



Before: Judge Francis Belle

Registry: Nairobi

Registrar: René M. Vargas M., Officer-in-Charge

IK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Amir Ullah Khan

Counsel for Respondent:

Rebecca Britnell, UNHCR

Charlotte Servant-L'Heureux, UNHCR

Introduction

1. By an application filed on 7 January 2023, the Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), is contesting the disciplinary measure imposed on him of dismissal pursuant to staff rule 10.2(a)(ix) (“the contested decision”).
2. The Respondent filed a reply on 20 January 2023 urging the Tribunal to reject the Applicant’s arguments and dismiss the application in its entirety.

Facts and Procedural Background

3. The Applicant joined UNHCR on 2 March 2004. He held different positions at different duty stations through the years. On 1 November 2021, he was assigned to an UNHCR Sub-Office (“SO”).
4. On 21 February 2022, the Inspector General’s Office (“IGO”) received information that the Applicant had sexually harassed his supervisee, the Complainant.
5. The IGO opened an investigation on 23 February 2022. During the investigation, the IGO interviewed four individuals and reviewed available documentary evidence. On 25 March 2022, the IGO sent a Subject Notice of Investigation to the Applicant to inform him about the allegations that prompted an investigation. On 28 March 2022, the Applicant was interviewed as the subject of the investigation. On 1 April 2022, the IGO shared the draft investigation findings with the Applicant and gave him an opportunity to comment, which he did on 1 and 6 April 2022. On 13 May 2022, the IGO finalized the Investigation Report (“IR”).
6. By letter dated 20 May 2022, the Applicant was notified of the allegations of misconduct. It was alleged that:
 - a. On or around 15 December 2021, he attempted to kiss the Complainant on the mouth, touched her breast and took her hand to make her feel his erection;

- b. On the same day and/or after, he insisted on questioning why she was refusing his advances by asking her, amongst other questions, if she was a virgin and why she was behaving like a teenager; and
 - c. A few days later, he had another conversation with the Complainant where he told her of his interest in a romantic relationship.
7. On 16 June 2022, the Applicant provided his Response to the allegations of misconduct.
8. After considering the IR, its annexes and the Response to the allegations of misconduct, the High Commissioner determined that the allegations had been established to the clear and convincing standard of evidence. He also determined that they constituted misconduct and were inconsistent with the Applicant's basic obligations as a United Nations staff member and more specifically: staff regulations 1.2(a) and (b); staff rules 1.2(e) and (f); UNHCR/HCP/2014/4 (Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority); and ST/SGB/2003/13 (Special Measures for Protection from Sexual Exploitation and Sexual Abuse).
9. By letter dated 13 October 2022, the Applicant was notified of the contested decision.
10. The Tribunal heard the case from 4 to 6 March 2024, during which oral evidence was adduced from: the Applicant; from MV; MM; and the Complainant. The proceedings were held *in camera*.
11. The parties filed their closing submissions on 18 March 2024.

Parties' submissions

12. The Applicant's principal contentions are:
 - a. MV's testimony was relied upon by the IGO on the pretext that she was the first to have been informed by the Complainant and that she ratified the Complainant's story to be true. Furthermore the Complainant introduces MM

as an additional witness to prove the Applicant's conduct, however, if this testimony is analysed in light of the cross-examination as well as the applicable law, it tarnishes the Complainant's story.

b. MV's evidence is hearsay and should only be given little worth. MV only states that there was a failed attempt of kissing between the Complainant and the Applicant (even though the Complainant had testified on oath that she had told everything to MV).

c. During MV's examination, she categorically admitted that she believed the Complainant's story based on emotions. She also admitted that the Applicant never accepted any wrongdoing to her. She accepted that there are different cliques within UNHCR. She accepted that both S and the Applicant had applied for the coveted post of P-5, and that is what the Applicant thought was the reason for his false involvement.

d. MV accepted that the official recommendations for the P-5 post was made well after the allegations levelled against the Applicant, whilst during the days of the allegation the said decision was not made public and/or was pending. MV was the manager of the P-5 post, it is very convenient that despite having multiple female residents, the Complainant chose to disclose the alleged occurrence to her and after a substantial delay.

e. MV confirmed that it was not public as to who had applied for the P-5 position, which grants credence to the Applicant's story regarding a confrontation with S regarding the post.

f. MV admitted that at the upstairs floor where the Applicant used to reside, there was no functional kitchen and admits there was no stove upstairs. In her examination-in-chief, MV did not say anything about MM, yet her statement was made the basis on which MM was interviewed.

g. MV was involved as a third party by the Complainant but in her statement of interview with the IGO and before the Tribunal, she appears to have violated the mandatory obligations of a third party particularly by adding

the case of MM to aggravate the impact of the allegations under investigation. Thus, MV's statement suffers from dishonesty due to the breach of her obligations under section 5.29 of UNHCR/HCP/2014/4.

h. MM was interviewed by the IGO on the basis of the interview of MV in which the latter stated that MM was uncomfortable with the Applicant, however, neither MV testified to this effect nor did MM make any reference to being harassed or being made uncomfortable by the Applicant. The allegations made against the Applicant in MM's interview was the basis on which a negative inference was drawn against the Applicant, however, in her testimony before the Tribunal she skipped this vital aspect and only testified based on hearsay.

i. MM admitted that the Applicant was nominated twice as the mediator/facilitator to resolve her problems with fellow colleagues. MM could not recall if the Applicant had given her a reprimand or censure in culmination of the aforementioned disputes. As such, *mala fides* against the Applicant cannot be ruled out. Additionally, MM did not deny that there are different cliques within UNHCR.

j. The Complainant's testimony is full of lacunas, doubts and irreconcilable accounts as such she is not worthy of credence, her testimony falls well short of clear and convincing evidence and is further negated from the circumstantial evidence.

k. The Complainant specified the date of occurrence to have been 15 December 2021 but when the Applicant gave cogent evidence regarding the impossibility of the occurrence to have taken place on that date, she conveniently changed the date of occurrence to 19 December 2021 for the first time before the Tribunal and after the Applicant's testimony.

l. In another dishonest improvement, for the first time after two years, the Complainant stated that the other person present in the vicinity of the alleged occurrence was EL. EL's testimony/interview would have gone a long way

in proving that in fact the Complainant and the Applicant had never gone together to the top floor.

m. The Applicant has had an unblemished service record, is a devout husband and a caring father of two daughters, whilst the Complainant is 10 years older than the Applicant.

n. In the presence of a fully functional kitchen, it does not make sense that the Complainant and the Applicant would go upstairs only to boil milk when both the milk and the stove for its boiling were available on the first floor's fully functional kitchen. The impossibility of taking milk from the downstairs kitchen to boil it upstairs and then bring it downstairs for preparing tea is lost on logic and common sense.

o. That the alleged incident took place for 30 minutes yet the milk was not burnt or spilt and EL did not go to check on them upstairs is bereft of all logic.

p. Being such a strong and vocal woman, it is impossible that the Complainant could have remained quiet regarding the alleged occurrence on its day and thereafter for such a considerable time.

q. A message dated 20 December 2021 addressing the Applicant as "Hi Dear" and asking the Applicant whether he had safely reached his destination would not have been composed by the Complainant if she had been harassed on 19 December 2021. The Complainant would have avoided exchanging and initiating niceties with the Applicant if she was harassed by him on 15 or 19 December 2021.

r. The Complainant would not have appreciated the Applicant's role in understanding and facilitating her in an email dated 31 December 2021 if she had been sexually harassed by the Applicant.

s. In his testimony, the Applicant categorically denied the allegations. The Applicant proves his innocence by providing:

- i. Day by day account of his life to disprove the dates the alleged incidents occurred;
- ii. Documentary evidence showing that there was no chance of any untoward incident happening between the two;
- iii. Cogent evidence regarding cliques and the turmoil of the P-5 post;
- iv. In the agreed statements of facts, the Complainant admitted that they would have regular dinners in December on the floor occupied by the Complainant followed by tea; and
- v. Up until the Complainant's testimony before the Tribunal, the Applicant was kept in the dark regarding the day of the alleged occurrence and the unknown person who was kept waiting for tea which seriously diminished the Applicant's defence because had he known the name of the person to have been EL, then he could have testified to the impossibility of the occurrence.

13. The Applicant seeks the following reliefs:

- a. Rescission of the contested decision;
- b. Reinstatement with all back benefits; and the Applicant's internal status to be reassigned within UNHCR to be restored;
- c. Alternatively, he be awarded payment of his full salary and benefits until the ordinary retirement age;
- d. That the investigation report, the due process letter and all related material and the impugned decision be expunged from his personnel file and that he be issued a factually correct certificate of employment, mentioning the quality of his work and recommending him to future employers;
- e. USD50,000 in moral damages; and
- f. USD50,000 in legal fees.

14. The Respondent's principal contentions are:

a. There is clear and convincing evidence of sexual harassment and abuse. The Complainant provided a detailed and coherent account of when the Applicant attempted to kiss her and touch her breast, how he forced her hand on his erection; and of when he reiterated his sexual interest in her a few days later. She showed good recollection and observation of details. Her testimony was consistent with her previous statements to MV, to MM and to the IGO.

b. The Complainant's testimony before the Tribunal was consistent with her previous statements. She testified that, one evening, when they had finished eating dinner, between 6.30 and 8.30 p.m., the Applicant offered to prepare tea with milk and asked her to help prepare it upstairs in his living area. While upstairs waiting for the milk to boil, he asked the Complainant to take his contribution for an upcoming party, which she accepted. He subsequently asked her to give him a kiss. She approached his cheek to kiss him as colleagues or as friends, but she stated "he started to approach my mouth, touch my body, hug me, and I started to push him away from me"; she said "no" and started explaining to him that she does not have affairs with colleagues.

c. She recalled that the Applicant became angry, he used the "F" word and threw the money; he told her he loved her and started asking if she was rejecting him because she is a virgin or because of his appearance and skin colour. She reiterated that she said "no" to the Applicant. However, he grabbed her forearm to forcibly direct her to his bedroom. She insisted that they return downstairs and pushed him away when he started approaching her again to hug her; he took her hand and made her "touch his private areas to see how hard it was".

d. The Complainant credibly recounted how she felt during this event and how she was impacted by the Applicant's behavior. Specifically, she felt "insecure" and thought she could lose her job given that the Applicant was a

senior manager in the Sudan operation and she was at the P-2 level in her first international assignment.

e. She developed trouble sleeping and would wake up stressed to check if her bedroom door was locked (noting that the Applicant's bedroom was one flight of stairs away); she stated that she barely slept for four days and she started feeling pain in her brain, different than a regular headache. The Complainant also indicated that she became easily irritated and developed an eating and compulsive buying disorder.

f. During the hearing, the Complainant testified that, during her interview with the IGO, she was not sure about the exact date of the incident. At the time, she recalled that she could only remember that the Applicant was travelling to Khartoum the next morning. This is consistent with her statement to the IGO. The Complainant further testified that, after checking her past emails and WhatsApp messages, she could now confirm that the incident happened on 19 December 2021.

g. She provided a reasonable explanation as to why she was now certain of the date. First, she was assigned in the morning as the focal point to collect her colleagues' contributions for an upcoming party, and the Applicant had tried to give her his contribution at the time of the incident, and second, on 20 December 2021, when she consulted with him via WhatsApp on a work-related issue, he replied that he had just arrived home, i.e. in Khartoum.

h. During the hearing, she stated that at the time she was too shocked to precisely identify the date and any sign of the Applicant was bringing back the trauma; given the time that has passed, though still impacted, she was able to confirm prior to the hearing on which date the incident occurred and testify to this effect before the Tribunal. Furthermore, the IGO only asked her to approximately identify the date.

i. The Complainant's clarification does not affect her credibility as she consistently associated the incident with the Applicant having handed over his contribution for the party (which on his own admission he did

notwithstanding that he would not be present for it), and the event of the Applicant's travel to Khartoum. Furthermore, the Complainant gave a reasonable explanation as to why she now ascertained a precise date.

j. Finally, the Applicant was not prejudiced, as he had an opportunity to respond, noting the IGO and DHR had told him that the incident allegedly occurred around 15 December 2021; he indeed provided information about his whereabouts during the whole week of 12 December 2021, including on 19 December 2021.

k. During the hearing, the Complainant also identified the colleague with whom the Applicant and herself had a meal and who had stayed behind while she and the Applicant went upstairs to prepare milk for the tea i.e., EL. She however indicated that neither EL nor any other person witnessed the incident or would have heard anything. She explained that she tried to deal with the situation peacefully and confirmed "I didn't scream, I didn't hit him" as she was worried about the possible repercussions on her career, especially given it was her first international assignment. She also testified that when she and the Applicant finally came back down to have tea with EL, she feigned listening to them and once she finished her tea, she excused herself and went back to her room. The Complainant confirmed that she did not want EL, who was her new colleague (for a few days), to know about what had happened.

l. The Complainant also credibly testified that a few days after the initial incident of 19 December 2021, the Applicant reiterated his unwelcome advance. She indicated that, on the day after his return from Khartoum, when she was telecommuting from the guesthouse, he knocked on her bedroom door and asked her whether they could talk; when she came out of her room to speak with him, he asked her "What's wrong", and she told him that nothing would be wrong if he promised that what happened (referring to the events described above) would never happen again.

m. The Applicant responded that he thought she was consenting and she responded, "What acceptance? I was pushing you away. I was saying 'no'";

she reiterated that what had happened should not happen again, and he offered to resign if the only reason she had refused was because she did not want to have relationships with colleagues. She insisted that they could be “very good colleagues”; he responded it was “bullshit” and told her that he had an interest in her. She recalled that he continued using the kitchen on her floor and as she did not want to interact with him, she had to often stay in her bedroom, which she would lock. She stated that, after this incident, she could not hear his voice or see him. The Complainant indicated that after this second incident, she avoided any interactions with him, other than the necessary professional interactions (that made her uncomfortable) and was forced to stay in her bedroom to avoid seeing him in the kitchen.

n. On 9 January 2022, the Complainant reported the Applicant’s conduct to MV. During the hearing, MV credibly recounted that she met with the Complainant on this date, at which time the Complainant told her that the Applicant made sexual advances in December 2021. She recalled that the Complainant was clearly very stressed, embarrassed and angry and confirmed she believed the Complainant because of her genuine emotions, agitation, anger and disbelief.

o. On 27 January 2022, the Complainant confided in MM, who credibly and consistently recounted that, during a training, she found the Complainant “almost crying”; the Complainant explained to MM that she was worried about the Applicant coming back from his leave because one evening, he had approached her and touched her inappropriately on her breasts. When asked whether the Complainant had specified a date or time, MM explained that she let the conversation “run as a free account” and she did not probe the Complainant. MM affirmed that she believed the Complainant because she was “really shaken” and her suffering felt real.

p. There is no exculpatory evidence that would contradict the Complainant’s account of the facts and inconsistencies in the Applicant’s statements negatively affect his credibility. The ostensible alibi produced by the Applicant in his comments on the draft investigation findings, i.e., that he

spent the evening of 19 December 2021, around 4.30 p.m. until 9.00 p.m., napping in his bedroom, is unsupported by evidence, (noting that his whereabouts on all the other days around 15 December are at least minimally supported by circumstantial evidence) and is contradicted by his own testimony. Indeed, before the Tribunal, the Applicant stated that, on 19 December 2021, he returned to the SO around 4.00 p.m. and after having a meeting at the office with the Deputy Representative, he ate around 6.30 p.m./7.00 p.m. “because the meeting went for almost 2h”. When asked whether he had cooked with colleagues on this day, he indicated that he had bought dinner at the market and ate in his room because he arrived late. When confronted with the discrepancy, the Applicant explained, after a long silence, that it could be a typo and, instead of 4.30 p.m., it should read 6.30 p.m.

q. However, the information about his whereabouts on 19 December 2021, one of the identified dates for the misconduct, was too critical for the Applicant to have inadvertently made a typo. Furthermore, the Applicant had the opportunity to revise them when submitting his response to the allegations on 16 June 2022 and his application on 19 January 2023, but did not do so. Additionally, his explanation that it had been too late to prepare dinner (thus the reason why he bought dinner at the market before 6.00 p.m.) is inconsistent with his statement that he would generally start cooking around 6.00 p.m. This discrepancy significantly undermines the Applicant’s credibility and reveals that the Applicant is attempting to cover up for the sexual harassment and abuse he engaged in on this date.

r. Additionally, the Applicant failed to deny the allegations when confronted by MV; MV was clear in her testimony that he never denied the allegation. In not immediately doing so, he did not react as one would expect from a person who had been falsely accused, which suggests that the Applicant engaged in the behavior complained of by the Complainant.

s. The Applicant has submitted that the accusations against him are the result of a conspiracy; however, any orchestration of these accusations would have required the participation of MM and MV. There is no evidence of any

ulterior motives. The Complainant credibly explained why she decided to report to the IGO. The Applicant also points to a plot to harm his chance in the recruitment process for the Head of Office position in the SO and support the assignment of S. However, MV testified that she was not the hiring manager in this selection process and by the time she joined the SO, i.e., on 2 January 2022, a week before the Complainant reported to her the allegation, the hiring manager (i.e. the Deputy Representative) had already recommended a candidate for this position (neither the Applicant nor S). Furthermore, while the Complainant, on her own admission, maintained a cordial relationship with S, she testified that she equally did not appreciate his working style and MM indicated that she was also not on good terms with him. Thus, none of them would have had an interest in his appointment as Head of Office in the SO.

t. In respect of the Applicant's vague allegations that there were "regional cliques", it is unclear how the Applicant, MM, and MV fit into those groups. Additionally, it is unsupported by evidence. MV affirmed that while the Deputy Representative had mentioned perceptions that S was surrounding himself with Arab and Middle Eastern colleagues, she did not witness that or any tensions between groups in the SO. MM and the Complainant also testified that they had positive relations with colleagues, regardless of their region.

u. In respect of MM, the Applicant suggested that he had made a recommendation against the renewal of her mission in the SO. However, MM credibly indicated that she was not unaware and explained that she thought her manager of her regular position had refused the extension. The Applicant also brought email exchanges evidencing a work-related conflict with MM and two other colleagues; the Applicant's involvement and how it would have given MM a motive to invent false allegations of sexual harassment and abuse against him however remains unclear.

v. The issues regarding the use of a common kitchen does not constitute a motive for the Complainant to orchestrate false accusations, noting that she

made her formal complaint to the IGO on 21 February 2022, i.e., after the Applicant vacated the kitchen and EL had already moved to another floor. Additionally, the Applicant had been on leave and the Complainant had not been at the duty station for nine days. She clearly indicated that her issue was not the use of the kitchen but the Applicant's presence, and credibly recounted how the incidents of sexual harassment and abuse made it extremely difficult for her to interact with him and the Applicant's use of the kitchen was facilitating his access to her.

w. The disciplinary measure, dismissal, is proportionate to the gravity of the Applicant's misconduct. The United Nations Appeals Tribunal ("UNAT") has held that dismissal is a reasonably proportionate sanction and reasonably appropriate sanction, especially in light of the damage to confidence it causes, for a staff member who had engaged in sexual harassment (which did not involve touching of body parts). In the present case, the Applicant's conduct is significantly more serious than passing inappropriate remarks, as it involved the touching of private parts of the body and more than one occasion of unwelcome sexual advances. Furthermore, the impact on the Complainant was significant.

x. The Applicant argued that his rights to provide and respond to evidence were denied, especially given that the IGO failed to interview additional witnesses. However, during the hearing, the Applicant decided not to call any witnesses. The Respondent submits that this decision suggests that no other witnesses would have corroborated the Applicant's evidence or provided exculpatory evidence. Finally, the Applicant's assertion during the hearing that he requested a second interview but the IGO refused is incorrect and contradicted by the available evidence, further undermining the Applicant's credibility.

15. In view of the foregoing, the Respondent submits that: the disciplinary measure imposed on the Applicant is lawful; he has failed to establish any reasons that could justify interfering with the contested decision on judicial review; and therefore, the Tribunal should dismiss the application in its entirety.

Consideration

16. The United Nations policy on sexual exploitation speaks to various kinds of situations in which sexual abuse, intimidation, blackmail, physical force and influence singularly or collectively are used overtly or impliedly or where a person, male or female, may fairly assume that if they do not give in to sexual demands they may face further harassment, discrimination, retaliation or punishment.

17. This case reveals overt sexual harassment where both words and physical touching were used and attempted to extract sexual favour, but even though no such favour was extracted, the harassment caused harm to the victim who was put in fear of loss of her position in the Organization and caused unnecessary tension in the staff relations between the persons involved.

18. There are degrees of intimidation, both intended and unintended. Some may just be in words. In this case there are both words and deeds if the Complainant is to be believed.

19. It may be argued in this case that the alleged perpetrator went away but by his deeds indicated that he did not intend to continue with the behaviour which is complained about. However, there is sufficient evidence to indicate that for a while there was an intention to gain sexual favour.

20. In some cases, a degree of perceived harassment can be forgiven or treated with a response which presupposes that a man's or woman's inappropriate approach was withdrawn without sexual harm and that his feelings may have been pure emotion free of any physically aggressive acts.

21. However, in this case both words and acts were used together during a short period of persistence. When this happens in a work setting it can cause serious emotional stress and hurt. Based on the evidence this is what occurred in this case.

22. The Tribunal finds that there is clear evidence of tension in the kitchen where the Applicant and the Complainant met even though prior to the alleged incident of harassment there were more relaxed relations.

23. It may be argued that even a much less intimidating form of declaration of interest of sexual kind may cause such tension. Unfortunately, in this case there was touching which demonstrates a strong intention to achieve what was intended. It is therefore permissible to assume that tensions and strained relations would have been caused by the sexual harassment.

The Applicant's Case

24. The Applicant has raised various issues to shake any presumption of sexual harassment. Firstly, the Applicant raises the insinuation that the incident in which the Complainant says the Applicant asked for a kiss and a relationship, while touching her on her breast and attempting to touch her private parts while placing her hand to feel his hard penis was fabricated.

25. The Applicant says this did not happen and the basis for saying so is that there was no precise date given by the Complainant until the date of the hearing. The Tribunal notes that it is true that the Complainant did not provide a precise date until the date of hearing.

26. When questioned about this failure to provide a date, the Complainant says she did not want to lose her job. She delayed in reporting the matter but eventually decided to report it.

27. It should be noted that part of the result of sexual harassment is a feeling of depression and inability to function properly. The Complainant nevertheless reported the matter to workmates and later assisted the investigation.

28. The Applicant also alleged that the report was made to prevent him from obtaining a P-5 position for which he and a rival officer had applied. In response, the Complainant said that she did not know that the Applicant had applied for this position.

29. The Applicant also argues that he was not at the living quarters where the incident allegedly took place between the dates 12-15 December that year and in fact left the country around 19 December 2021.

30. The Applicant further raised the issue of a division between the Arab and African staff. However, it is difficult to understand how this affected the complaint against the Applicant who was neither Arab nor African. This argument does not damage the Complainant's account of what happened between her and the Applicant.

31. It is accepted nevertheless that the Complainant's uncertainty about the date of the alleged incident is the weakest link in the case against the Applicant. However, it is not in itself a strong enough area of doubt to totally repudiate the Complainant's report that she was sexually harassed.

32. The Tribunal is of the view that the Complainant's case was sufficiently detailed and the description explained why it could happen without causing alarm elsewhere. The sequence of events as related appears quite plausible. Also, the fact that she told other persons before reporting to the IGO is not considered unusual.

33. The Tribunal is of the view that the circumstances in which the incident occurred are highly plausible. Both parties were comfortable in each other's company/presence. Bearing in mind that level of comfort, it was not unusual that they would choose to go to the Applicant's private living quarters to boil milk. It is also highly believable that the perpetrator would seize such an opportunity to express his feelings even possibly in an aggressive way, and to express his interest in a relationship with highly sexual connotations.

34. It is of some significance that the witnesses called by the Complainant reinforced the main evidential premises of her complaint. The first supporting witness, MV, described meeting the Complainant and the Complainant then told her that the Applicant made sexual advances toward her in December of 2021. She recalled the Complainant appearing very stressed, embarrassed and angry. She believed these emotions because they were genuine.

35. The second witness, MM, remembered that during a training she noticed the Complainant was almost crying. She was concerned about the Applicant returning to the living quarters where they were based because one evening he had approached her and touched her on her breast.

36. MM had said that she did not press the Complainant to provide a date and time of the incident. She believed the Complainant because she appeared really shaken.

37. The Tribunal is therefore satisfied that this incident occurred and that is sufficient to establish a case of sexual harassment against the Applicant.

Due Process Rights Were Respected

38. The Applicant has raised the fact that he had no opportunity to question the Complainant. The Tribunal is unclear as to what circumstances would lead to the ability to question a complainant in a case of sexual harassment. It is entirely normal for a complainant to make a statement and an applicant to have an opportunity to respond to that statement. In this case the Applicant was able to respond to the Complainant's statements.

39. In sexual harassment cases it is also often the case that a face-to-face confrontation between the parties is particularly damaging to the victim. In the circumstance, the occasion for confrontation is the trial and even there certain precautions can be made to protect the alleged victim against re-victimization.

40. The Applicant should also recognize that this is not a hearing to consider criminality of the act and exposing him to a criminal penalty. His lawyer has been present at the hearing of this matter and asked the Applicant questions which were in turn answered. The Tribunal heard the answers and was able to observe the demeanour of the parties under cross-examination, both the Applicant and the Complainant, and to decide who was telling the truth in the circumstances.

41. The Tribunal is satisfied that the Applicant understood the charge against him. He was allowed to call witnesses and put his case. He declined to call witnesses. But that was his own decision and neither the Complainant nor the Tribunal played any part in that decision.

42. The idea of securing the rights of the Complainant would be undermined if she had to face cross-examination before a charge is brought and before the

Applicant was deemed to have committed the breach of conduct. In the circumstances there was no breach of natural justice.

43. It is true that the IGO may not have interviewed all of the persons who could possibly have been witnesses. However, it is questionable whether these witnesses would have contributed anything to the Applicant's case. One such witness identified as EL who did not witness the incident and the Complainant explained why he would not have heard anything.

44. At the case management discussion, the Applicant had stated that he would call witnesses. But he later stated that he would not do so. He had the opportunity but did not avail himself of it.

45. The Applicant gave his evidence at the hearing in May 2024 and put forward his case for review without hindrance. He raised all of the issues earlier discussed including questioning the alleged date of the incident, the alleged cultural divisions and the Complainant's possible resentment of the Applicant's decision in one matter. He referred to the evidence witnesses called, namely MV and MM, as hearsay and implied that they were biased. He also charged that the Complainant's report was to prevent him from obtaining a promotion. The Tribunal listened to these allegations but accepted the Respondent's analysis of their failure to shake the veracity of the witnesses' statements.

Proportionality

46. Dismissal is one of the most draconian and drastic penalties that can be imposed in an administrative/employment matter. However, the alternative would leave open the possibility of retaliation in the workplace. Also, where there is a likelihood that the harassment had an impact on the victim, the possibility is that a more lenient sentence would open the Organization to a claim in damages as a result of the continued unabated impact of the harassment.

47. These circumstances leave the Administration with little or no option to dismissal as the penalty for sexual harassment.

Conclusion

48. In the circumstances the application is denied in its entirety.

(Signed)

Judge Francis Belle

Dated this 27th day of May 2024

Entered in the Register on this 27th day of May 2024

(Signed)

Eric Muli, Legal Officer, for René M. Vargas M., Officer-in-Charge, Nairobi