



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Steven W. S. Kayuni

Counsel for Respondent:

Alister Cumming, UNICEF

Introduction

1. The Applicant, a former staff member of the United Nations Children’s Fund (“UNICEF”) contests the decision to separate him from service, with compensation in lieu of notice, and with termination indemnity.

Facts

2. The Applicant joined UNICEF on 8 April 2012 as an Emergency Specialist at the P-4 level in the Nepal Country office, whilst remaining at the same level and with the same functional title, he transferred to several Country and Regional Offices. Specifically, on 11 October 2017, the Applicant transferred to the South Asia Regional Office in Kathmandu, where he held a fixed-term appointment.

3. In January 2020, the Applicant was offered the position of Emergency Specialist, at the P-4 level, at Cox’s Bazar Field Office (“CBFO”), Bangladesh.

4. From 5 to 8 February 2020, the CBFO held an all-staff retreat in Bandarban, Bangladesh. The Applicant was invited to participate in the retreat as he had been identified as the incoming Emergency Specialist at CBFO and was scheduled to take up this position in March 2020.

5. On 11 February 2020, the Office of Internal Audit and Investigations (“OIAI”) received a report of possible misconduct involving the Applicant. Specifically, it was reported that, on 7 February 2020, at the Cox’s Bazar all-staff retreat, the Applicant sexually harassed several female personnel by “physically grabbing them” after having consumed alcoholic beverages and becoming intoxicated.

6. On 28 February 2020, the Applicant declined the position in Cox’s Bazar.

7. On 23 April 2020, the Applicant was informed that OIAI was conducting an investigation in relation to the reported matters and that he was the subject of the investigation.

8. During the investigation, OIAI interviewed witnesses and gathered other evidence. The Applicant was interviewed on 6 May 2020.

9. On 21 October 2020, OIAI completed its investigation and transmitted the investigation report to the UNICEF Deputy Executive Director, Management (“DED/M”) for appropriate action.

10. By letter dated 19 November 2020, the DED/M informed the Applicant of the decision to initiate a disciplinary process against him and issue him with formal charges of misconduct. It was alleged that on 7 February 2020, during the gala night and raffle draw event held as part of the Cox’s Bazar all-staff retreat, the Applicant:

a. Grabbed V01 from behind her and held her tight with his hands around her waist to the front of her body. He rested his head on her back while he pulled her back so that the front of his body rested against the back of her body. V01 did not consent to him touching her; and

b. Hugged V02 from the front side of her body with his body pressed against her body. He hugged her with both his arms, and with one hand he pressed her breast. He held V02 for a few seconds before a colleague took her away. V02 did not consent to him touching her.

11. The Applicant was requested to submit a response to the allegations of misconduct within 14 days of his receipt of the charge letter. Following some requests for extensions of time, which were granted, the Applicant submitted his response on 1 January 2021.

12. Following a review of the Applicant’s response, on 20 January 2021, OIAI was requested to interview another witness in relation to some of the matters raised in the Applicant’s submission. Furthermore, OIAI received additional information (video recordings and photos from WhatsApp messenger) from witnesses it had interviewed previously in the context of the investigation.

13. On 26 January 2021, the Applicant was provided with the additional material that OIAI obtained, and on 1 February 2021, he provided his response to the additional information.

14. By letter dated 15 February 2021, the DED/M informed the Applicant of the decision to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice, and with termination indemnity in accordance with staff rule 10.2(a)(viii).

15. On 13 May 2021, the Applicant filed the present application.

16. On 17 June 2021, the Respondent filed his reply.

17. On 16 September 2021, the Applicant filed his observations on the Respondent's reply.

18. On 20 September 2021, the Respondent filed a motion to strike the Applicant's observations noting that he did not request leave to submit any additional submission, nor did the Tribunal grant him leave in this regard.

19. By Order No. 63 (GVA/2022) of 8 June 2022, the Tribunal invited the parties to a case management discussion ("CMD"), which took place *in camera* on 23 June 2022 and during which it was agreed, *inter alia*, that the case is sufficiently briefed and there was no need for a hearing on the merits.

20. By Order No. 70 (GVA/2022) of 1 July 2022, the Tribunal accepted the Applicant's observations of 16 September 2021 and granted the Respondent leave to file his comments thereon. The parties were also ordered to file their respective closing submission. The Tribunal further decided to anonymize the victim's identity as well as the Applicant's name in its judgment.

21. On 11 July 2022, the Applicant filed his closing submission and on 21 July 2022, the Respondent filed his closing submission including his comments on the Applicant's 16 September 2021 observations.

Parties' submissions

22. The Applicant's principal contentions are:

- a. The facts on which the disciplinary measure was based had not been established. The testimonies of V01 and V02 and other witnesses are unreliable and inconsistent;
- b. The investigators failed to interview the witnesses that the Applicant proposed and, as a consequence, the Applicant's due process right was violated;
- c. There is evidence that Ms. S.A. colluded and coached V01 and V02, therefore their testimonies were biased and improperly motivated;
- d. The Applicant's actions are denied and not proven to the requisite standard. He further claims that "even if it is granted that the alleged incidents constituted physical conduct, such conduct was not in any way sexual in nature and not intended to reasonably be perceived to cause offense or humiliation to V01 and V02";
- e. Not all misconduct must result in termination and a gradual assessment of the possible measures should be undertaken on a case-by-case basis;
- f. The disciplinary measure imposed is unfair and disproportionate to the "established misconduct", which deserves a more clement disciplinary sanction; and
- g. The Applicant requests the Tribunal to replace the sanction imposed with suspension without pay for twelve months followed by special leave with full pay with retroactive payment of his salary and related benefits. He also requests the Tribunal to order costs.

23. The Respondent's principal contentions are:

- a. The facts are established by clear and convincing evidence. V01 and V02 provided credible and reliable evidence regarding the Applicant's actions;
- b. The Applicant has not identified any motivation for V01, V02 or any of the other witnesses to fabricate allegations against him;
- c. The Applicant's assertion that Ms. S.A. coached V01 and V02, and colluded with the witnesses is without foundation;
- d. The Applicant's actions amount to misconduct in violation of the staff regulation 1.2(a), staff rule 1.2 (f), and the provisions of UNICEF's policies against prohibited conduct. Specifically, his established conduct in relation to the incidents involving V01 and V02 amounts to sexual harassment within the meaning of sec. 1.1(c) of CF/EXD/2012-007;
- e. The disciplinary measure was proportionate to the Applicant's established misconduct and followed a disciplinary process in which the Applicant's due process right was fully respected; and
- f. There is no basis to rescind the decision nor to order costs.

Consideration

The scope of judicial review in disciplinary cases

24. The Tribunal is seized of an application whereby the Applicant contests the disciplinary measure of separation from service, with compensation in lieu of notice, and with termination indemnity.

25. The Applicant disputes the credibility of the two complainants. He argues that the threshold of evidence was not met as there is no clear and convincing evidence of sexual harassment. He maintains that the sanction was harsh and disproportionate to the gravity of the offence. He further claims that the facts had no impact on the work environment because he declined the job offer in Cox Bazar.

26. The Appeals Tribunal has held that judicial review is focused on how the decision-maker reached the impugned decision, and not on the merits of the decision (see *Sanwidi* 2010-UNAT-084, para. 42 and *Santos* 2014-UNAT-415, para. 30).

27. The Appeals Tribunal has also determined what the role of this Tribunal is when reviewing disciplinary cases (see *Mahdi* 2010-UNAT-018, para. 27 and *Haniya* 2010-UNAT-024, para. 31). In the case at hand, this Tribunal considers that the issues to be examined are:

- a. Whether the facts on which the disciplinary measure was based have been established according to the applicable standard;
- b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules;
- c. Whether the disciplinary measure applied is proportionate to the offence, and
- d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

Have the facts on which the disciplinary measure was based been established according to the applicable standard?

28. According to the jurisprudence of the Appeals Tribunal, when the disciplinary sanction results in separation from service, the alleged misconduct must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable (see *Molari* 2011-UNAT-164, para. 2).

29. In assessing if the standard of evidence was met, the Tribunal recalls that the burden of proof lays on the Organization, since it is incumbent on the Administration to allege and provide evidence that the facts took place in accordance with the standard of "clear and convincing evidence".

30. After a careful review of the case file, the Tribunal finds that the investigation gathered clear and convincing evidence that supports the complainants' allegations. In fact, both victims' statements are clear and consistent and do not reveal any bias against the Applicant. Moreover, their account of the events was corroborated by other witnesses who testified before OIAI, in a clear and objective manner, about the Applicant's behaviour at the retreat.

31. The Tribunal examined the evidence concerning the two incidents and noted the following:

Incident involving V01

32. In her report to OIAI, V01 indicated that during the staff retreat, the Applicant "had unexpectedly grabbed her tight from behind and she had to struggle to 'get rid of him' leaving her feeling uncomfortable as a result of the 'unwanted touch'". She also reported that the Applicant "did not drink responsibly" and "was not behaving properly".

33. In her interview with OIAI, V01 told the investigators that the evening of 7 February 2020, she was the master of ceremony of the programme for the cultural events and that her role involved announcing participants to the stage to perform their piece. She told OIAI that "certain staff, including [the Applicant], had consumed rice wine and that [the Applicant] had not 'drunk responsibly'". V01 explained that "the 'home-brewed' rice wine consumed that evening was not a beverage that was served by UNICEF or the resort where the event was held. Rather, access to the drink was arranged by individual staff who brought it to the venue".

34. V01 further explained that when she was not on the stage, she was on the floor with the audience dancing on her own. "Suddenly, while she was dancing, [the Applicant] 'grabbed her from behind' and held her tight". V01 told OIAI that she had struggle to get rid of him. V01 added that, "by that time, [the Applicant] was clearly intoxicated". V01 told OIAI investigators that "she felt 'really uncomfortable' by the physical contact to which she was subjected by [the Applicant] without her consent".

35. V01 described the physical contact as follows:

[All] of a sudden I found someone all over my body, um, from back I am not prepared or anything and grabbed me tight. The hands were tight on, on like, uh, you know, on my waist.

36. V01 added that the Applicant “had put his whole weight including his head on her back”. V01 also mentioned that she had seen other staff who had felt uncomfortable with the Applicant’s behaviour towards them.

37. The Tribunal further notes that V01’s evidence was corroborated by W01 who witnessed the incident and intervened by “pulling [the Applicant’s] hands apart and freed V01 from his hold”.

Incident involving V02

38. In her complaint to OIOS, V02 reported that “during a cultural evening held at Bandarban, Bangladesh, on 7 February 2020, [the Applicant] progressively became ‘imbalanced in attitude’, and unexpectedly got close to her, hugged her very tightly and pressed his body against hers, which caused her a lot of stress”.

39. In her testimony to OIOS, V02 indicated that on the evening of 7 February 2020, she was responsible for selling raffle coupons and as the evening progressed, the Applicant became “imbalance in his behaviour and attitude and then unexpectedly hugged tight”. V02 explained that the Applicant “hugged her with his two arms, then quickly pressed her breast with one hand”. She further told OIAI that, “even though alcoholic beverages were not served at the retreat, the Applicant had a plastic bottle in his hand from which he was drinking a ‘reddish or orange substance’, and that his speech was ‘imbalanced’”.

40. The Tribunal notes that V02 evidence was corroborated by Mr. I.A. who witnessed the incident and took her away from the Applicant.

41. Having said the above, the Tribunal notes that the Applicant did not specifically deny the incidents. In fact, in his interview with the OIAI investigators, he stated that he did not remember touching V01 or V02 at the retreat.

42. The Tribunal notes that there is consistent evidence of the Applicant's behaviour at the retreat, specifically that he appeared to be drunk and was pulling women to dance. In particular, Mr. M., a witness interviewed by OIAI, confirmed that the Applicant was drunk and that, at a certain point, Mr. M. personally took the Applicant to his room and told him it "was enough".

43. The account of events made by both victims and witnesses leave no room for doubt as to the nature of the Applicant's attitude that evening. In addition, the Applicant did not provide any evidence of the alleged collusion against him nor there is any evidence of bias from any of the victims or witnesses.

44. The Tribunal also adds that the fact that the Applicant decided not to accept the job offer in Cox Bazar reveals that despite his denial, he was mindful of the facts at stake and of the gravity of his behaviour towards his female colleagues during the retreat.

45. Contrary to what normally happens in situations of sexual harassment, in this case, there is direct evidence of the facts, and the Tribunal is satisfied that the concatenation of elements gathered by OIAI is in accordance with the standard of clear and convincing evidence. Therefore, the Tribunal finds that the facts have been established to the required standard.

Do the established facts amount to misconduct?

46. In order to legally qualify the Applicant's behaviour, the Tribunal recalls the applicable framework and reminds the Applicant that, as an international civil servant he is obliged to act ethically, respectfully and responsibly in any circumstance and, in particular, towards his peers.

47. In this regard, staff regulation 1.2 (b), reads as follows:

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.

48. Staff regulation 1.2 (a) provides that:

Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

49. Staff rule 1.2 (f) reads as follows:

Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

50. Furthermore, UNICEF Executive Directive CF/EXD/2012-007 on Prohibition of discrimination, harassment, sexual harassment and abuse of authority, defines sexual harassment in sec. 1.1 (c) as:

[A]ny unwelcome sexual advance, request for sexual favor, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile, or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident.

51. CF/EXD/2012-007 further provides in sec. 2.1 that:

In accordance with the provisions of Article 101, paragraph 3 of the Charter of the United Nations, and the core values set out in UN Staff Regulation 1.2(a) and UN Staff Rule 1.2 (e), every staff member has the right to be treated with dignity and respect, and to work in an environment free from harassment and abuse. Consequently, any form of discrimination, harassment, sexual harassment and abuse of authority is prohibited.

52. The Applicant's conduct towards his two female colleagues as described in the sanction letter, *i.e.*, hugging them from behind their back and pressing one's breast, is an attitude of a sexual nature, taken against the victims' will, which made them feel offended, embarrassed and extremely uncomfortable.

53. From the Tribunal's point of view, there is no doubt that the Applicant's conduct is unacceptable and amounts to sexual harassment. While the incidents took place outside the office and after working hours, they occurred at a work-related event, *i.e.*, an all-staff retreat which purpose, according to the investigation report, was to review programmatic matters and to serve as a team building exercise. Consequently, the Tribunal finds that the Applicant's behaviour as per the established facts amounts to misconduct.

Was the disciplinary measure applied proportionate to the offence?

54. It is well-established jurisprudence that the Secretary-General has wide discretion in applying sanctions for misconduct and that at all relevant times he must adhere to the principle of proportionality (*Applicant* 2013-UNAT-280, para. 120). Once misconduct has been established, the level of sanction can only be reviewed in cases of obvious absurdity or flagrant arbitrariness (*Aqel* 2010-UNAT-040, para. 35).

55. In *Rajan* 2017-UNAT-781, para. 48, the Appeals Tribunal held that

The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, 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.

56. The Appeals Tribunal found in *Mbaigolmem* 2018-UNAT-819, para. 33 that “[t]he Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment.”

57. In *Conteh* 2021-UNAT-1171, para. 48, the Appeals Tribunal recently held that sexual harassment does not depend on ill intent and that the absence of ill intent is not a relevant consideration for the proportionality of the sanction.

58. Under the applicable legal framework, international civil servants must uphold the highest standards of integrity and to conduct themselves in a manner befitting their status as international civil servants when they are at work and off-duty.

59. In this context, the Tribunal highlights the “zero-tolerance policy” the Organization has adopted against sexual harassment and endorses the Appeals Tribunal jurisprudence in *Conteh* para. 46, where the Appeals Tribunal held that “if there is zero tolerance, there should be no requirement for the conduct to be repetitive. Depending on the circumstances, one instance could conceptually be sufficient to be misconduct subject to the sanction of separation”.

60. The impact on a victim of sexual harassment can have long lasting effects and is not quantifiable. The Appeals Tribunal in *Conteh* recognized that acts of sexual harassment do not require “any concrete or palpable result,” and held that “unwelcome advances and inappropriate behaviour towards colleagues such as touching their body parts [...] are *per se* grave enough to cause harm”.

61. In determining the appropriate sanction, the Administration considered the nature of the Applicant’s actions, the past practice of UNICEF in matters of comparable misconduct as well as aggravating and mitigating circumstances. As aggravating circumstances, the Administration considered that the Applicant’s conduct was of a physical nature and involved two victims. It also noted that the Applicant expressed no insight into his actions, nor did he express any remorse. As mitigating circumstances, the Administration considered that the Applicant served UNICEF, including in hardship duty stations, for nine years.

62. In his application, the Applicant argues that when determining the appropriate measure in cases of sexual harassment, the Tribunal shall consider relevant factors such as whether the behaviour of the offender is objectively unlawful or harsh, fearful, repetitive, persistent, intolerable and incompatible with a direct and continuous supervision of V01 and V02.

63. The Applicant states that he was sanctioned for a behaviour that was essentially episodic, was not threatening the victims or persistently annoying them, without specific consequences. He also adds that he immediately gave up the conduct when he was pulled away from the alleged hug.

64. He further maintains that the alleged facts had no impact or at least very limited impact on the work environment since the Applicant was only visiting and did not have supervisory responsibility over V01 and V02.

65. From the Applicant's perspective, mitigating circumstances were overlooked such as the fact that he cooperated with the investigation, his long and satisfactory service with the Organization with no disciplinary measures, his "single day drunken-state" and his cultural inclinations which broadly accept "hugging, touching and similar contact" without sexual or other negative connotations.

66. The Tribunal is not satisfied with the Applicant's arguments and recalls that the seriousness of his conduct and the impact on the victims cannot be overlooked. In fact, these incidents happened in an all-staff retreat where many staff members were gathering and who testified the incidents to the extent that two of them had to intervene to separate the Applicant from V01 and V02. This situation is particularly humiliating to the victims who may have felt exposed to public comments.

67. The Tribunal recalls that the Applicant pressed V02's breast. This attitude is not equivalent to a "hug" and cannot be justified as a "cultural difference" since it has clearly an underlying sexual connotation.

68. Similarly, the Tribunal is not persuaded by the Applicant's argument concerning his long service or unblemished disciplinary record. In fact, as a long-serving staff member who is familiar with the Organization's policies, he had the legal and ethical obligation to conduct himself in a manner befitting his status as international civil servant. Unfortunately, he did not do so.

69. Furthermore, the Tribunal reminds the Applicant that separation from service with compensation in lieu of notice and with termination indemnity is not the most severe disciplinary measure available to the Administration under staff rule 10.2.

70. In light of the above, the Tribunal finds the sanction adequate and proportional to the gravity of the offence.

Were the Applicant's due process rights respected during the investigation and the disciplinary process?

71. According to the Appeals Tribunal's jurisprudence, due process entitlements only come into play in their entirety once a disciplinary proceeding is initiated (*Akello* 2013-UNAT-336, para. 36), whereas at the preliminary investigation stage only limited due process rights apply (*Powell* 2013-UNAT-295, para.17).

72. After having carefully reviewed the case record, including the investigation stage and the disciplinary process, the Tribunal is satisfied that the Applicant's due process rights were fully respected throughout both phases.

73. The evidence shows that on 23 April 2020, the Applicant was informed that OIAI was investigating in relation to the reported matters and that he was the subject of said investigation.

74. The Applicant was interviewed by the OIAI's investigators on 6 May 2020. The interview was audio recorded, the Applicant was provided with a digital copy of the audio recording and given two weeks to present any additional information that he deemed appropriate and/or a written statement in relation to the matter under investigation.

75. The Applicant provided OIAI with written comments and supporting material on 27 May 2020. In his submission, the identified ten individuals that were present on the night of the events and that he believed should be interviewed to inform OIAI of their "observations".

76. The Applicant takes issue with the fact that OIAI did not interview all the witnesses he had indicated. In this regard, the Tribunal recalls that the investigator has a certain margin of discretion, based on a critical assessment of the evidence produced, to decide what is relevant or not for the purpose of the investigation (*Pappachan* UNDT-2019-118, para. 93).

77. The Tribunal notes that the Applicant did not indicate the relevance of the proposed witnesses other than having been present on the night of the incidents. Nonetheless, OIAI interviewed six of those witnesses who mainly testified about the state of the Applicant's intoxication and/or his behaviour the evening of 7 February 2020. The investigators considered that interviewing additional witnesses would not add substantial information, given the consistency of the witness statements already obtained regarding the Applicant's behaviour.

78. Therefore, the Tribunal concludes that during the investigation phase, the Applicant's due process rights were observed.

79. The evidence further shows that on 19 November 2020, the Applicant was notified of a charge letter, according to which, he would be subject to a disciplinary process and formally charged of misconduct.

80. The charge letter contained not only an account of the allegations against him but also, a description of his "due process rights" during the course of the disciplinary procedure namely, the following:

- a. He was entitled to submit a response to the charges within 14 calendar days from receipt of the charge letter;
- b. He was given the opportunity to include in his response all information relating to the formal charges, including any countervailing evidence, that he wished to be considered; and
- c. He was informed of the possibility to avail himself of the assistance of the Office of Staff Legal Assistance ("OSLA") or seek the assistance of outside counsel in his defence at his own expense.

81. The Applicant replied to the allegations of misconduct on 1 January 2021. Following his response, OIAI was requested to interview another witness in relation to some of the matters raised in the Applicant's response. OIAI was not obliged to interview Ms. S.A. as the evidence that the Applicant sought to adduce from her testimony was not relevant for the determination of V01 and V02's allegations.

82. Furthermore, OIAI received comments and additional information from witnesses it had previously interviewed in the context of its investigation. The Applicant was provided with this additional material on 26 January 2021, and he provided his response to said material on 1 February 2021. The evidence shows that the Applicant's responses to the charge letter and the additional material were properly considered by the Administration.

83. Bearing in mind all the relevant elements of the case file, the Tribunal finds that the Applicant's defence rights were observed and fully respected during the disciplinary proceedings.

Conclusion

84. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 29th day of July 2022

Entered in the Register on this 29th day of July 2022

(Signed)

René M. Vargas M., Registrar, Geneva