



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/063

Judgment No.: UNDT/2020/124

Date: 22 July 2020

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye Berko

DORE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Background

1. In this application the Applicant is challenging the United Nations High Commissioner for Refugees (UNHCR) High Commissioner's decision finding him guilty of misconduct and the imposition of two disciplinary measures; the loss of two steps in grade and a written censure, a copy of which was placed in his official status file ("the impugned decision"). The Respondent urged the Tribunal to dismiss the application. It is dismissed in its entirety.

Facts and Procedure

2. The Applicant holds a fixed-term appointment at the ~~SS6~~ level, as a Field Associate with UNHCR in Melkadida, Ethiopia. On 19 June 2018 he filed an application contesting the UNHCR High Commissioner's decision finding him guilty of misconduct and imposing two disciplinary measures: (i) the loss of two steps in grade; and (ii) a written censure, a copy of which was placed in his official status file.

3. The Respondent filed his reply on 19 July 2018.

4. The Tribunal held a hearing on the merits from 11 to 12 March 2020. During the hearing, oral testimony was received from the Applicant.

5. The Applicant joined UNHCR as a Field Officer at the UNHCR Melkadida Sub-Office on 23 March 2011 in Ethiopia at the ~~C1~~ level. He continues to hold this position¹

6. Before the UNHCR sub office was relocated to Melkadida in September 2014, the office was initially situated at Dolle Ado. Following the change of the physical location of the office, many national staff often travelled back to Dolle Ado for the weekend to spend time with their families. To facilitate the transportation of national staff to Dolle Ado, Senior Management at the Melkadida Sub office

¹ Reply, para 4.

9. The bone of contention is that while at Ms's house the Applicant had conducted himself in a manner that constituted harassment. She reported the incident to management who on 16 May 2016 invited the parties for a discussion that ended in the Applicant apologising to Ms K for the incident. Thereafter management instituted disciplinary proceedings. An investigation was conducted where more than 12 members of staff were interviewed. The Applicant was charged and found guilty of misconduct leading to the imposition of the sanctions.

Submissions

The Applicant

10. The Applicant argues that the misconduct was not proved through clear and convincing evidence and that the decision should be rescinded. He argues that the Administration failed to apply the correct evidentiary standard applicable in disciplinary matter under ST/AI/37 Amend.1, (Revised disciplinary measures and procedures) and that there was lack of corroborated evidence regarding the alleged harassment.

11. He refers to the sanction letter and admits that the High Commissioner merely referred to "holistic assessment" in arriving at the impugned decision. This holistic assessment is a clear misrepresentation of the content of the case file and does not in any way flow from the analysis of the available documentation.

12. The Applicant submits that the Respondent attributed decisional weight on the testimony of non-direct witnesses, who were not in a position to observe the event and disregarded the testimony of the Applicant who produced pictures (photographs of the distance and obstacles that should have prevented some of the witnesses from viewing and/or hearing what was being discussed between the Applicant and Ms. K at her door step)

13. The Applicant further submits that the Respondent attributed weight to two minor inconsistencies in the Applicant's testimony during investigations or in the

alternative not attributing weight to the third party witnesses who testified that the Applicant's role during the exchange with Ms. K was passive and not confrontational. This reflects a biased approach on the part of the Respondent, particularly because the evidence collected contained significant discrepancies these were not addressed in the sanction letter.

14. The sanction letter he argues, lacked specificity and substantiation and failed to accord the Applicant the opportunity to confront the evidence adduced against him.

15. He concludes that due to the inconsistencies in the witness statements, the evidence was not sufficient to establish misconduct, therefore the decision must be rescinded.

The Respondent

16. The Respondent on the other hand submits that the alleged facts have been established on the balance of probabilities, and that established facts constitute misconduct within the meaning of the United Nations Staff Regulations and Staff Rules. Consequently, the disciplinary measures imposed were proportionate. Without specific reference to the Applicant's submissions, the Respondent arguments are summarised below:

17. The Respondent argues that where the disciplinary measure does not lead to the staff member's separation from service, the facts can be established on the preponderance of evidence or balance of probabilities.

18. He submits that the varying accounts in the number of staff that visited Ms. K's residence and the nature of the exchange that happened at the house was assessed and the UNHCR Inspector General's Office ("IGO") was satisfied that there was sufficient evidence to substantiate on the balance of probabilities that the Applicant engaged in harassment.

19. The Respondent affirms that from the High Commissioner's "holistic

distribution of school bags.

32. Accordingly, the Tribunal finds that because in the instant case, separation is

handling international members of staff. Regardless of whether the Applicant was standing in front or behind Mr. Adow, or whether it was him or not that knocked on the door, or whether he addressed the Complainant first or at all, it is evident from the facts that he and at least one other person, Mr Adow, led this group. It follows that the Applicant played an active role in the alleged harassment. This fact is proved to the requisite standard.

(b) Engaging in confrontation

40. The Applicant on the one hand denies that there was arimonious exchange of words with the Complainant while on the other he admits that the situation had gotten out of hand. As a matter of fact, this exchange got so bad that the Applicant had to physically restrain Mr. Adow by taking his hand and leading him away from the Complainant's house. This was the Applicant's version at page 17 of the trial transcript.

I spoke as I was grabbing his hand and asking him to leave. Because I judged the situation was not good I had to diffuse it so that they don't converse wrongly anymore. So it was like I once a few steps ahead, grabbed his hand as I spoke and then we left.

41. This admission corroborates the Complainant's version of events and the Respondent's finding after assessing other witnesses' statements that there was confrontation at the house. The Tribunal finds that the Respondent has proved allegation to the required standard.

42. One further area of controversy that needs a finding on this point is whether the Applicant had said anything to the Complainant or remained silent throughout the exchange. He said it was Mr. Adow who spoke to the Complainant. He went to the Complainant's house in peace, to ensure that there was no problem, just to get the key to the extra vehicle. This is contrary to the Applicant's own statement in court where he said:

I did not talk that much, except that that words I said and from this distance, none ca18(udge)412 792.0000064(r)-6(e)-9(c)(6(e)p4(r)g4()-9(c)2210(t)-21(h)-

At that time I was two, three steps behind Mr Adow and I said, "We only came to pick up the keys for the log base, but we have no intention of offending you. Sorry, if that's not okay." (Page 35 transcript)

A Yes, this is not a conversation with Ms. K. As you can see, I was behind, two, three steps from Mr Adow, when I heard her shouting and, "What are you doing at my house." I had to go forward, as I say this, I was going Mr Adow -- I was not directly conversing with her. As I said, it was general. I did not make direct conversation with Ms. K. It's just the -- the (indistinct) the way the sentence is put and it may look that we were conversing, but it's not. I was two-to-three steps behind Mr Adow. I can clearly remember. I was -- I was not talking to her. She was not talking to me as well. She was talking to Mr Adow. When I saw her shouting and saying this, I have to go immediately saying this, we only while we came to the general, including to Mr Adow, I was looking to Mr Adow and took G [(-)] TJ ET Q q (

question that the Complainant had. The Applicant was the witness and yet this evidence was not proved and was not taken into account by the Respondent when charging the Applicant.

47. In essence the Applicant is trying to show that there was no group of staff that went to the Complainant's house. It was just Mr Adow and himself. However, there is overwhelming evidence that at least five and not two members of staff went to the Complainant's house. Mr Sargo, one of the witnesses who gave evidence during the investigations, ran into four or five national staff, including the Applicant, who were at that time looking for the Complainant

and intimidatory atmosphere under which Ms. K operated on 132016. It is easy to conclude that Ms. K operated under an apprehension of fear of ~~offence~~ that the Applicant's behaviour did not help to alleviate that fear.

Whether the established facts qualify as misconduct ~~under~~ the Staff Regulations and Rules

52. It is clear from the Tribunal's analysis of the uncontroverted evidence that the Applicant violated the Staff Regulations and Rules and the policy on discrimination through his unwelcome and improper conduct. The acts constitute ~~harassment~~.

53. The Applicant violated staff regulation 1.2(b) staff rule 1.2(f) and UNHCR's Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (UNHCR/HCP/204/4 which defines harassment as:

Any improper and unwelcome conduct that ~~might~~ reasonably be expected to be perceived to cause offence or humiliation to another. Harassment includes ~~but~~ is not limited to words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle or cause personal humiliation or embarrassment to another or that cause an intimidating, hostile or offensive work environment. It includes harassment based on any grounds such as race, religion, colour, creed, ethnic origin, physical attributes, gender or sexual orientation. It can include a one off incident or a series of incidents. Harassment may be deliberate, unsolicited and coercive. ~~Harassment~~ may also occur outside the workplace and/or outside working hours.

54. The Tribunal finds and holds that the Respondent has demonstrated that the Applicant's conduct was inconsistent with a staff member's basic obligations set out in staff regulation 1.2(b) stipulating that "staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status. He also breached staff rule 1.2(f) which stipulates 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.

Judgment

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