



Case No.: UNDT/NBI/2010/033/  
UNAT/1710

Judgment No.: UNDT/2011/215

Date: 20 December 2011

## **Introduction**

1. On 26 June 2009 the Applicant filed an appeal to the former United Nations Administrative Tribunal against the decision of the Secretary-General to have a written censure placed in his official status file. The censure was the result of a disciplinary case brought against the Applicant in which he was charged with “having improperly touched” the complainant’s “upper body, fondled her breasts, attempted to fondle her private parts and groped her,” in violation of staff regulations 1.2(b), (e) and (f) and Staff Rule 301.3(d).

2. On 1 January 2010, this case was transferred to the Nairobi Registry of the United Nations Dispute Tribunal (UNDT) in accordance with ST/SGB/2009/11 on Transitional Measures Related to the Introduc

nights of 18 and 19 December 2006. MR, another female staff member was also staying at the house at the time. The Applicant returned to Lubumbashi on 20 December.

6. The following week, on 26 December, SG filed a complaint of sexual assault against the Applicant alleging that on the night of 19/20 December 2006, she awoke in the middle of the night to discover the Applicant touching her upper body and fondling her breasts. She alleged that he asked her to caress him and repeatedly tried to get into her bed, despite her telling him to stop and attempting to fight him off. SG stated that the incident lasted about 15 minutes.

7. On 22 March 2007, the Special Representative of the Secretary-General (SRSG) convened an investigation panel, consisting of two MONUC staff members, to look into the allegations. The investigation panel interviewed the complainant and the Applicant on 3 and 4 April 2007. On 17 April, the Panel submitted a report of its findings on the allegations in which it concluded that “[the Applicant] has most likely attempted to have sexual contact with [SG] in the evening of 19 December 2006...”

8. On 8 August 2007, the Director, Department of Field Support (DFS) recommended to the Assistant Secretary-General, Office of Human Resources Management (OHRM), that the Applicant be subjected to disciplinary action. Consequently on 8 October 2007, the Applicant was charged by OHRM with “having improperly touched [SG’s] upper body, fondled her breasts, attempted to fondle her private parts and groped her, in violation of the Organization’s Staff Regulations and Rules.” This led to his suspension from duty with full pay on 15 October 2007.

9. The Applicant was asked to provide his response to the allegations. On 23 October 2007, the Applicant did so, denying the alleged conduct entirely, and stating that he slept through the night of 19/20 December and never went near SG’s bedroom nor made any advances to her. He pointed out that the other occupant of the house, MR, did not hear any noise, whereas SG alleged that she screamed and shouted. He further pointed out that the complainant did not call UN security either during the night or the

following day, and further, that she actually drove him to the airport on 20 December. The Applicant suggested that these facts were inconsistent with SG's version of events.

10. On 19 November 2007, OHRM referred the





## **Issues**

16. The role of the Tribunal in reviewing disciplinary cases is to examine the following:<sup>1</sup>

- (a) Whether the facts on which the disciplinary measure was based have been established;
- (b) Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations;
- (c) Whether the disciplinary measure applied is proportionate to the offence; and
- (d) Whether there was a substantive or procedural irregularity.

17. Consequently, these are the issues that will be explored in the present matter. In considering these issues, the Tribunal will scrutinize the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available and draw its own conclusions.<sup>2</sup> The Tribunal is not bound by the findings of the JDC or of the Secretary-General.

## **Considerations**





Applicant was telling her to caress him and asking her whether she wanted him. He tried to glide his hands towards her private parts but she managed to prevent that.

23. SG stated that the Applicant then left but returned to her room later and this time he just stood by the bed. SG felt scared and crouched in her bed to protect herself. The Applicant again asked her whether she wanted him. This second time he did not touch her. SG then told him firmly to leave her room, and eventually he did.

24. The next day in the early morning SG drove the Applicant to the airport for him to catch his plane to get back to his duty station. She did so because she wanted to get rid of him as soon as possible. In the car the Applicant was apologetic, telling her that he just went crazy.

25. The next day SG asked MR, who was occupying another room at her house, whether she had heard anything on the previous night but MR told her that that she had heard nothing. MR told the Tribunal and the investigation panel that she was fast asleep at the relevant time. She also stated that SG was a bit reluctant to give a detailed account of what had happened as she is a very private person and MR believed that SG felt that her privacy had been shamefully invaded. But MR had sensed that something had happened to SG and when she questioned her, SG related the incident of the night of 19/20 December to MR.

26. Both MR and EN, SG's supervisor to whom the latter talked, said that SG was in a state of shock and distressed and was not keen on making a formal complaint because of the shame and humiliation she felt following the incident. But MR and EN encouraged her to do so. EN had received a call from SG who related the incident to her. EN stated that after the incident, SG was nervous, tense and on her guard all the time. She added that the reason SG left the United Nations was because she had to continue to work with the Applicant.



reason to doubt it. There is no evidence of ill-motivation on SG's behalf and she appeared to this Tribunal to be an honest witness who was upset and embarrassed by the incident but who was determined to tell the truth.

31. The fact that SG was reticent to make a complaint and that MR and EN had to fish for details and convince her to file a complaint might be considered adverse to her credibility. But that would be taking a very simplistic approach to her evidence. The Tribunal considers that in cases of a sexual nature or involving the forced invasion of a person's physical privacy it is not only the factual aspects of the incident that need to be considered but also the character and personality of the alleged victim.

32. There is undisputed evidence to show that SG, as explained by EN, kept a lot to herself. MR stated that she had known SG over a period of time and that she is a very private person. The Tribunal also notes that following the incident SG was cautious about relating the incident because, as stated by MR, she was concerned at what would happen to her both in her professional and personal life if she went ahead with it. The personality, character, and attitude of SG are clear indications that her account of the incident was not a premeditated concocted conspiracy emanating from a warped mind. There is no evidence to indicate that she would have any motive to invent such an allegation against the Applicant or that she would gain in any way by openly talking about an unpleasant, intimate, and, as she perceived it, humiliating experience.

33. It is true that SG did not raise as great a hue and cry as might have been expected in the circumstances but the fact that she did call out is an indication that she attempted to alert those around. It is no fault of hers if those around could not hear her distress call. That cannot be held against her. Furthermore, given the character of SG, as noted by the Tribunal above, it is consistent with her version of events that she was reluctant to cause a row.

34. The version of events as told by the Applicant is much more obviously an attempt to brush aside a serious incident by suggesting that SG's story could be faulted

because she did not scream loudly enough or because she took the Applicant to the airport. At best, that Applicant's attempt to extricate himself from a tight corner was feeble and has the opposite effect to what he desired: his attack on the credibility of SG has only buttressed further the complaint levelled against him.

35. This Tribunal has assessed both the documentary evidence and the oral testimony presented in this case. The Tribunal has considered in particular the following issues: the time at which the complaint was made; the initial reticence of the complainant to file a complaint; her overall mindset following the incident; her testimony and explanations; the testimony and statements of the two ladies to whom the complainant talked after the incident; the testimony of the Applicant and his written statements as well as the various explanations he has given. In the end, this Tribunal has reached the conclusion that the Respondent has discharged the burden of proof to the requisite standard in this matter.

***Issue 2 - Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations***

36. The Applicant was charged with misconduct violating Staff Regulation 1.2(b), (e) and (f) and Staff Rule 301.3(d). Staff Regulation 1.2 (b) requires 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.

37. Staff Regulation 1.2(e) and (f) state:

(e) By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations as well as the



***Issue 3 - Whether the disciplinary measure applied is proportionate to the offence***

41. The Applicant was visited with a written censure. The Tribunal does not have the power to modify this sanction in order to impose a higher one. However, the Tribunal cannot help pointing out that the sanction erred on the side of leniency and it will be up to the Secretary-General to exercise his discretion to impose a sanction commensurate with the misconduct which this Tribunal has found to have occurred.

***Issue 4 - Whether there was a substantive or procedural irregularity***

42. On the issue of procedural irregularity, the Applicant was informed of the charge, and he was given adequate time to respond to it. All the materials relating to the investigation were made available to him. Admittedly in a disciplinary matter which is of a quasi criminal nature the issue may arise whether a staff member should be informed of his or her right to representation or legal assistance at the investigation stage. The well entrenched practice within the Organisation has been not to allow any representation or legal assistance at the investigation stage as such an investigation is considered to be confidential in nature. However, the irony of the situation is that the staff member is required to collaborate in the investigation and if subsequently OHRM decides to level charges against that staff member, whatever incriminating statements he or she may have made during the investigation are, as a rule, used against him or her. That practise on the face of it looks unfair.

43. It is inconceivable that a staff member who is in the grip of, or facing, trained investigators, should be left alone to wrestle with questions the answers to which are used against him ultimately.

44. In the present case however that is not the situation. The Applicant did not make any incriminating statements and denied the charge. Even the former JDC did not find the charge proven, a conclusion that was not approved by the Respondent who had the power to reverse the findings of such a panel.

45. The Applicant also complained that the JDC was not in a position to fairly and properly assess the evidence in the case. True it is that the JDC did not hear the complainant and acted on her written statement. That was wrong. What the JDC did was to act on the testimony of an absent witness. The Tribunal refers to the Appeals Tribunal decision in the case of *Liyarachchige* UNAT 2010-087, where a finding of guilt in a disciplinary matter was quashed on the ground that the finding was based solely on the testimony of anonymous witnesses who had not been tendered for cross-examination. The Appeals Tribunal stated:

The use of statements gathered in the course of the investigation from witnesses who remained anonymous throughout the proceedings, including before the Tribunal, cannot be excluded as a matter of principle from disciplinary matters, even though anonymity does not

procedural irregularity there may have been before the proceedings reached this Tribunal, has now been cured.

### **Conclusion**

47. There was a procedural irregularity in the manner in which the Secretary-General reached his decision to impose a disciplinary sanction upon the Applicant—the complainant did not testify to the JDC and the Applicant had no opportunity to cross-examine her. However, this Tribunal is entitled to consider matters afresh and in so doing, the Applicant was afforded the opportunity to challenge the complainant’s testimony fully. This Tribunal is convinced that the misconduct alleged took place as described in the original complaint, and that it amounts to both sexual harassment in connection with work as well as conduct unbecoming of an international civil servant. In such circumstances, the sanction imposed upon the Applicant, a written censure, is, in the view of this Tribunal, a lenient measure for which the Applicant ought to be gratified.

48. In light of the above, the Application is refused in its entirety.

*(Signed)*

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Judge Vinod Boolell