
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/008

Judgment No.: UNDT/2018/095

Date: 27 September 2018

Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

NADASAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Ms. Miryoung An, ALS/OHRM, UN Secretariat

Ms. Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. On 18 January 2017, the Applicant, a former Air Operations Assistant with the United Nations Stabilization Mission in Haiti (“MINUSTAH”), filed an application contesting the imposition of a disciplinary sanction consisting of separation from service with compensation in lieu of notice and with termination indemnity, under staff rule 10.2(a)(viii).

2. The sanction was based on a finding that the Applicant had sexually harassed Ms. X (name redacted for privacy), a staff member at the French Embassy in Liberia, and thereafter a staff member of the United Nations Children’s Fund (“UNICEF”) between the period January 2012 and October 2015.

3. The Respondent argues that the application should be dismissed in its entirety contending, *inter alia*, that the grounds of the Applicant’s challenge to the disciplinary sanction are unclear in the application, and that the application itself

12. In July 2014, the UNMIL SIU determined that the matter should proceed by way of a complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) in MINUSTAH, where the parties had since located.

13. On 25 November 2014, the Chief, Conduct and Discipline Team, MINUSTAH, received a request from the Chief, Conduct and Discipline Team, UNMIL, to address the unresolved complaint of possible sexual harassment. The case was then re-assigned to the MINUSTAH Conduct and Discipline Team by the Department of Field Support (“DFS”).

14. On 27 March 2015, in accordance with the provisions of ST/SGB/2008/5, the Special Representative of the Secretary-General for MINUSTAH convened an investigation panel of two MINUSTAH staff members, Mr. AO (name redacted for privacy), Chief Integrated Mission Training Center in MINUSTAH and Ms. CM (name redacted for privacy),

Applicant's submission dated 24 January 2018 by 29 January 2018. On 24 January 2018, the Applicant filed a submission pursuant to Order No. 8 (NY/2018).

25. On 29 January 2018, the Respondent filed a submission responding to the Applicant's submissions of additional documents pursuant to Order No. 8 (NY/2018).

26. On 9 February 2018, the Respondent filed a submission entitled "Motion for Case Management Discussion".

27. On 9 February 2018, by Order No. 33 (NY/2018), the Tribunal directed the parties to, *inter alia*, file one of the following by 14 February 2018: (a) if the parties agree that this matter should be decided on the papers, they shall file their respective closing submissions; or (b) if either or both parties request a hearing, they shall file a joint submission proposing hearing dates.

28. On 14 February 2018, the parties filed their respective closing submissions.

Parties submissions

29. The Applicant's principal contentions may be summarized as follows:

The investigation was biased and based on false statements by Ms. X.

a. The contested decision is flawed as the Applicant's actions were taken out of context in order to fit the provisions under ST/SGB/2008/5. The contested decision was mainly based on Ms. X's declarations which are false and exaggerated. The Administration ignored the convincing evidence in the Applicant's favor;

b. The Panel was partial and did not properly consider all the evidence before it. The report produced by the Panel shows a clear bias in favor of Ms. X by giving full credit to her declarations and never questioning them, not even when they were clearly self-contradicting and erroneous;

h. With regards to the Respondent's contention that the application itself states the facts central to the case, namely, that the Applicant knew that Ms. X did not want his advances and that he continued his approaches, knowing they would offend her, the Applicant rejects these statements as inexact and out of context. The Applicant only knew for sure that Ms. X did not want his advances after 22 November 2012, when she made her complaint. Prior to that, her last action with regards to the Applicant was to unblock the Applicant from Facebook messaging on or before 11 August 2012. After 30 September 2012, none of the sparse communications over a period of the following three years could be interpreted as "approaching" but were all of a totally different nature and intention, namely, peaceful forms of protest against the unfair treatment.

The allegations made by Ms. X were made in bad faith.

i. Ms. X made her claims as revenge. It is clear now that Ms. X became upset, infuriated or frustrated when she saw the Applicant stop his advances towards her on 30 September 2012 and continue with his life;

j. There is a clear time overlap between Ms. X's public "character-assassination" actions, followed shortly after by her multiple complaints, and the Applicant's "breaking loose from her spell" on 30 September 2012 and starting a new relationship, of which she was aware;

k. The Applicant also submits as being relevant that he has never before been accused of harassing, stalking or disturbing anyone's life, privacy or safety.

The investigation was procedurally flawed.

l. Due to technical reasons, the Applicant had no access to the third round of questions sent to him by OHRM on 26 July 2016 and, consequently,

did not provide a reply. As a result, the Applicant's due process rights to defend himself were respected;

m.

c. The Applicant's procedural rights were fully respected throughout the investigation and the disciplinary process. The additional information submitted by the Applicant in January 2018, namely, his emails to mission personnel in which he alleged he could not access his work email, is not exculpatory and thus not relevant to this case.

Consideration

Scope of review

31. Section 5.20 of ST/SGB/2008/5 outlines the scope of judicial review (emphasis added):

5.20 Where an aggrieved individual or alleged offender has grounds to believe that the *procedure followed in respect of the allegations of prohibited conduct was improper*, he or she may appeal pursuant to chapter XI of the Staff Rules.

32. The consistent jurisprudence of the Appeals Tribunal in cases concerning the imposition of a disciplinary measure is that the Dispute Tribunal must verify if a three-fold test is met as follows: (1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts qualify as misInTJET@.00000912 0 612 792 reW*n@.00000912 0 612 792W*npy as

Did the established facts amount to serious misconduct under the applicable staff regulations and rules?

35. The Tribunal is satisfied, having regard to the contents of the evidence on file, that the established facts considered in their entirety amount to misconduct in the form of sexual harassment for the reasons particularized below.

36. The essence of the Applicant's claim is that his actions were incorrectly determined by the Administration to amount to misconduct in the form of sexual harassment. The Applicant argues that the evidence on record has been taken out of context by the Administration. He contends that Ms. X was erroneous in her subjective belief that she was the victim of sexual harassment and that what occurred between the Applicant and Ms. X did not amount to sexual harassment as his true intention was to initiate and engage in a long-term romantic relationship with Ms. X.

37. The Applicant's case must be assessed under the applicable legal framework which consists of staff rule 1.2 (Basic rights and obligations of staff) and ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

38. Staff rule 1.2(f) provides that any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

39. ST/SGB/2008/5 was promulgated for the purpose of "ensuring that all staff members of the Secretariat are treated with dignity and respect and are aware of their role and responsibilities in maintaining a workplace free of any form of discrimination, harassment, including sexual harassment [...]". Under this Bulletin, discrimination, harassment, including sexual harassment, and abuse of authority are classified as "prohibited conduct".

40. ST/SGB/2008/5 defines sexual harassment as "any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual

nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident”. ST/SGB/2008/5 further provides that all staff members, in their interactions with others, are expected “to act with tolerance, sensitivity and respect for differences. Any form of prohibited conduct in the workplace or in connection with work is a violation of these principles and may lead to disciplinary action, whether the prohibited conduct takes place in the workplace, in the course of official travel or an official mission, or in other settings in which it may have an impact on the workplace”.

41. The Appeals Tribunal held in *Applicant*, 2012-UNAT-209, that the test of sexual harassment is “

circumstances surrounding his actions towards Ms. X, such as that he and Ms. X had allegedly engaged in “mutual flirting and seduction”. The Tribunal agrees with the Respondent’s submission that these contentions do not mitigate the gravity of the essential facts under consideration.

48. In *Hallal*, UNDT-2011-046, the Tribunal held that the subjective belief of the victim must be taken into account in determining whether sexual harassment has occurred. It is very clear from her complaint to the Chief Security Adviser and her statements that Ms. X was distressed by the Applicant’s unwelcome and persistent advances, and felt harassed and unsafe, especially as she became aware from the content of several messages that the Applicant was awaiting Ms. X in a car near her residence and watching her coming home from work.

49. Moreover, the Tribunal finds no merit in the Applicant’s claim that the allegations made by Ms. X were made in bad faith as a way of “revenge” by her. On the contrary, the evidence on file demonstrates Ms. X’s consistent rejection of the Applicant’s conduct. She attempted to informally resolve the matter in good faith several times, including clearly communicating to the Applicant that his advances were not welcome and were inappropriate. In Ms. X’s witness statement dated 14 April 2015, she stated that she pursued the formal complaint as she became increasingly scared by the Applicant’s behavior and by his inability to understand the impact of his actions on her. Ms. X’s account is corroborated by the other witness statements adduced as part of the Panel’s investigation, including the Chief Security Adviser’s statement, who attested to the fact that Ms. X approached him for assistance in resolving the matter, stating that she did not want to create trouble for the Applicant but wanted the harassment to stop. As Ms. X became increasingly concerned about her safety in light of the Applicant’s continued advances, she requested of her friends to “keep an eye on [her]”. The Tribunal finds that Ms. X’s actions went above and beyond what a staff member should have to endure to secure their wellbeing. The Applicant on the other hand, seems to have very little sensitivity towards Ms. X’s concerns, nor does he appear to grasp the impact of his actions on

misconduct. The additional information concerned: (a) the Applicant's recruitment for MINUSTAH; (b) an email statement from a witness proposed by the Applicant, Ms. AC (name redacted for privacy) outlining her version of the events during the initial meeting at the Saja House restaurant, Liberia between the Applicant, Ms. X and herself (which corroborated Ms. X's version of the events); and (c) an opinion from the Medical Service Division that there was no clear causal relationship between the Applicant's medical condition in 2008 and the alleged actions concerning Ms. X. Upon review of the 26 July 2016 email by the OHRM, none of the information cited would have affected the material findings of the Panel.

56.

the Secretary-General among the various reasonable courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General (see *Sanwidi* 2010-UNAT-084; *Said* 2015-UNAT-500; *Hepworth* 2015-UNAT-503; *Portillo Maya* 2015-UNAT-523).

61. The Respondent submits that the disciplinary measure of separation with compensation in lieu of notice and with

65. In light of the above, the Tribunal finds that the disciplinary measure imposed of separation from service with compensation in lieu of notice and with termination indemnity was proportionate to the misconduct that the Applicant committed and was consistent with the practice of the Secretary-General in similar cases.

Conclusion

66. The Applicant's claim is rejected in its entirety.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 27th day of September 2018

Entered in the Register on this 27th day of September 2018

(Signed)

Nerea Suero Fontecha, Registrar, New York