

UNDT/2020/147, Khamis

UNAT Held or UNDT Pronouncements

The Tribunal found that neither JA nor TA were refugees, or beneficiaries of UNHCR assistance or fell within the prohibitions stipulated in staff rule 1.2(e). The Tribunal did not agree with the Respondent that unsubstantiated and scandalous allegations made against a staff member are conclusive evidence that the staff member was responsible for the reputational damage caused thereby to the Organization. The Applicant had no control over what the media chose to report. Hence, UNHCR basing its decision on these facts was unlawful as they were extraneous to the case at hand and irrelevant. The High Commissioner improperly concluded that the Applicant's relationship with JA was inconsistent with the standards of conduct expected of an international civil servant because it was a "transactional", deeply and fundamentally unequal relationship because, inter alia, he earned more money than her and because of their age difference. The High Commissioner's reliance on staff regulation 1.2(f) was misguided as it had no bearing on the conduct of the Applicant. In particular, the status in the organisation, society, earnings, education and age of the Applicant had no adverse consequence on a customary relationship that the Applicant maintained with the two women, nor did it make the relationships transactional. The High Commissioner failed to establish that the Applicant's "polygamous" lifestyle was contrary to any "human rights instrument adopted by the United Nations system" or that it compromised the image and interests of the Organization. The IGO investigators had opportunity to interview community leaders in the area to establish the facts in line with the cultural context of the area but they failed without good reason to do so. The Applicant, on the other hand, cited verse 4:3 of the Quran to support his averment that "many Muslim communities in Sub Saharan Africa adhere to the belief that polygamy is freely permitted. Polygamous marriages are common in the region". The Tribunal held that apart from the Muslim faith, most customary laws in this region permit polygamous relationships, hence all customary relationships are potentially polygamous. The Tribunal found that the Administration had failed to prove that the facts on which the allegations were made were established. The Applicant had not committed any misconduct because he had

not breached any regulation, rule, administrative issuance or policy under his terms of appointment or contract of employment. The Tribunal found that the Applicant's due process rights were violated. The impugned decision was rescinded. In lieu of rescission the Respondent was ordered to pay the Applicant 23 months' net base salary as compensation. The Applicant's claim for compensation for moral damages was rejected as he did not prove such harm to the requisite standard.

Decision Contested or Judgment/Order Appealed

The Applicant was contesting the decision to impose on him the disciplinary sanction of dismissal from service for serious misconduct in accordance with staff rule 10.2(a)(ix).

Legal Principle(s)

In disciplinary cases, the Tribunals will examine the following: (i) whether the facts on which the disciplinary measure is based have been established (where termination is the sanction imposed, the facts must be established by clear and convincing evidence in all other cases preponderance of the evidence is sufficient) (ii) whether the established facts amount to misconduct (iii) whether the sanction is proportionate to the offence and (iv) whether staff member's due process rights were respected. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable. The burden of proving improper motivation lies with the staff member raising such claims. Where alleged conduct is assessed by the Administration as having caused reputational damage, the alleged conduct must be established by clear and convincing evidence that it occurred and that it constitutes misconduct to justify disciplinary sanction of separation against a staff member. A different interpretation would negate the presumption of innocence which is enshrined in the internal laws of the Organization. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered and also examine whether the decision is absurd or perverse. Paragraph 40 of the ICSC Standards, among others, requires respect for diversity. The world is

home to a myriad of different peoples, languages, cultures, customs and traditions. A genuine respect for them all is a fundamental requirement for an international civil servant. Any behaviour that is not acceptable in a particular cultural context must be avoided. However, if a tradition is directly contrary to any human rights instrument adopted by the United Nations system, the international civil servant must be guided by the latter. International civil servants should avoid an ostentatious lifestyle and any display of an inflated sense of personal importance.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

The Tribunal found that the decision to dismiss the Applicant from service for serious misconduct was not established by clear and convincing evidence resulting in an illegal decision.

Full judgment

[Full judgment](#)

Applicants/Appellants

Khamis

Entity

UNHCR

Case Number(s)

UNDT/NBI/2018/031

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

18 Aug 2020

Duty Judge

Judge Sikwese

Language of Judgment

English

French

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Sexual exploitation and abuse

Remedies

Rescission

Termination (of appointment)

Summary dismissal

Applicable Law

Staff Regulations

- Regulation 1.2(f)