



Before: Judge Francis Belle

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Victor Rodriguez

Counsel for Respondent:

Isavella Vasilogiorgi, AAS/ALD, OHR, UN Secretariat
Jacob van de Velden, AAS/ALD, OHR, UN Secretariat

Introduction

1. At the time of the impugned decision, the Applicant held a continuing appointment at the FS-4 level and was serving at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”).
2. The Tribunal determines that real names should not be used in this matter because of its nature. Instead, initials and or substitute names may be used to identify the important characters.

Procedural History

3. On 10 February 2020, the Applicant was separated from service of the Organization pursuant to staff rule 10.2(a)(viii) with compensation *in lieu* of notice, without termination indemnity, for serious misconduct in violation of staff regulation 1.2(b), staff rules 1.2(c) and 1.2(e), and sections 3.2(e) and 3.2(f) of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse). The Applicant filed his application to challenge this decision on 13 May 2020.
4. The Respondent filed his reply on 13 June 2020. The Respondent takes the position that all relevant circumstances were considered in making the disciplinary decision, and that the Applicant’s rights to due process were respected throughout the disciplinary process.
5. The parties attended a case management discussion (“CMD”) with the Tribunal on 4 June 2021.
6. On 7 June 2021, the Tribunal issued Order No. 116 (NBI/2021) directing the Applicant to file his motion for disclosure of documents, justifying each disclosure that was being sought.
7. On 14 June 2021, the Applicant filed his disclosure motion. The Respondent filed his response to the motion on 28 June 2021.

8. The Tribunal finds that the material sought by the Applicant is not relevant and has little probative value to the inquiry at hand, and the motion is accordingly denied.

9. The parties were strongly encouraged to consider alternative methods of resolving this dispute, but they informed the Tribunal their positions were too far apart for talks to effectively commence.

Facts and Parties' Submissions

The failure to report the alleged sexual abuse

10. The Allegations Memorandum, dated 7 June 2019, charges the Applicant as follows:

- a. While you were aware since around 15 July 2017 of the allegation that Mr CE, another UN staff member, had sexually abused a female Congolese teenager, you did not report that allegation to MONUSCO, for instance to CDT, OIOS or other officials of the Organisation;
- b. You refused, without justification, to participate in an interview by OIOS.

11. It is the Respondent's case that there is clear and convincing evidence to establish these allegations as proven, and this behaviour amounts to misconduct *per* staff rule 1.2 and ST/SGB/2003/13. In failing to report allegations against a fellow staff member, and refusing to participate in an investigative interview, the Applicant, the Respondent contends, displayed a serious lapse of "integrity and exhibited a marked disregard" of the Organization's policies and processes, thereby irrevocably undermining the trust and confidence placed in him by the Organization.

12. All relevant circumstances were considered by the Respondent before he decided that separation from service was the appropriate sanction. It was proportionate for misconduct of this nature. In any event, the Respondent adds, the

Applicant “did not specify the basis” for his submission that the sanction was disproportionate.

13. The Applicant was a member of a local prayer group in Goma, DRC, which comprised staff of the Mission and members of the local community. CE, a fellow staff member of the Mission and colleague of the Applicant, led the prayer group.

14. On 13 July 2017, CE was summoned to appear at the local court on 15 July 2017. The summons was caused by a complaint by one CM.

15. On 14 July 2017, CE filed an incident report with the Security and Safety Section of the Mission. CE stated that he was filing the report because he had been threatened by CM with legal action for allegedly having an affair with her daughter. He added that the summons to appear was served on him by a plain clothes policeman the day before, who also demanded that he sign a document to acknowledge receipt. CE refused to sign the document because he did not understand the contents of the document, and because the allegation of the affair was entirely false.

16. CE attended court on 15 July 2017, as summoned. He was accompanied by three men, including his landlord and the Applicant. A lawyer, SA, was also there for CE.

17. CE then took ill and was hospitalised between 15 and 17 July 2017. While in hospital, his landlord, the Applicant, the lawyer and a fellow colleague from human resources visited CE.

18. On 3 November 2017, CM reported the matter to MONUSCO. CE was placed on administrative leave without pay on 1 December 2017 until he was summarily dismissed on 29 January 2019.

19. On 14 December 2017, the Applicant was interviewed by the Office of Internal Oversight Services (“OIOS”) as a witness in the investigation against CE. CE’s landlord was also interviewed about a month later.

20. An OIOS Note to File dated 28 April 2018 indicated that 10 members of the prayer group, including the Applicant, were interviewed.

21. It is the Applicant's case that not only have the facts surrounding the impugned decision been misconceived, the procedure was irregular and the eventual sanction entirely disproportionate.

22. The Applicant strongly contends that he cannot possibly have been obliged to report on an alleged wrongdoing which the Respondent was already aware of through his legal office, and indeed through the staff member who has been accused himself! Not only did CE report the matter to the Mission as soon as he received the summons, the Mission had itself received the summons and transmitted it to CE. There was, therefore, nothing further for the Applicant to report.

Refusal to cooperate with the investigation

23. On his refusal to cooperate with the investigation, the Applicant submits that OIOS first invited him for an interview *as a subject of an investigation* on 5 November 2018. The Applicant was on annual leave from 9 to 31 October 2018, and on certified sick leave between 16 October 2018 and 10 January 2019. The Applicant responded to the email from OIOS on 6 November 2018 and told them that he was unwell and on certified sick leave.

24. The Applicant makes the point that it is curious that the Medical Services Division ("MSD") took the view that there was no impediment to him being interviewed on 7 December 2018, whereas MSD approved his sick leave on 28 November 2018 after it was apprised of the severity of his illness. OIOS made no effort to ascertain the duration of his sick leave through the Mission's Human Resources Section nor from MSD. Following MSD's "clearance" for the Applicant to be interviewed, OIOS made one attempt to contact the Applicant. Had OIOS sought clarification from the Mission or MSD, they would have been aware that the Applicant was due to return to work on 10 January 2019 and could be interviewed then. In the circumstances, an investigation report was concluded on 31 January 2019.

25. The Respondent argues that the Applicant's reliance on MSD's approval of his sick leave is misplaced. Placement on sick leave does not automatically preclude a staff member from participating in an investigation. MSD had full access to all the necessary information regarding the Applicant's ailments and must have properly considered the relevant material before assessing the Applicant as being fit to be interviewed.

Considerations

26. The function of the Tribunal in this matter is that of judicial review.

27. The Appeals Tribunal has consistently held that the "[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration". In this context, the Dispute Tribunal is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence".¹

28. In reviewing the Secretary-General's exercise of discretion, the Tribunal is to follow the well-established standard of review as provided in *Sanwidi* 2010-UNAT-084 at para. 40:

[W]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

29. This case turns on the meaning to be given to three Staff Rules of the United

¹ See, for instance, para. 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT-1024.

Nations.

Sexual Exploitation and Abuse

30. The Respondent charges that the Applicant failed to report misconduct which he became aware of on 15 July 2017.

While you were aware since around 15 July 2017 of the allegation that Mr CE, another UN staff member, had sexually abused a female Congolese teenager, you did not report that allegation to MONUSCO, for instance to CDT, OIOS or other officials of the Organisation.

31. The Applicant's position is that he became aware of the fact that CE had been charged when he accompanied the latter to the local court on 15 July 2017, by which time CE had himself reported the matter to the Mission.

32. The charge against the Applicant is not one of sexual exploitation but rather being involved in activity which 'assisted' another in pursuing sexually exploitative activities. The Respondent takes the position that the Applicant's conduct contravened rule 1.2(c) and (e) of the Staff Rules.

33. These provisions of the Staff Regulations and Staff Rules stipulate as follows:

Regulation 1.2

Basic rights and obligations of staff

Core values

(b) 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;

Rule 1.2

Basic rights and obligations of staff

General

(c) Staff members have the duty to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.

Specific instances of prohibited conduct

(e) 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.

34. These provisions must therefore be applied on the facts alleged against the Applicant. Did the Applicant contravene these provisions of the staff regulations and rules by not reporting the allegations facing CE to MONUSCO?

35. The evidence is that while the Applicant went to court with CE, he did not enter the court room. He was informed by someone else who had entered the court room that CE was accused of rape.

36. To implicate the Applicant, the evidence would have to show that he was aware of more than just what others may have said that the alleged victim V02 reported.

37. The requirement that the Applicant should report his knowledge of the alleged misconduct, namely sexual exploitation, is the substance of the charge against the Applicant.

38. The Respondent's position, as gleaned from the OIOS Report and from his submissions to the Tribunal is that the Applicant's conduct contravened staff rule 1.2 and section 3.2 (e) and (f) of ST/SGB/2003/13.

39. ST/SGB/2003/13, in relevant part, provides:

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;

(f) United Nations staff are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse. Managers at all levels have a particular responsibility to support and develop systems that maintain this environment.

40. The question before this Tribunal is whether the Applicant failed in his obligations as a staff member by not reporting his “concerns or suspicions regarding sexual exploitation” by a “fellow worker.”

41. Although not referred to by the Respondent, the Tribunal is also guided by ST/AI/2017/1 on Unsatisfactory conduct, investigations and the disciplinary process, which places on staff members the obligation to report “information about suspected unsatisfactory conduct.”

42. Section 4.1 of ST/AI/2017/1 reads:

4.1 Pursuant to staff rule 1.2 (c), staff members have the duty to report any breach of the Organization’s regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.

43. To have this applied strictly, the Applicant in this case would have been required to report an allegation of rape which he heard from another person who attended court and which in turn was based on what that individual was told based on a complaint by the victim’s mother/the Complainant.

44. The section goes on to state exactly what the reporting staff member “shall” report.

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.

45. In order for the Applicant to assist the investigation in a manner which would be in full compliance with the relevant section (4.5) he would have to report: (a) a detailed description of the unsatisfactory conduct; (b) the names of the staff member(s) involved; (c) where and when the unsatisfactory conduct occurred; and (d) the names of potential witnesses to the unsatisfactory conduct and provide supporting documents.

46. It is apposite at this juncture to note that the rule which was applied relies on a totally subjective view of the applicable facts. The staff member was charged with not reporting his knowledge of the alleged sexual abuse of VO2. But the applicable rule states that where a staff member develops concerns or suspicions regarding sexual misconduct by a fellow worker he or she must report such concerns via established reporting mechanisms.

47. It should not be presumed in applying this rule that the Applicant had a concern or suspicion about the alleged sexual abuse which sections 3.2 (e) and (f) of ST/SGB/2003/13 suggests he should report. Indeed, based on the evidence produced the only information the Applicant would have become aware of on 15 July 2017 is that CE had been charged with rape by the domestic authorities.

48. The Applicant contends that at the time, indeed the day before on 14 July 2017, the Respondent already knew about the complaint against CE and was also aware that he had been summoned to appear in court.

49. The Respondent contends that the report made on the 14 July 2017 did not provide important details about the alleged misconduct. The fact that CE's report to the Mission did not contain "the precise nature of the allegations" against him cannot be held against the Applicant. Likewise, the invitation to attend court, which was transmitted to the Applicant by the Mission, did not "mention the nature of the allegations" against CE.

50. The fact is that the Applicant would not have known the substance of CE's or any other person's report. There is no evidence that he had any knowledge of the relevant details on 14 July 2017. And what he came to know on 15 July 2017, was no more "precise" than that CE had been charged. Indeed, the facts show that the Applicant could not have supplied four out of the five kinds of information required under section 4.5 to enable the report to be of some substance.

51. The Tribunal finds that section 4.1 of ST/AI/2017/1 does not apply to an individual who merely hears second-hand about a case of misconduct since much of what such a person has to report would be hearsay and possibly misleading and devoid of the kind of detail the rule is seeking to elicit from the staff member.

52. In the circumstances, it cannot be said that there is clear and convincing evidence that the Applicant failed to comply with section 3.2(e) of ST/SGB/2003/13 by failing to report to the Respondent what the latter was already aware of.

Plan to pay money to CM and VO2

53. Having found that it is unclear what the Applicant knew about the details of the substance of the Charges against CE, indeed, his attendance at a meeting cannot be directly linked to his knowledge of CE's alleged breach of the Staff Rules or Staff Regulations or special measures for protection from sexual exploitation and sexual abuse. There is therefore no clear and convincing evidence of this charge.

Duty to cooperate

54. The final charge against the Applicant was that he failed to cooperate with the investigation, because he did not agree to be interviewed on the charge against him but insisted that he was on sick leave. It is appropriate to consider the relevant rule.

Duty to cooperate

6.2 Pursuant to staff regulation 1.2 (r) and staff rule 1.2 (c), staff members are required to fully cooperate with all duly authorized investigations and to provide any records, documents, information

and communications technology equipment or other information under the control of the Organization or under the staff member's control, as requested. Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct.

55. The Applicant argued that he had cooperated with the investigation into CE's conduct but was on sick leave at the time when he was contacted for the interview. The Tribunal accepts that the interview is an integral part of the investigative process. Indeed, the interview would be seen as part of due process which permits the investigator to probe the evidence given by the person being investigated and possibly check sources or information provided to ensure that justice is done.

56. But the Applicant argues that he was on sick leave and the investigator could have given some time for him to recover and go back to work to continue the investigation. The Tribunal does not accept that the word of MSD on whether the Applicant was well enough to be interviewed was conclusive. There is nothing on the record to show how MSD, who had certified the Applicant's sick leave, came to the conclusion that he was nevertheless well enough to be interviewed as a subject of an investigation. The Tribunal considers this process, as reported, fatally flawed since any medical professional who is going to comment on the availability of a person on sick leave to be interviewed should first examine or at least speak to that person about the nature of their illness. There is no evidence that they did so.

57. MSD certified the Applicant as fit to be interviewed on 7 December 2018 but had also approved his sick leave until 10 January 2019. Given that more than a year had passed between the incident at issue, and the decision to interview the Applicant as a *subject* for failure to report the wrongdoing of a fellow staff member, the Tribunal must ask what difference it would have made to the investigation if OIOS had simply waited until January 2019 to interview the Applicant?

58. The Tribunal is of the view that the strongest aspect of the case against the Applicant is the involvement in a meeting about the payment to be made to V02 and CM. However, the evidence is not sufficiently convincing to establish the Applicant's misconduct on this aspect of the charges.

Disposal

59. In the circumstances, the Tribunal determines that the decision to impose the sanction of separation from service with pay *in lieu* of notice and without termination indemnity for serious misconduct is rescinded.

60. The Tribunal orders that *in lieu* of reinstatement, the Applicant should be paid compensation of 12 months' net base salary.

(Signed)

Judge Francis Belle

Dated this 29th day of July 2021

Entered in the Register on this 29th day of July 2021

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Geneva