UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/046/T
Judgment No.: UNDT/2022/024
Date: 17 March 2022
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

SAINT-LOT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Jorge Diaz-Cueto

Counsel for Respondent:
Matthias Schuster, UNICEF
Alister Cumming, UNICEF

Introduction

1. On 28 September 2020, the Applicant, a former staff member of the United Nations Children's Fund ("UNICEF") filed an application contesting the "Allegations of sexual harassment and a finding of misconduct in violation of Staff Regulation 1.2(a), Staff Rule 1.2(f), and section 2.1 of CF/EXD/2012-007".

2. On 20 November 2020, the Respondent replied that the application is without merit.

3. For the reasons stated below, the application is dismissed.

Relevant facts and procedural history

4. On 24 April 2020, the Applicant was notified that following an investigation by the Office of Internal Audit and Investigations ("OIAI"), it had been concluded that there was a reasonable factual and legal basis to sustain a finding that he had engaged in misconduct in the form of sexual harassment towards staff members of a UNICEF National Committee in violation of 1.2(a), Staff Rule 1.2(f), and section 2.1 of CF/EXD/2012-007 (Prohibition of Discrimination, Harassment, Sexual Harassment and Abuse of Authority) ("charge letter").

5. On 1 July 2020, UNICEF's Deputy Executive Director, Management ("DED"), notified the Applicant of the conclusion of the disciplinary process ("decision letter"). She stated that she considered the following comments made by the Applicant to a staff member of a UNICEF National Committee ("V01") while visiting the offices of said National Committee in May 2019, were established by clear and convincing evidence:

a. The Applicant commented adversely on V01's clothing;

b. The Applicant asked V01's age and compared it to his son's while stating that he, himself, tried not to talk to old women;

c. The Applicant asked V01 if she had children and stated that while he would like to have more children, his wife did not, but that it was "fun to keep trying".

6. The DED concluded that the Applicant's conduct amounted to sexual harassment under para. 1.1(c) of CF/EXD/2012-007 and violated staff regulation 1.2(a), staff rule 1.2(f) and para. 2.1 of CF/EXD/2012-007. She therefore decided to impose the sanction of written censure in accordance with staff rule 10.2(a)(i).

7. On 28 September 2020, the Applicant filed his appeal against the contested decision with the Nairobi Registry of the Dispute Tribunal.

8. The case was transferred to the New York Registry on 20 October 2021.

9. On 26 January 2022, the Tribunal heard oral testimony from V01 and from the Applicant.

Consideration

Standard of review in disciplinary cases

10. The Appeals Tribunal has consistently held 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". In this regard, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred", and when "termination is a possible outcome, misconduct must be established by clear and convincing evidence". Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it "means that the truth of the facts asserted is highly probable". 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.

11. The Appeals Tribunal has generally held that the Administration enjoys a "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

12. The Appeals Tribunal, however, underlined that "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" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40). In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

13. Among the circumstances to consider when assessing the Administration's exercise of it discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

Parties' submissions

14. The Applicant challenges the contested decision on the grounds that the facts upon which the sanction is based are not established by clear and convincing evidence and that the accusations towards the Applicant were motivated by the racism prevalent in the UNICEF National Committee.

15. The Respondent replies that the facts are indeed proved at the requisite standard, that the evidence relied on to do so is credible, that the established conduct amounts to misconduct, that the imposed sanction was proportionate, and that the Applicant was afforded due process.

Whether the facts on which the disciplinary measure was based have been established?

Adverse comments on V01's clothing

16. The Applicant's main contention with respect to this charge is that his comments about V01's clothing were uttered out of concern for what he considered inappropriate attire for the workplace. He denies that the comments had any sexual connotation.

17. The Respondent submits that the Applicant adversely commented on V01's clothing and that the fact that he did so out of concern about V01's professionalism is irrelevant to whether or not this conduct is appropriately established. He also recalls that the Applicant had no supervisory role in the National Committee, and that it was therefore not his place to comment on the office's dress code.

18. V01 testified in court that the Applicant's comments on her clothing made her feel uncomfortable given that there was no specific dress code at the National Committee. She further recalled that she had worn the same outfit to the office before and no-one had ever raised objections to it.

19. The Applicant testified that he was shocked by V01's attire which he considered inappropriate for an office where high-level donors often visited. He also stated that he had made similar comments about inappropriate clothing to male staff in

his home office. Therefore, he stated, the comments were neither sexist, nor sexual in nature.

20. The Tribunal concludes from the evidence that the Applicant commented adversely on V01's clothing during his visit to the National Committee. However, while acknowledging that the comments may have been out of line given that he had no supervisory role over the staff in the National Committee, the Tribunal does not find that evidence supports that this conduct had a sexual component.

The Applicant asked V01's age and compared it to his son's while stating that he, himself, tried not to talk to old women

21. The Applicant states that these comments were merely conversations that take place every day between co-workers and were not meant to be perceived as sexual in nature.

22. The Respondent states that V01's evidence in this respect was clear and consistent and therefore, this part of the allegation is proved to the requisite standard.

23. Moreover, the Respondent recalls that, shortly after the incident, V01 reported the Applicant's comments to her colleague OS, which he confirmed at his interview with OIAI.

24. Having reviewed the totality of the evidence, the Tribunal is satisfied that there is clear and convincing evidence that the Applicant compared V01's age to his son while stating that he tried to avoid speaking to older women. The Tribunal is also satisfied that there is clear and convincing evidence that these comments were unwelcome by V01.

The Applicant asked V01 if she had children and stated that while he would like to have more children, his wife did not, but that it was "fun to keep trying"

25. The Applicant denies having ever uttered this statement and claims that he only admitted he could have made such a joke, as a hypothetical, during the investigation because he was unduly pressured by the investigators who were biased against him.

26. The Respondent states that the evidence given in support of this charge by V01 is credible because she maintained a coherent account of the event from the time of the investigation to her testimony in court, where she was cross-examined by Counsel for the Applicant.

27. The Tribunal notes that V01 was indeed consistent in her evidence about the Applicant's comments to the effect that while his wife could not have more children, "it was fun to keep trying".

28. The Tribunal is further satisfied that V01's evidence was indirectly corroborated at the time by OS's testimony.

29. Moreover, while V01 remained consistent in her account of the events, the Applicant's approach changed over time.

30. First, during his interview with OIAI, the Applicant did not deny that he made this comment, he rather stated that he did not remember while admitting that this could be the sort of joke he would make in the workplace.

31. Later, in the 11 June 2020 response to the charge letter, while the Applicant was already represented by Counsel, he did not address this aspect of the allegations.

32. Then, in his application, also submitted through Counsel, the Applicant states:

> The third allegation was that he told her his wife could not have babies but still fun to keep trying. While [the Applicant] did not admit having stated this, for argument sake lets accept these statements as fact. There is no sexual statement here that is intended to harass or make anyone feel uncomfortable in any way. [the Applicant] did not flirt with [V01] or anyone at [the National Committee] office. He did not make any sexually explicit statements. There was no comment made to [V01] by Michel that could be construed as sexual harassment (*sic*.).

33. Finally, in his testimony before the Tribunal and in his following submissions submitted through Counsel, the Applicant vehemently denied having commented that it was fun to keep trying to have babies with his wife.

34. In cross-examination, the Applicant testified that in the OIAI investigation, he admitted that this would be the kind of joke he would make because he was being pressured by the investigators.

35. The Tribunal notes that in his interview with OIAI, the Applicant stated that he did not remember having made the alleged comments to V01 but that this would be the kind of joke he would make in the workplace.

36. Having reviewed the entire transcript of the interview with OIAI, the Tribunal sees no merit in the Applicant's contention that he was unduly pressured by the investigators. While the investigators were thorough in their questioning, they clearly cautioned the Applicant at the beginning of the interview that he was being questioned as subject of an investigation and gave him ample opportunity to provide his account of the facts.

37. The Applicant further contests V01's credibility arguing that she has a disability that prevents her from properly understanding and processing words. According to the Applicant, this is supported by the fact that in her complaint and interview with OIAI, V01 claimed to have heard the Applicant make comments about pornography which were subsequently not retained in the decision letter because they were not corroborated by any other witness. This proves, according to the Applicant, that V01's testimony is unreliable because she has difficulty processing language.

38. The Applicant further alludes to the fact that V01 had difficulty repeating the oath prior to her testimony before the Tribunal which, he claims, further proves her disability.

39. The Respondent responds that V01 had difficulty repeating the oath because she was nervous at her first court appearance and recalls that her testimony was otherwise clear.

40. The Tribunal finds the Applicant's contention about V01's difficulties comprehending verbal language absurd.

41. First, the Tribunal notes that the Applicant has no expertise that would enable him to make such a diagnosis. Moreover, the Tribunal notes that V01 responded to all the questions posed during her testimony without difficulty.

42. The Tribunal is also not persuaded that the fact that certain allegations were not retained in the sanction letter due to lack of corroboration undermine the evidence that V01 provided in court.

43. The Tribunal concludes that V01's statements were consistent throughout the disciplinary process and her subsequent testimony in court. Her statements are also indirectly corroborated by OS's OIAI interview in which he confirmed that she reported the incident to him shortly after it occurred and the Tribunal therefore considers her credible.

44. Moreover, the Applicant's position is, as described above, inconsistent and unsupported by the evidence and is therefore insufficient to discredit V01's evidence.

45. The Tribunal therefore finds that there is clear and convincing evidence that the Applicant told V01 that it was fun to keep trying to have children with his wife.

Whether the established conduct amounts to misconduct?

46. Staff regulation 1.2(a) and staff rule 1.2(f) as well as sec. 1.1(c) of CF/EXD/2012-007 prohibit any form of discrimination and harassment, including sexual harassment.

47. The Applicant states that his comments concerning V01's clothing were not meant to have a sexual component and that his questioning V01 about her marital status and whether she had children were topics of conversation of "Applicant's generation and are not of a sexual nature nor intended to sexually harass the Respondent (*sic*.)"

48. The Respondent recalls that V01 consistently declared that the Applicant's behaviour made her feel uncomfortable to the point that she decided not to proceed with the planned visit of the National Committee to the Applicant's UNICEF office.

49. The Tribunal recalls that the Appeals Tribunal has defined sexual harassment as follows (*Appellant* 2021-UNAT-1137, paras. 57 and 58):

> … Sexual harassment can encompass numerous types of conduct, some overtly sexual in nature and others more subtle. There is a wide spectrum of conduct that can be defined as sexual harassment and its determination is entirely context specific. Whether a particular type of conduct constitutes sexual harassment will depend on a number of factors and the circumstances of each case.
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> … Importantly, a determination of whether a particular type of conduct is sexual in nature does not turn on the intentions of the perpetrator but on the circumstances surrounding the conduct, the type of conduct complained of, the relational dynamics between the complainant and the perpetrator, the institutional or workplace environment or culture that is generally accepted in the circumstances, and the complainant's perception of the conduct.

50. The Appeals Tribunal provided further clarification in *Adriantseheno* 2021-UNAT-1146/Corr.1 (para. 44):

> …. Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behavior of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another. While typically involving a pattern of behavior, it can take the form of a single incident. It does not require that the alleged harasser was aware of the offending character of his or her behavior and was put on notice, which would otherwise preclude a single incident from constituting sexual harassment.

51. Therefore, in light of this jurisprudence, the Applicant's culture, age, status or perception of his own behavior are irrelevant to the determination of whether his conduct amounts to sexual harassment.

52. The Applicant himself recalls that he is a senior staff member of UNICEF with many years of unblemished service. It is precisely for this reason that the Applicant should have been aware of the standards of conduct expected of him as a UNICEF staff member, regardless of his personal background.

53. The Applicant further claims that his comments about V01's having children cannot be considered to be sexual harassment as V01 herself tweeted about her having children.

54. The Tribunal finds this argument without merit. First, V01's tweet occurred after the Applicant made the unwelcome comments. The Applicant cannot therefore justify his conduct with the argument that V01 disclosed her family situation at a later stage. Secondly, V01's sharing this information with her friends on a social platform does not exempt the Applicant from observing a correct behavior in the workplace.

55. The Tribunal further finds from the evidence that, as previously concluded, all of the Applicant's comments to V01 were clearly unwelcome. In any event, considering UNICEF's long-standing practice of zero-tolerance towards sexual harassment in the workplace, such comments can reasonably be perceived as inappropriate in a work environment. In particular, the Applicant's comments that it was fun to keep trying to have children with his wife have an unequivocal sexual component.

56. In light of these findings, the Tribunal is satisfied that the Administration was within its discretion in determining that the proven conduct constitutes misconduct.

Whether the disciplinary sanction imposed was proportionate?

57. In imposing the sanction of written censure, the Administration considered the Organization's policy of zero-tolerance for sexual harassment. It further considered the that while the Applicant's conduct was highly inappropriate, it was limited to a single conversation.

58. The Administration further considered the Applicant's senior position with respect to V01 as an aggravating factor and his successful service over 25 years in difficult duty stations as a mitigating factor in imposing the sanction.

59. The Applicant raises no arguments with respect to these determinations and the Tribunal sees no defect in them.

60. Therefore, the Tribunal is satisfied that the Administration was within the remit of its discretion in selecting the disciplinary sanction.

Whether the Applicant's due process rights were respected

61. The Applicant objects that the charges levied against him were caused by the racism prevalent in the National Committee. He argues that the witness interviews with OIAI reveal that all the witnesses were biased against him.

62. The Tribunal notes that the investigation and subsequent disciplinary proceedings were not initiated or conducted by the National Committee but by UNICEF. The Applicant brings no evidence that this process was tainted by any ulterior motive.

63. Moreover, the Tribunal notes that in imposing the disciplinary sanction, the Administration relied on V01's and OS's testimonies.

64. The Tribunal does not find any indication that V01 was biased against the Applicant, who she did not know prior to the day he made the challenged comments in the National Committee office.

65. As regards OS, the record of his interview shows that he did not know the Applicant before the day of the events under review and there is no evidence that he harbored any prior ill-intent against the Applicant.

66. Therefore, the Tribunal does not find evidence of ill-motive in the process leading up to the contested decision.

67. The Tribunal further notes that the Applicant was interviewed by OIAI in the course of the investigation as the subject. At the completion of the investigation, the Applicant was served with a charge letter in which he was notified of the specific conduct alleged against him and the subsequent initiation of a disciplinary process against him. The Applicant was provided with the opportunity to respond to the allegations and informed of his right to be represented by counsel.

68. The Applicant was provided with the OIAI report and supporting material.

69. At the conclusion of the disciplinary process, the Applicant was duly notified of the contested decision in writing.

70. In light of the above, the Tribunal is satisfied that the applicable procedure was followed to ensure that the Applicant's due-process rights were respected.

Conclusion

71. In light of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Joelle Adda

Dated this 17th day of March 2022

Entered in the Register on this 17th day of March 2022

(Signed)

Nerea Suero Fontecha, Registrar, New York