 1.2(q) above by ferrying women, being unauthorised passengers from a bar where he had been drinking alcohol (and not working) and taking them to his house for sex and not for official purposes in the wee hours of the day²³ using the property of the Organization identified as motor vehicle registration number UN 24342.

43. The Tribunal finds that this allegation is proved through clear and convincing evidence and it constitutes misconduct as per the staff regulation.

Allegations of Discrimination

44. The Applicant argues that he was targeted for dismissal based on his race, national origin and his low rank in the service. He was targeted because he was “low hanging fruit”.²⁴

45. The Tribunal finds the Applicant’s allegations that he was targeted to be baseless. He has not adduced any evidence containing particulars to show how he was targeted. UNAT jurisprudence considers allegations of discrimination to be serious and must be proved:

²² Application, annex 2, para. 5.

²³ According to the reply, para. 11, it was around 2.00 a.m. on 8 December 2016.

²⁴ Application, para. 4.

Allegations of discrimination, improper motive and bias are very serious and ought to be substantiated with evidence; evidence which should have been presented to the UNDT to support the allegations²⁵.

46. In deciding an appeal where the Appellant had argued that she was a victim of racism, UNAT found the allegation baseless, dismissed her appeal, finding that it was not racism which induced her to behave dishonestly, corruptly and with an appalling lack of integrity.²⁶

47. The same should be said about the Applicant in the instant case. He went out looking for women to have sex with, in exchange for money. It does not seem that he was doing this because he was a low-ranking staff member of black African race. Nor can the Tribunal accept his argument that because other staff members in the United Nations have engaged in similar or worse activities and were not punished therefore, he should have been spared this sanction.

48. There is ample evidence through UNAT and UNDT jurisprudence to show that staff members are dismissed from service for violating SEA rules.²⁷ It was up to the Applicant to produce evidence before this Tribunal to show that these cases did not involve as culprits, persons of races other than black African and of higher ranks. Below are more examples of disciplinary measures taken by the Secretary-General in SEA cases:²⁸

- a. A staff member, exercising responsibilities that included the authority to hire casual daily workers, engaged in sexual relationships with local women, pursuant to which sexual favours were exchanged for money and/or employment for them, their relatives and/or friends. The staff member was

²⁵ *Ross* 2019-UNAT-944, para. 25.

²⁶ *Jenbere* 2019-UNAT-935, para. 35.

²⁷ See for example *Kramo* UNDT/2018/122 and *Oh* 2014-UNAT-480. In *Liyanarachchige* 2010-UNAT-087 and *Diabagate* 2014-UNAT-403 the Administration took action although the decisions were rescinded by UNAT.

²⁸ Compendium of disciplinary measures (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2018) available at https://hr.un.org/sites/hr.un.org/files/Compendium%20of%20disciplinary%20measures%20July%202009-%20December%202018.Final_.15.10.19.xlsx

dismissed.

b. A staff member engaged in sexual activity with a female who was, at the time, under the age of 18, and in several sexual relationships with beneficiaries of United Nations assistance, in violation of ST/SGB/2003/13. The staff member also engaged in the unofficial and unauthorized use of United Nations vehicles. The staff member was dismissed.

c. A staff member engaged in sexual abuse and exploitation by paying prostitutes for sexual services. The staff member was dismissed.

d. A staff member engaged in sexual exploitation. The staff member's admission and belief that the conduct was not exploitative constituted mitigating factors. The staff member was separated from service with compensation in lieu of notice and without termination indemnity.

49. The Applicant has not mentioned any staff member except Mr. Tettekpoe who engaged in sexual activities or worse and was not made to answer for his/her actions.

50. In his interview with the investigators, he alleged that Mr. Tettekpoe engaged in these activities²⁹ but the Applicant does not indicate whether the allegations were brought to the attention of relevant local authorities or the Administration and they opted not to take any action on the matter. The Applicant has not even included this piece of allegation in his submissions. He just made general and sweeping accusations. The Tribunal finds that these allegations are not substantiated therefore they do not prove anything.

51. Further, the Tribunal has read the web articles³⁰ whose links the Applicant cited in his application alleging that;

it is common for UN staff pay others for sex... Moreover UN officials

²⁹ Application, annex 2, para. 75.

³⁰ Applicant's closing submissions, para. 13, footnotes 11 and 12.

have sexually assaulted (raped) in many parts of the world with impunity.

The referenced articles do not show that any particular member of staff committed these acts and was spared because he/she was senior in rank or of race other than black African. This argument lacks sound basis and it is irrelevant to resolving this application.

52. All in all, the Tribunal finds that the Applicant's conduct clearly violated the following Staff Regulations:

a. Staff regulation 1.2(b) which stipulates that, staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

53. The Tribunal agrees with the Respondent that the Applicant did not uphold the highest standards of integrity, in fact, he breached this provision by behaving dishonourably.

b. Staff regulation 1.2(f), which stipulates, inter alia, that staff members shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

54. The Applicant was an international civil servant regardless of his race and country of origin or position at the workplace as such he was expected to conduct himself exemplarily. Engaging in sex in exchange for money and transporting unauthorised passengers in the Organization's motor vehicle clearly marked with an official registration number as such cannot be said to be befitting conduct. The

Respondent has proved that the Applicant cumulatively violated these provisions and that these violations constitute misconduct punishable by dismissal from service.

Whether the sanction is proportionate to the offence.

55. Any disciplinary measure imposed on a staff member has to be proportionate to the nature and gravity of his or her misconduct.³¹ Factors other than the impugned behaviour to be considered in assessing the proportionality of a sanction include the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.³²

56. The Applicant has not made any specific submission with respect to the Secretary-General's choice of disciplinary sanction of dismissal other than his argument that other staff members of the United Nations were not sanctioned for conducting themselves in a similar or worse fashion. This Judgment has dismissed this argument as baseless. In view of the seriousness of the misconduct and consistent with prior UNDT and UNAT jurisprudence and the practice of the Secretary-General in similar cases, cited above, the Tribunal finds that the sanction of dismissal is appropriate under the circumstances.

Whether due process rights were observed

57. The Applicant was accorded his right to fair procedure. The investigation process has not been challenged. He was given notice of the allegations against him to which he was asked to respond. He responded to the allegations. In his submissions, he has not alleged any violation of his due process rights.

58. As the impugned decision was properly motivated, the Applicant's claim for various reliefs is baseless.

³¹ Staff rule 10.3(b).

³² *Rajan* 2017-UNAT-781 at para. 48.

JUDGMENT

59. The application is dismissed in its entirety.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 16th day July 2020

Entered in the Register on this 16th day July 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi