

UNDT/2020/220

Date: 31 December 2020

Original: English

Before: Judge Francis Belle

Registry: Nairobi

Registrar: Abena Kwakye Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Omar Josef Shehabi, OSLA

Counsel for the Respondent:

Kevin Browning, UNICEF

Applicant to be granted reciprocal anonymity. This motion was objected to by the Respondent, but granted by the Dispute Tribunal.

10. On 12 November 2020, the Applicant

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testified that the atte

He did remember they were making some sort of circle when dancing all together. He then stated it cannot happen, you know you touch each others when you are making round. And, seven or eight people in a circle in a container and you are pulling, you know, this neck like this, this, and moving in a circle and you are drunk. So, absolutely people were touching each other, but not intentionally. He did not remember if he was next to the Complainant or not.

26. The Tribunal finds that this is an admission of touching, possibly accidentally.

27. The Tribunal finds that it is not very useful to argue about whether anyone saw the Complainant being touched when the Applicant himself admits that the group was

RdN does not even recall that there was dancing in a circle that evening. But she did recall placing herself in a position between the Complainant and the Applicant. The Tribunal considers this important evidence of the consistency of the account of what happened the night of the alleged sexually loaded words and touching of the breast.

28. But the Complainant clarifies how she thought of the entire circumstances of sexual harassment. This is how she summarized the episode:

She tried to solve the situation informally by talking [to the Applicant] but instead of refraining from approaching her, he continued to contact her and not show any regret for what he had done.

29. This was said in response to allegations that she had ulterior motives for bringing the complaint against the Applicant and when she would have been forced to

ensure that justice was done. She fielded the questions that were asked by for the Applicant and answered them without any difficulty.

31. In addition to what is stated above by other witnesses such as RdN who gave the following account of the incident at the party.

32. RdN, who was at the gathering of 12 October 2017, stated to OIAI that those gatherings are regularly organized over the weekend to share a meal. She remembered that in mid-October 2017, at one of the gatherings that was attended by Complainant Mr. B, Mr. A, the Applicant, and herself, after having dinner outdoors, while they were dancing inside the room, the Complainant approached her and asked her if she could speak with her. They went to the garden and the Complainant burst into tears and told her that she was sexually harassed by the Applicant, and that she did not know what else to do to make it clear that advances were not welcome. The Complainant was considering leaving the party but RdN asked her not to do that she would keep an eye on the situation.

33. When they reentered the room, the Applicant was sitting on the bed/sofa and a short while after laid completely down and fell asleep. RdN added that she had the impression that during that night, the Applicant was under the influence of alcohol. When he woke up, the rest of the attendees were dancing in the middle of the room. The Applicant stood up and started dancing very close to the Complainant, and as she moved away, he moved closer to her. RdN remembered that at one point, when she was putting music in her phone, the Complainant looked at her as if to call for help, so she moved across the room to stand in between her and the Applicant. RdN stated that the Applicant was trying to touch the Complainant while dancing, that she saw the Applicant holding the Complainant around the shoulder while the Complainant kept raising her hand to put some distance between them. RdN recounted that she was trying to continually stand and dance between them discreetly, not to make it obvious to others how uncomfortable the situation was and spoil the night. After a short while, the Applicant gave up and left the room. RdN said that it was clear to her that the

Complainant was not sending any messages of encouragement to the Applicant. RdN told OIAI that at no point in the evening did she see the Applicant taking his shirt off or the Complainant trying to take his shirt off. Neither did she see any of the other male participants doing so they behaved respectfully.

34. Mr. U said that he attended the gathering in October 2017, and he remembered that there was a little bit of dancing, that they were in a circle. He said that he did not see the Complainant trying to remove the Applicant's T-shirt, and what he remembered was that at some point when he came back to the container the Applicant was lying on the bed without his T-shirt. Mr. U told the Applicant that he did not have his shirt on and the Applicant replied that the ladies had taken his shirt off.

35. In his initial reply to the allegations, the Applicant stated that the following day, on 13 October 2017, the same people who attended the gathering the night before got together again, had a dinner which he also participated in but left early. He said that caused the Complainant to express her anger at him for leaving early. He also stated that he never asked her to meet him, she was the one who wanted to meet further. However, during the interview with OIAI the Applicant stated that he did not attend the gathering the following night.

36. The Applicant also argued that the Complainant wanted him to support her efforts to get her way in the UNHCR programmes in Sudan. Part of this strategy had to do with her alleged poor performance at work. But this allegation is rebuffed by Mr. K. K is reported as having stated that he did not know of any adverse finding against the Complainant at work.

37. The fact that the Complainant stated that she told investigators that she told told

in no way nullifies the powerful evidence of the witness who felt it necessary to get between the Complainant and the Applicant to prevent unwanted touching.

51. Apart from the breast touching incident, which was initially referred to as breasts being grabbed is properly explained as a linguistic error, there are other relevant factors. In any event, even if the touching was accidental which is a real possibility based on the facts of this case, it occurred in a context of reckless unwanted behaviour by the Applicant which the witness reported seeing at the party.

52. Counsel appeared to be of the view that the touching was the major issue involved in sexual harassment and cited a case in which a number of explained on the basis that the circumstances were not the same. A sexual assault can occur when both parties are inebriated, and one has too many liberties in the circumstances but attaches no nuances of power relations to the behaviour either because he/she is unable to do so or because the perpetrator is not interested in exploiting any power imbalance.

Are all of the elements of sexual harassment present?

53. In this case, the exercise of power is implied by the disparity in the positions held by the respective parties and the words used in his advances, if the Complainant is to be believed. The Tribunal also finds the evidence of the Complainant credible and convincing, and the persistence of continuing to call and attempt to establish a relationship when it was clearly unwelcome is an important element of sexual harassment in this case.

54. In this regard, the Tribunal cannot ignore how the Complainant felt. She stated that the Applicant behaved as if her wishes expressed to him were being ignored.

55. The Tribunal is satisfied based on the evidence of the Complainant

60. In *Negussie* 2020-UNAT-1033, the United Nations Appeals Tribunal opined as follows:

convincing evidence of misconduct, including as here, serious that the evidence of misconduct must be unequivocal and manifest.

evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events may be of evidential inferences that can be properly drawn from other direct evidence.

61. The Tribunal finds that the evidence of the perpetration of the alleged breach of staff rule 1.2(a) and (b) is clear and convincing.

Due process in the investigation

62. The evidence provided by the investigators clearly showed that the Applicant was afforded the due process rights he was entitled to. He was informed about the

maker, including the Complainant in this case could confirm or deny and finally a prepared statement reflecting all of these inputs would be signed and returned by the maker.

64. The Tribunal ensured that the two main investigators were brought to give evidence at the hearing. Counsel for the Applicant was able to ~~examine~~ the witnesses and

Counsel was permitted to address the Tribunal and file written submissions.

Disciplinary measures were proportionate

65. As stated earlier the Tribunal was made aware of other decisions in disciplinary cases which involved sexual harassment. The Tribunal ~~is not~~ to challenge any of the findings in those decisions and is not desirous of doing so since as ~~earlier~~ state the facts of each case of sexual harassment may be different, giving rise to different conclusions in relation to aggravating and mitigating factors of the offence and the offender.

66. However, it should be stated that in citing the case of ~~Conteh~~ 2020-UNDT-189, the Applicant relied on decision

followed unhesitatingly today in a case not involving sexual harassment but is less likely to be applied in a case involving sexual harassment

68. The Tribunal holds the view that the imposition of a sanction has to take into account the degree of odium with which the misconduct of sexual harassment is regarded today. The Tribunal therefore cannot without pause apply a decision made in relevant new thinking on the subject matter.

69. In this case it is true that the Applicant was not able to use his power to enforce any discriminatory or harsh action or sexual abuse. This is a case in which the perpetrator, being the Applicant, the most senior UNICEF official in the area, persisted

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(Signed)