



JUDGE SOPHIA ADINYIRA, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2011/218, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 29 December 2011 in the case of *Massah v. Secretary-General of the United Nations*. The Secretary-General appealed on 27 February 2012, and Counsel for Mr. Mohamadou Massah answered on 14 September 2012.¹

Synopsis

14. Mr. Massah appealed to the Joint Appeals Board (JAB) to contest MINURSO's acceptance of his resignation. On the recommendation of the JAB, on 4 October 2005, the Secretary-General decided to suspend the decision to separate Mr. Massah pending determination of the merits of the case. Mr. Massah was accordingly placed on Special Leave with Full Pay (SLWFP) until 31 March 2006.

15. During Mr. Massah's SLWFP, the Office of Internal Oversight Services (OIOS) conducted an investigation. OIOS investigators found approximately 58,000 images stored on Mr. Massah's office computer, of which a significant portion depicted naked women displaying their sexual organs in graphic detail. According to OIOS, Mr. Massah admitted to having taken pictures of people during parties that he had organized. He also admitted to having downloaded some pictures onto his office computer in order to free up space on his camera; he would later remove them and store them permanently on his private computer. Mr. Massah further admitted to having received, sent and forwarded a number of pornographic images from his office computer and UN email. Mr. Massah finally admitted to having taken some of the pictures stored on the CD at his Laayoune apartment.

16. Mr. Massah was charged with sexual exploitation by taking pornographic nude photographs of local women in Laayoune, in breach of the Secretary-General's Bulletin ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse). He was also charged with unauthorized use of the Organization's information and communication technology resources and data, in violation of Sections 4.1 and 5.1 of ST/SGB/2004/15 (Use of information and communication technology resources and data).

17. Mr. Massah's case was subsequently referred to the JDC for advice. The JDC found that Mr. Massah's conduct constituted "sexual abuse" and that several photographs were of a pornographic nature. It recommended that Mr. Massah be separated from service. The Secretary-General endorsed the JDC's recommendation and Mr. Massah was separated effective 14 March 2007.

18. Mr. Massah appealed. His application was transferred from the former Administrative Tribunal to the Dispute Tribunal in Nairobi on 1 January 2010.

19. In Judgment No. UNDT/2011/218, the UNDT concluded that Mr. Massah had been wrongly charged with sexual exploitation, stating: "There is not an iota of evidence to establish any act of sexual exploitation (as defined [in Section 1 of ST/SGB/2003/13]) was perpetrated by

the Applicant”. However, the UNDT found the second charge of unauthorized use of the Organization’s IT resources established, as Mr. Massah had admitted to having stored the pornographic images on his office computer. In the view of the UNDT, the sanction of separation without notice or compensation was disproportionate in comparison with the disciplinary measures that the Administration had meted out to other staff members who had committed computer-related misconduct. The UNDT reasoned that, given that Mr. Massah had died in the interim, the only appropriate remedy was compensation, which the UNDT fixed at four months’ net base salary effective March 2007.

Submissions

Secretary-General’s Appeal

20. The Secretary-General submits that the UNDT erred in finding that there was no evidence to establish sexual exploitation on the part of Mr. Massah. The UNDT ignored the clear

31. Sexual exploitation is defined in Section 1 of Secretary-General's Bulletin ST/SGB/2003/13 as

any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Similarly, the term "sexual abuse" means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

32. Compensating or paying women for sex is prohibited under section 3.2(c) of the same Bulletin:

Exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. This includes any exchange of assistance that is due to beneficiaries of assistance.

33. In reviewing disciplinary cases, the role of the Dispute Tribunal is to examine:

- i. whether the facts on which the disciplinary measure was based have been established;
- ii. whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations; and
- iii. whether the disciplinary measure applied is proportionate to the offence.³

Sexual exploitation

34. The Secretary-General submits that Mr. Massah abused the women's trust by failing to adequately exercise caution in handling the nude photographs he had taken of them, and was grossly negligent in having stored, for years, the nude pictures of local women and in allowing many local persons access to his home in a highly politically sensitive environment.

35. The Dispute Tribunal was of the opinion that "[t]here is no evidence to suggest that the Applicant forced these women into these pictures or that he profited monetarily, socially or politically from taking them". The Appeals Tribunal considers that the Dispute Tribunal

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failed to appreciate the fact that the women came from a highly-sensitive cultural background and were socially vulnerable.

36. The UNDT also failed to consider the fact that Mr. Massah, as OiC of Security of MINURSO, had a particular duty of care towards women and children, pursuant to Section 7 of ST/SGB/1999/13.

37. The UNDT further failed to consider the position of the OiC of Security for MINURSO and the fact that Mr. Massah abused his position in taking pictures of nude local women including cleaners in his apartment.

38. Two of the pictures show a hand on the sexual organs of a nude woman. Mr. Massah admitted it was his hand. We consider these as acts of sexual exploitation, as defined in ST/SGB/2003/13 as the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

39. Furthermore, Mr. Massah stored the sexually graphic photographs on both his home computer and his work computer, where he allowed local persons and co-workers to view them, thus exposing the local women to recognition within the community and possible danger, including the loss of their lives. It was clear to us that, in so doing, Mr. Massah abused the trust of the photographed women and displayed a reckless disregard for their safety.

40. Accordingly, we hold that the established facts legally amount to sexual exploitation. The appeal succeeds on this ground.

Compensating or paying women for sex

41. The Secretary-General submits that the UNDT failed to address the second basis on which Mr. Massah was separated from the service, namely that Mr. Massah had compensated women for sexual services.

42. The JDC concluded that there was sufficient evidence that Mr. Massah had compensated women for sexual services. Mr Massah admitted to the fact during the investigations. Although this report was before the UNDT, it ignored the evidence. The fact that Mr. Massah compensated women for sexual services was a clear breach of section 3.2(c) of ST/SGB/2003/13.

43. Accordingly, we uphold the submission that the UNDT erred on a question of fact and law in concluding that there was not an iota of evidence to establish any act of sexual exploitation.

44. The appeal is allowed on this ground.

UNDT has erred on questions of law and fact in finding that the disciplinary measure was disproportionate to the offence

45. Given that the UNDT found that the charge of sexual exploitation had not been proven, it concluded that the disciplinary measure was disproportionate in the present case.

46. The Secretary-General has wide discretionary powers in applying sanctions for misconduct committed by staff. However, the disciplinary measures must be proportionate to the offence.⁴

47. The case was seriously treated because of the allegation of sexual exploitation and abuse. Section 3.2(a) of ST/SGB/2003/13 provides that:

- a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore

50. The appeal is allowed on this ground.

Judgment

51. The appeal is allowed in its entirety and the UNDT Judgment is reversed in part.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Chapman

Entered in the Register on this 18th day of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar