



Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Antoine Saad

Counsel for Respondent:

Susan Maddox, AAS/ALD/OHR, UN Secretariat

Elizabeth Gall, AAS/ALD/OHR, UN Secretariat

Introduction

1. At the time of the application, the Applicant served at the United Nations Multidimensional Integrated Stabilisation Mission in Mali (“MINUSMA”). He held a fixed-term appointment at the FS-5 level and was based in Bamako.

2. On 12 November 2018, the Applicant challenged the Respondent’s decision to separate him from service with compensation *in lieu* of notice and termination indemnity in accordance with staff rule 10.2(a)(viii). The decision was based on a finding that the Applicant had sexually harassed the Complainant, which is misconduct under the Rules and Regulations of the Organization. It is the Applicant’s case that the impugned decision should be rescinded on grounds that his actions were the result of the medical condition he suffered from and were therefore not deliberate.

3. The Tribunal has decided *proprio motu* to remove as much identifying information as is possible to protect both the Applicant and the Complainant in this matter. This Judgment is therefore being issued without use of the Applicant’s name.

Procedural History

4. The Respondent filed his reply to the application on 14 December 2018. The Respondent’s case is that the impugned decision was based on clear and convincing evidence that the Applicant’s conduct amounted to serious misconduct in violation of staff regulation 1.2(f), staff rule 1.2(f) and sections 2.1 and 3.1 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

5. On 15 April 2020, the case was docketed to the instant Judge and on 8 May 2020, a Case Management Discussion (“CMD”) took place pursuant to Order No. 073 (NBI/2020). Both parties agreed to engage in settlement discussions, however, ultimately the talks failed.

6. At the 8 May 2020 CMD, the Presiding Judge indicated the preliminary view that this matter will require either an oral hearing of expert medical evidence or that supplemental medical evidence could be submitted in writing. However, there was no request by the Applicant to submit further evidence. The Respondent expressed the view that the matter should be determined on the papers including the medical reports based on which the decision was made. The Applicant preferred that there be a trial with oral testimony to support his case that there was no conscious misconduct and there should be withdrawal of the charges, annulment of the sanction and reinstatement.

7. In accordance with directions given at the CMD, the Respondent filed a submission on 22 May 2020 to clarify whether prior to the time of the alleged misconduct the Organization was aware of the Applicant's illness and the extent of their knowledge.

8. Order No. 100 (NBI/2020) was issued on 27 May 2020 setting the matter down for a three-day oral hearing. The parties jointly filed a paginated Trial Bundle and list of witnesses on 9 June 2020. The Trial was conducted remotely using the Tribunal's Microsoft Teams electronic services from 16 to 18 June 2020.

Issues

9. As the case concerns judicial review of a disciplinary decision, the issues relevant for consideration are settled in well-established jurisprudence including the decision of UNAT in *Wishah*.¹ The primary issue to be determined is usually whether the facts on which the sanction is based have been established.

10. In the instant case, however, there is no dispute as to the essential facts of sexually harassing actions that were committed by the Applicant. Accordingly, there remain to be determined issues as to whether the established facts qualify as misconduct and whether the sanction imposed was proportionate to the offence.

¹ 2015-UNAT-537 at paragraph 20.

11. In the context of the mental health condition raised by the Applicant, the Tribunal must determine firstly, whether the Respondent ignored this condition as a relevant factor based on which a determination other than that he had engaged in misconduct could have been reached; and secondly, whether the sanction that was imposed was proportionate under the circumstances.

Facts

12. The Applicant moved to Bamako, Mali for his assignment in July 2013. MINUSMA is a non-family mission. Living alone and adjusting to life in the new mission environment proved difficult for the Applicant. He was homesick, suffered depression and began consuming a controlled substance. According to the Applicant, he used a controlled substance as a remedy for his loneliness and anxiety. The Respondent maintains that he did not know of the staff member's addiction as it was not brought to the attention of the Organization prior to the time of the alleged misconduct.

13. Sometime in the latter part of 2014, the Applicant was on a visit to Lebanon where he met with a UNIFIL staff counsellor, Mrs. Lilyana Ivatic. On her advice, he consulted Dr. Joseph El Khoury, Consultant Adult & Addiction Psychiatrist. On the facts as stated in the application, Dr. El Khoury diagnosed a major depressive disorder ("MDD") of moderate severity; the Applicant was also diagnosed with, and treated for, substance abuse. The Applicant says he was prescribed Revia, a medication used to prevent substance abuse. The Applicant was also required to attend counselling sessions one to two days per week. Rest at home on sick leave was recommended and accordingly Dr. El Khoury provided documentation including a letter and a completed MS 24 Form which the Applicant submitted to support the grant by the Organization of sick leave.

14. The then Medical Services Division ("MSD") which is now known as the Division of Health-Care Management and Occupational Safety and Health ("DHMOSH") certified the Applicant's sick leave from November 2014 to 8 March

2015 in accordance with ST/AI/2005/3 (Sick leave) based on Dr. El Khoury's medical report dated 4 December 2014. In this medical report, addressed "To Whom It May Concern", Dr. El Khoury stated that the Applicant suffers from MDD. The Report made no mention of substance abuse, nor of the treatment with Revia referred to by the Applicant.

15. Subsequently, on 23 March 2015, Dr. El Khoury advised that the Applicant was in remission, fit to return to work and no longer required intensive treatment at that stage. He cautioned however that the Applicant required therapeutic support when needed and monitoring every three months in the short term. The Organization, upon review of this report, cleared the Applicant to return to work in Bamako. This decision was not challenged.

16. The Applicant told the Tribunal that he relapsed into substance abuse shortly after he returned to Mali.

17. In October 2015, the Applicant was working in the Assets Unit of the Communications and Information Technology Section. One of the Applicant's responsibilities was providing check-in/check-out clearance for MINUSMA staff. The Complainant was a United Nations Volunteer and was leaving the duty station permanently.

18. On the afternoon of Thursday, 8 October 2015, the Complainant visited the Applicant's office to begin her check-out process. The Applicant spoke with the Complainant for a few minutes regarding the check-out process, and the conversation was strictly professional. As part of the check-out process, the Complainant sent the Applicant an email containing her signature block which included her private mobile phone number. On the evening of 8 October 2015, the Applicant attempted to add her as a "friend" on Facebook. The Complainant did not respond to the Applicant's request.

19. On Friday, 9 October 2015, between 00:44 and 23:15, the Applicant sent approximately 60 unsolicited, inappropriate and sexually explicit messages to the Complainant's mobile phone via WhatsApp, using a local Malian number.

20. The WhatsApp messages included persistent requests to arrange a meeting with the Complainant and gave sexual invitations and proposals to start an intimate relationship with her. Examples include the following: "I saw you once only, and since that time I keep thinking of you [...] you are always on my mind [...]"; "The feeling that makes a man freez[sic] with lust"; "The fact that you are married doesn't stop me at all, it makes me want to know you more"; "I really want you..."; "I wish you are my wife!"; "I want to meet you"; "I insist for the drink"; "Why do I have to stop?".

21. On 9 October 2015, in response, the Complainant repeatedly requested that the Applicant cease contacting her and stated twice that she would report him if he continued. The Complainant's messages to the Applicant were: "I am sorry but I do not know you and do not want to. I have a husband and child so do not want to hear such things"; "No. Thanks. Sorry but just stop writting[sic]. Please". The Applicant did not stop.

22. On 9 October 2015, the Complainant blocked the Applicant's number on WhatsApp so that she would no longer receive his messages. Having been blocked in this way, the Applicant attempted during the night of 9-10 October 2015, to contact her via Facebook Messenger, by sending a message, which she ignored. Several hours later, in the early hours of the morning on Saturday, 10 October 2015, the Applicant called the Complainant three times, at 04:18, 05:13 and 05:32. The Complainant answered only the second call and there was no reply. The calls were made from the Applicant's United Nations-issued mobile phone with the use of a United Nations PIN Code.

23. The Complainant continued to ignore the Applicant's attempts to contact her so he purchased another local sim card so that he could contact her again by

WhatsApp. Between 21:42 on 10 October 2015 and 19:07 on 11 October 2015, the Applicant sent approximately 50 messages by WhatsApp, from his new number, including at least six obscene photographs of male genitalia. Examples include the following: “Don’t be angry, it is not a big deal if I am sexually attracted to you”; “You liked the pictures?”; “Answer me”; “Contact me as soon as you can”.

24. On Sunday, 11 October 2015, the Complainant submitted a complaint against the Applicant to the Special Investigations Unit (“SIU”). She left Mali on the same day. The Respondent’s case is that the Applicant attempted to contact her again on Thursday, 26 November 2015, via Facebook Messenger; and at the end of November 2015, using Skype.

25. The Applicant admits to, and apologises for, all the unwanted, offensive communications sent and calls made over the period 9-11 October 2015. The Applicant disputes the suggestion that he attempted further contact in November 2015.

26. The Applicant remained at the mission until the end of 2015. From January 2016, the Applicant was absent on rest and recuperation leave, followed by paternity leave, then certified sick leave (“CSL”). This further sick leave was supported by an MS 24 Form and a letter from Dr. El Khoury, both dated 19 January 2016. At this stage, the Doctor stated that the last time the Applicant consulted him was a year prior. He indicated that at that time he was treating him for an addiction disorder, namely a controlled substance dependence.

27. Dr El Khoury recommended several months’ sick leave to be added to the time the Applicant would be away for paternity leave as his wife was due to have a baby in three months. He also specifically recommended that he be sent to an alternate post in Africa where his family could be with him, regular drug testing for the Applicant, monitoring from “your colleagues” and follow-up counselling by skype.

28. The Applicant says that during this post incident time away from the mission he underwent further treatment for MDD and substance abuse. His wife delivered twins. The Applicant's Doctor provided an update on his condition by Medical Report dated 8 August 2016. This report spoke to the history of the MDD diagnosis and said that there was a parallel issue of substance abuse that was being treated since 2014. In clearing the Applicant as fit to return to work by 17 August 2016, the Doctor declared that the Applicant was now fully abstinent from substance abuse and fit to return to work with his family accompanying him. The Doctor stated that the Applicant would be seeking counselling on site through the United Nations mission and had also agreed to return to the Doctor for a review.

29. The Applicant returned to work at the end of August 2016, based on prior clearance by what was then the MSD. The clearance letter was dated 4 August 2016. The decision to clear the Applicant as fit to return to work was not challenged. On his return, he was informed that he was going to be investigated for sexual harassment based on a complaint that had been received.

30. SIU interviewed the Applicant on 12 October 2016 and submitted a Preliminary Investigation Report on 25 December 2016. On 18 May 2017, the Special Representative of the Secretary-General of MINUSMA convened a fact-finding panel in accordance with ST/SGB/2008/5 to investigate the reported harassment ("the panel"). The Applicant was interviewed by the panel on 1 June 2017. The Applicant could not explain the reasons for his behavior, or what pushed him to behave that way, and expressed sincere apologies. On 27 June 2017, the panel issued its report.

31. On 9 October 2017, the Assistant Secretary-General for Field Support referred the Applicant's case to the Office of Human Resources Management ("OHRM") for appropriate action. By memorandum dated 26 February 2018, the Applicant was requested to respond to formal allegations of misconduct ("the Allegations Memorandum").

32. On 13 April 2018, the Office of Staff Legal Assistance (“OSLA”), on behalf of the Applicant, provided comments to the Allegations Memorandum, with supporting documentation. Included among the documentation were the initial 23 March 2015 medical report that had cleared the Applicant’s pre-incident return to work, the 8 August 2016 report clearing his return to work months after the incident, and a medical report dated 5 April 2018. It was in this final report that the Doctor specifically addressed the Applicant’s medical history in the context of the then pending sexual harassment investigation.

33. In the 5 April 2018, medical report, Dr. El Khoury said that in 2014 the Applicant had turned to substance use and his employers who became aware of the problem allowed him to return home for treatment. As it relates to the sexual harassment allegation, the Doctor said that chances of him being intoxicated under the influence of a controlled substance at that time were high up to the end of December 2015. He stated,

It is well known that cocaine impairs judgement, encourages impulsive behaviour and inflates confidence disproportionately. An effect experienced by [the Applicant] and that played a key part in his addiction. While this clinical information in no way excuses any inappropriate behaviour on his part it is nonetheless relevant especially given that as far as I am aware [the Applicant] does not have a history of displaying aggressive or grossly inappropriate behaviour outside this context.

34. The Doctor certified that the Applicant was, as at April 2018, in full remission.

35. On 5 July 2018, the Applicant provided OHRM with additional medical records pertaining to the period of December 2014 to August 2016.

36. By letter dated 16 August 2018, the Applicant was informed that, based on a review of the entire dossier, including his comments, the Under-Secretary-General for Management had concluded that the allegations against him were established by clear and convincing evidence, and that she had decided to impose the disciplinary

measure of separation from service with compensation *in lieu* of notice and without termination indemnity (the “Sanction Letter”). Detailed reasons for the decisions were set out in an annex to the Sanction Letter.

Applicant’s Submissions and Evidence

37. The Applicant’s primary ground for the challenge as summarised from the application is that due process was not followed in the investigation and decision making. In particular, he is arguing that the Respondent failed to properly consider medical evidence presented as to his “insanity”, failed to seek neutral expert medical advice and failed to interview the counsellor who was helping him prior to the incident i.e., Ms. Ivetic.

38. He also argues the fact-finding panel only interviewed witnesses to confirm the accuser’s version of events. Further he complained that he was interviewed in English instead of his mother tongue Arabic, which made it difficult for him to choose the correct words to express himself.

39. The Applicant contends that his substance abuse problem was overlooked as the Respondent had a duty to afford him support instead of the sanction. This contention was reiterated by Counsel for the Applicant in closing submissions. His argument was that the Applicant could not be sanctioned for misconduct when his actions were done in a state of “unconsciousness”.

40. The Applicant called two witnesses at the Trial, W1 and W2, and their testimony is summarised below.

41. W1 (name redacted to protect the Applicant and the witness) testified as a retired former employee in the Organization.

He was the Applicant’s room-mate and he gave evidence about the Applicant’s situation during his stay in Africa and his health condition at the time. W1 said

that he met the Applicant as one of the pioneering Staff Members at MINUSMA. They were part of the first pre-mission deployment.

In his testimony W1 spoke of the age difference between himself and the Applicant but for whom he developed a fatherly fondness. He was saddened to observe that over a period of seven months the Applicant's behavior changed in a way that he felt was due to loneliness and being away from his home country for the first time. He often saw colleagues face similar difficulties. Some turned to alcohol others to prayer.

Under cross-examination however, it was put to W1 that Bamako was not the Applicant's first mission away from home as he was previously in East Timor for four years. W1 candidly admitted that he was unaware of the Applicant's prior service.

W1 says he tried to give the Applicant fatherly advice but after a few weeks he further deteriorated. There were marks of drug use on his body and he behaved like an addict. He said the mission did not send the Applicant to get help but when he went home to Lebanon, he saw a counsellor. According to W1 the Applicant may have returned to the mission prematurely because his behaviour on his return was still not normal.

42. The Applicant's wife (W2) testified on her husband's situation and health condition as well as his "overall journey".

W2 expressed a great deal of concern at the fact that her husband who was working well in Bamako at first then started to deteriorate in 2014. Both W2 and her husband, the Applicant, became emotional and visibly shed tears while she testified about the measures she had to take to ensure he had food when he started to use his money for substance abuse.

When he came home at the end of 2014, she says the family decided to help him, including his mother a local United Nations staff member. She took him to

see the counsellor, Ms. Ivetic, who recommended his visit to Doctor El Khoury. According to W2, the Applicant was treated for substance abuse from that time but in order to avoid possible incarceration, as this was an illegal activity in Lebanon, the use of drugs was not included in his medical report.

She said the Applicant was doing well in Lebanon but on his return to Mali he relapsed. She said that the Applicant's substance abuse and deterioration was a matter of concern to all his friends and supervisors in Bamako. She said under cross-examination that she spoke with them about it. It was common knowledge.

To underscore this during her evidence in chief, she referred to an online article. The article spoke of United Nations staff members visiting a certain road in Bamako to purchase a controlled substance. There was a photo of one such person in a United Nations vehicle and according to W2 the person in the picture was the Applicant. Immediate permission was granted for the article to be submitted in evidence. It was filed electronically. The date when the photo was taken was in December 2015 which would have been a few weeks after the incident of alleged misconduct.

W2 expressed that fellow staff members, including those at the mission after the Applicant left, expressed concern for him and sadness about his situation knowing that his actions during the incident were not the norm for him. She said he was very unhappy at home, was not seeking money in these Tribunal proceedings. He values his career with the United Nations as an international civil servant greatly and just wants to get back to work.

43. The Applicant was courteous and helpful throughout the proceedings. He assisted his Attorney who had difficulties adjusting to the use of the online hearing technology. The Applicant played a lead role in some aspects of his own representation at the Trial. He also spoke on his own behalf in closing submissions. He was articulate and composed in his presentation.

44. The Applicant explained that during the investigations he had “denied about the article” because he feared incarceration for the purchase of drugs.

45. He explained that since separation from service he has been unable to find alternate employment. His sole source of income to contribute to caring for his twins is his pension. He cares a great deal about his job at the United Nations and seeks only to return to work.

46. The Applicant expressed heartfelt regret about his actions and reiterated his apology for what the Complainant had experienced.

Respondent’s Submissions and Evidence

47. The Respondent’s principal submission as stated in the reply is that there was no contemporaneous record before the fact-finding panel to prove that the Applicant was either unable to control his actions or had a substance abuse problem before the incident. In fact, the doctor’s report indicates he was cleared for work at the time of the incident. The Applicant’s own interview responses also did not speak to substance abuse.² It was only in medical reports prepared after the incident that the Doctor spoke of substance abuse.

48. The Respondent submitted that the evidence of the online article was not probative of a substance abuse problem involving the Applicant being brought to the attention of the Organization prior to the incident. The article post-dated the incident and the person photographed and referred to therein is not identified as the Applicant. The Applicant’s own submissions are that he was denying being involved in activities referred to in the article. Engaging in activities referred to in the article, in breach of the laws of the host country, would itself have resulted in separate disciplinary proceedings.

49. Had he brought substance abuse to the attention of the Organization he may have accessed treatment.

² Respondent’s Annex 4 and 5.

50. Counsel for the Respondent submitted that the record of the Respondent's investigation revealed that on a review of the Applicant's actions during the incident there was no indication that his actions were based on a lack of control due to substance abuse. The Respondent had, during the disciplinary process, fully considered the possibility that the Applicant may have had no control or been unconscious during the incident. That there was a lack of control/consciousness was rejected based on the number of times he attempted communication with the Complainant, the fact that different methods were used and that it continued for several days. Further, the actions of purchasing a new sim card to get around his number being blocked indicated that his actions were deliberate.

51. The Respondent further contends that the Applicant cannot be absolved from blame because of his own substance abuse, for which he did not seek support from the Organization or outside sources.

52. In the Respondent's written submission filed on 22 May 2020, and in Counsel's oral closing submissions, the Respondent addressed the contention that the Applicant's conduct ought to have been treated as an illness caused by substance abuse for which the Organization should have offered the Applicant due care instead of termination. Counsel underscored that although there is provision in the regulatory framework at ST/AI/372 (Employee assistance in cases of alcohol/substance abuse) ("the AI") for care and support to be given to staff members afflicted with substance abuse illness, there must be positive steps taken by the affected staff member to access support. The AI provides for the fact of substance abuse to be the basis for disciplinary action in certain cases.

24. In some cases, the staff member may refuse evaluation and treatment and the problem behaviour is not corrected. If this is the case, a maximum of three months will be allowed after the first formal meeting and a second formal meeting will be held. The question of applicable disciplinary/ administrative actions, including separation, may be considered and the administration's position should be clearly established.

53. Counsel refuted the Applicant's allegation that the Respondent had failed in a duty of care to the Applicant, for not providing the therapeutic support and monitoring which were indicated as being necessary in the March 2015 medical report. According to the Respondent, MSD had no such obligation to initiate these services for the Applicant under the governing framework at Section 8 of ST/SGB/2011/4 (Organization of the Office of Human Resources Management). Instead, Counsel contended that it was the Applicant's responsibility to have followed the advice of his doctor by seeking therapeutic support and monitoring of his condition. There was no evidence that he sought these services either from the Respondent or from his own health providers.

54. As to the allegation about the language of the interview, the Respondent says the Applicant's recruitment documents showed him as proficient in English.

55. Although the issue had not been raised by the Applicant, the parties were informed of the concern of the Tribunal as to whether the Applicant could have been treated as incapacitated to work due to ill health instead of being terminated. Specifically, the parties were asked to submit on the applicability of ST/IC/1999/111 (Mental Health - Medical and employee assistance facilities) ("the Mental Health IC") which at art. IV.16 stipulates the circumstances whereby staff members with permanently impaired health may retire with disability benefits.

A participant will receive a disability benefit if found to be incapacitated for further service in a position reasonably compatible with his or her abilities, when the disability is a result of injury or illness constituting an impairment to health likely to be permanent or of long duration. In order to award a disability benefit, the United Nations Joint Staff Pension Committee must be satisfied that there is sufficient medical evidence to establish that the illness or injury qualifies the staff member for the benefit.

56. This issue was addressed by the Respondent in closing submissions by reference to the regulatory framework for ill-health retirement. Counsel underscored that the Mental Health IC is at the bottom of the hierarchy of rules applicable to staff

members.³ As such the applicability of art. IV.16 of the Mental Health IC is subject to the provisions of ST/AI/1999/16 (Termination of appointment for reasons of health).

Sections 2 and 3 provide as follows:

2. For a staff member's appointment to be terminated for reasons of health under staff regulation 9.1 (a) or (b), the staff member's incapacity must be established by conclusive medical evidence that results in the award of a disability benefit under the UNJSPF Regulations.

3.1 When a staff member has used all his or her entitlement to sick leave with full pay, the executive or local personnel office shall bring the situation to the attention of the Medical Director or designated medical officer in order to determine whether the staff member should be considered for a disability benefit under article 33 (a) of the UNJSPF Regulations, while the staff member is on sick leave with half pay.

3.2 If the medical conclusion is that the staff member's illness or injury constitutes an impairment to health which is likely to be permanent or of long duration, the Medical Director or designated medical officer shall so advise the relevant human resources officer at Headquarters or the local personnel office for notification to the staff member

3.3 Where the conclusion by the Medical Director or designated medical officer is either not contested by the staff member or is confirmed by the independent medical practitioner or medical board selected to review the matter, the relevant human resources officer at Headquarters or the local personnel office shall submit as soon as possible a request to the United Nations Staff Pension Committee ("the Committee") for the award to the staff member of a disability benefit. This request shall be in the form set out in the annex to the present instruction.

3.4 The Committee will determine whether the staff member is incapacitated within the meaning of article 33 (a) of the UNJSPF Regulations and, if a positive determination is made, will award a disability benefit. The secretariat of the Pension Fund will notify the relevant human resources officer at Headquarters or the local personnel office and the staff member of the Committee's decision.

3.5 If the Committee has decided to award a disability benefit, a recommendation for the termination of the staff member's appointment for reasons of health under staff regulation 9.1 (a) or (b),

³ *Villamorán* UNDT/2011/126, at para. 29.

as appropriate, shall be submitted as expeditiously as possible by the relevant human resources officer at Headquarters or the local personnel office for approval by the Assistant Secretary-General for Human Resources Management on behalf of the Secretary-General. [Emphasis added].

57. In the context of this regulatory framework, Counsel for the Respondent clarified that the rules require the Applicant to exhaust his entitlement to sick leave with full pay before being considered for ill-health retirement.

58. The Respondent contended that in any event a decision to impose a sanction other than separation for misconduct would not be in keeping with the Organization's serious zero-tolerance policy regarding sexual harassment, as set out in section 1.5 of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority). The past practice of the Organization in cases involving sexual harassment shows that disciplinary measures have been imposed at the strictest end of the spectrum, namely, separation from service or dismissal in accordance with staff rule 10.2(a).

59. This approach to sanctions in sexual harassment cases has been affirmed by the Appeals Tribunal which held in *Mbaigolmem*, 2018-UNAT-819 at para. 33 that:

[s]exual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The 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.

60. Counsel for the Respondent reminded the Tribunal that consideration must be given to the experience of others in the Organization. Firstly, there were others including the Complainant who left their homes and loved ones to serve in a mission where adjustment to a new life was required. They did so without causing harm to others. Secondly, it is important that persons like the Complainant are assured that they can work in a safe environment free from sexual harassment.

61. It was underscored by Counsel for the Respondent that the Applicant's mental ill health was not seen by the Respondent as a mitigating factor allowing for a sanction other than separation from service. However, all relevant mitigating factors were considered in deciding on a sanction proportionate to the misconduct committed by the Applicant. including his admission of the conduct and expressions of remorse.

62. The Respondent called one witness at the Trial. Her evidence is summarized as follows:

Dr. Stefani Ascitti, Head, Medical Entitlements, DHMOSH, Department of Operations, testified to the Organization's knowledge of the Applicant's substance abuse disorder according to the information disclosed by the Applicant through the applicable procedures, including certification of sick leave and fitness for work procedures. She also gave evidence on the role and core functions of the former MSD in light of section 8.4 of ST/SGB/2011/4 including a detailed description of the procedure for certification of sick leave.

In her evidence in chief, Dr. Ascitti was asked to explain how the Organization deals with clearing fitness for return to work when a staff member's sickness ends. She explained that if it was a simple/brief illness there is no need for clearance. For long term or complex sickness that may interfere with the staff members duties or endanger others should a relapse occur, the Organization asks for a medical report which must include clearance to return to work and indicate whether there is any restriction on such return.

In her testimony, Dr. Ascitti reviewed the medical clearance documents submitted by the Applicant and confirmed that on 23 March 2015 he was diagnosed with MDD but not a substance abuse illness involving a controlled substance. She also explained, by reference to emails at page 162 of the Trial Bundle, the involvement of Mr. Joseph Brody, the Organization's medical team Clinical Psychologist in the clearance process for the Applicant's return to work. She said he is called in when there is need for specialist review of a

mental health issue. He may talk to the staff member or his doctor or request more detailed reports. On 1 April 2015, Mr. Brody advised by email that “No further Sick Leave can be approved for this condition”. Dr. Ascitti confirmed that this was a recommendation that the Applicant not be given sick leave beyond 8 March 2015. The Sick Leave Team, she said, had a discretion whether to accept the advice of Mr. Brody and could diverge from the recommendation.

As to the point made in the 23 March 2015 medical report from the Applicant’s Doctor, Dr. Ascitti commented on the indication therein that the Applicant would require therapeutic support and monitoring of his mental state every three months. She said that the Organization has no role in this. “We do not provide therapeutic care. It is between the staff member and his provider. We have a clinic, but we are not required to follow-up”. She said there is a clinic in Bamako and the Organization also has a staff counsellor there, but counselling is only provided in “acute” circumstances but not long-term care or treatment. Records of counselling visits are confidential and the sick leave team has no access to such records.

Dr. Ascitti testified that the Sick Leave Team was unaware of the Applicant’s diagnosis and treatment for substance addiction disorder until after the incident when his Doctor included it in a 19 January 2016 medical report. She said that at MINUSMA the Applicant’s option for addressing the addiction illness would have been to seek support from the staff counsellor in accordance with ST/AI/372.

Finally, on the point raised by the Tribunal as to whether the Applicant could have been considered for separation on grounds of ill-health, Dr. Ascitti indicated that his case did not meet the regulatory requirements for such consideration. This was so because he had not exhausted his sick leave so as to reach the stage of entitlement to separation for reasons of ill-health.

Considerations

63. The Tribunal's judicial review of the challenged decision in this case considered not only the remedies of withdrawal of charges, annulment of sanction and return to work sought by the Applicant, but also whether the Respondent could have considered an alternate approach to treating the Applicant based on his illness. It is my finding that such an approach could have been considered.

64. There is no doubt that, as submitted by Counsel for the Respondent, the acts of sexual harassment committed by the Applicant were of such a persistent and offensive nature that in keeping with the Organization's zero-tolerance policy he could not remain on the job. However, the Organization's policy on care and support for persons suffering with mental illness is also clear. ST/IC/1999/111 provides in sections 1 and 2 as follows:

Mental health issues are increasingly recognized throughout the world, including in large organizations that share and reflect the characteristics of society at large. This is also the case for the United Nations where staff, whether at Headquarters or in the field, often serve in duty stations far removed from their countries of origin and familiar cultural or family settings. Adjustment to living in a different host country and working with multiple cultures and languages is not always easy. Some assignments and missions involve extensive travel, and at times presence in crisis situations and danger spots.

There are many types of mental health conditions or diseases, which vary greatly from individual to individual in degree of severity and in the manner in which they manifest themselves. When one or more of these conditions occur, health professionals and professionals participating in employee assistance programmes agree on the benefits of early detection, acknowledgment of the situation and action so that individuals may recover their ability to engage in normal activities as soon as and whenever possible.

65. It is clear to the Tribunal that the Applicant's behaviour was influenced by severe mental illness. The illness ought to have been addressed in a more timely and considerate manner by the Respondent by denying his clearance to return to work in March 2015 and in August 2016. He may then have retired due to ill-health with disability benefits and a record clean of misconduct. This is a matter of concern; the

care, support and treatment that should be afforded to persons with mental illness must be addressed by the Respondent. The Respondent's position, as testified to by Dr. Ascitti, that the Organization does not bear "a duty of care" to staff members with mental health challenges needs to be re-examined.

66. The Respondent told the Tribunal that he considered the regulatory framework for separation due to ill-health, but decided that the Applicant did not meet the threshold for separation on grounds of ill health since he was cleared to return to work by his treating physician and had not exhausted his entitlement to certified sick leave. One of the Applicant's witnesses, W1, made the point that even the clearance for the Applicant's return in March 2015 may have been premature. The Applicant, although cleared by his doctor as fit for work, was still required to seek care and monitoring. His behavior was not normal according to W1. Had he not been so cleared, the incident in October 2015 may never have occurred. The Respondent was best placed to know what facilities existed in the Mission area for the Applicant to seek the help that was indicated as necessary.

67. The position that one has to exhaust all of one's entitlement to certified sick leave before being considered fit for separation on grounds of ill health should be revisited. The Tribunal believes that a holistic review of the Applicant's medical records coupled with the evidence that the Respondent had of the Applicant's egregious behavior would, at the very least, have suggested that something was amiss and prompted a deeper inquiry. As it is, the Respondent's review of the record and decision to clear the Applicant's return to Mali in 2016 does not appear to have been properly informed.

68. The Tribunal strongly recommends that the Respondent undertakes a comprehensive review of the Organization's procedures relating to staff members suffering from mental illnesses, like the Applicant, to identify problem areas and provide support where staff require it.

69. Be that as it may, there was no challenge by the Applicant to either of the two decisions that cleared him to return to work. Accordingly, the concern of the Tribunal that a separation for ill health would have been more appropriate cannot be reflected in the conclusion of this Judgment. In any event, the Applicant has at no stage indicated an interest in separation on grounds of ill-health. Rather, his sole objective throughout the instant proceedings has been to have the sanction of separation annulled so that he can return to work.

70. As aforementioned, a critical issue to be determined in review of the Respondent's decision is whether the Respondent sufficiently considered the Applicant's medical condition in concluding that his actions were to be treated as misconduct. The Applicant's case is that he was "unconscious" of these actions. It is however evident from the record that the Respondent carefully considered all the available medical documentation as well as the actions of the Applicant and concluded that he was sufficiently conscious to have been aware of his actions of sexual harassment.

71. The Tribunal cannot replace this finding with a conclusion of its own in the face of the Respondent's investigation and consideration of all relevant information. The Applicant's witnesses and the medical reports speak to severe behavioural change but not lack of awareness of his actions.

72. It is clear, from the totality of the evidence that was before the Respondent when the decision was made, that the Applicant knew what his actions were when he repeatedly sought to contact the Complainant. The Tribunal finds that the allegations of misconduct were properly investigated and established before the Respondent decided on the sanction. There is therefore no role for the Tribunal to consider the correctness of the decision compared with other choices that may have been made by the decision-maker.⁴ The Tribunal notes that the Applicant's substance abuse, contrary to the laws of the host country, would itself have given rise to disciplinary proceedings and sanction.

⁴ *Sanwidi*, 2010-UNAT-084 at para. 40.

73. In addition to there being no fault in the decision-making process the substance of the decision is not vitiated by such absurdity that the Tribunal can by judicial review replace it with an alternate choice. A decision by the Tribunal at this stage allowing for the Applicant's return to work where the nature of proven misconduct was so extreme would undermine the efforts of the Organization to protect staff members from undue anxiety and potential psychological duress from sexual harassment at the workplace.

74. On the issue of proportionality of the sanction, the Applicant has not established any basis for this Tribunal to conclude that it was blatantly illegal, arbitrary, adopted beyond the limits stated by respective norms, excessive, abusive discriminatory or absurd.⁵

75. It is clear from the Respondent's Sanction Letter that due consideration was given to the relevant mitigating factors of the Applicant's admissions and expressions of remorse in deciding on the appropriate conclusion to the disciplinary process. The Respondent also took into account that there were no aggravating factors. It was on this basis that while the sanction of separation was imposed to bring an end to the Applicant's employment with the Organization, the impact of the separation was tempered with the grant of compensation in lieu of notice. This was a sanction "within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance, etc."⁶

76. It is therefore determined that the Respondent's finding of misconduct was justified on the facts and the sanction imposed was proportionate to the offence.

Conclusion

77. The application is **DISMISSED**.

⁵ *Portillo Moya*, UNAT-2015-523 at para. 21.

⁶ *Ibid.*, at para. 20.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 8th day of July 2020

Entered in the Register on this 8th day of July 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi