



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

KHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Salim Shaikh

Counsel for Respondent:
Bartolomeo Migone, WFP
Simone Parchment, WFP

Introduction

1. The Applicant is contesting the decision of 1 December 2010 taken by the Director of Human Resources Division, World Food Programme (“WFP”) to separate him from service with compensation in lieu of notice and without termination indemnity following a finding that he had engaged in misconduct in violation of the United Nations Staff Rules and Regulations, WFP’s Policy on Harassment, Sexual Harassment and Abuse of Authority (“HSHAP”) and the Standards of Conduct for the International Civil Service.

2. The Applicant requests rescission of the contested decision, reinstatement to his original position with retroactive effect and payment of a sum equal to 24 months’ net base salary as compensation for moral and career damages. The Applicant also requests that the Organization initiate disciplinary proceedings against the staff members who filed complaints against him (“the complainants”), and against the Staff Counselor Asia, WFP, for breach of conduct and perjury.

Background

3. On 15 July 2008, the Applicant joined WFP under a fixed-term contract as Logistics Officer and Head of the Sub-Office, grade NO-B, based in Quetta, Pakistan.

4. On 22 December 2009, the Office of Inspections and Investigations (“OSI”) received an email from the Staff Counselor Asia, WFP, stating that he had received complaints from three female staff members alleging harassment, sexual harassment and abuse of authority by the Applicant in violation of HSHAP.

5. By letter dated 29 December 2009, the Director, Human Resources Division, WFP, informed the Applicant that “WFP is currently conducting an investigation into allegations of improper conduct on your part in violation of WFP’s Policy on

harassment”, and that he would be placed on administrative leave pending investigation “[i]n order to ensure that a proper investigation is conducted and given the seriousness of the allegations”. The following day the Applicant was placed on administrative leave with full pay, pending the completion of the investigation.

6. In January 2010, OSI commenced an investigation into the allegations submitted against the Applicant with a team travelling to Quetta where it conducted initial interviews with the complaining staff members. During the first week of January 2010, OSI received three additional complaints alleging harassment and abuse of authority by the Applicant.

7. On 7 April 2010, based on the evidence collected, OSI sent the Applicant a memorandum advising him that he had “been made the subject of allegations which, if proven, could lead to administrative or disciplinary action against [him]”.

8. On 14 June 2010, the Chief, OSI, issued its investigation report which was provided to the Director, Human Resources Division (“HR”), WFP, whereby it recommended that “[a]dministrative or disciplinary action be taken against [the Applicant] for his violation of the WFP HSHAP Policy ... [and] [c]areful consideration should be given as to whether [the Applicant]’s future service at WFP in any capacity would be in the best interest of the organization”.

9. On 12 August 2010, the Applicant was notified, by memorandum dated 6 August 2010, that he was charged with specific instances of “serious misconduct” and that the “findings are sufficiently serious to the initiation of disciplinary action [and that] ... [g]iven the gravity of the charges ... if confirmed, the measure that is proposed in connection with the charges is that of ‘Dismissal’ ... in accordance with UN Staff Rule 10.2(a)(viii)”. The Applicant was asked to provide a written response to the memorandum, and the investigation report, within 10 working days.

10. On 22 August 2010, the Applicant received a copy of the investigation report referred to in the 6 August 2010 memorandum, with the applicable annexes being provided to him the following week.

11.

17. On 4 June 2012, the undersigned Judge was assigned to the present case.

18. On 5 October 2012, the parties, pursuant to the Tribunal's Order No. 174 (NY/2012) of 30 August 2012, submitted a joint statement of agreed facts and legal issues. The parties also submitted that there was no need to convene a hearing. The joint statement also identified facts and legal issues on which the parties did not agree.

19. On 26 July 2013, the parties, pursuant to Order No. 170 (NY/2012) filed their closing submissions.

Consideration

Receivability

20. By the application filed with the Tribunal on 24 February 2011, the Applicant contests the disciplinary decision to separa

Burden of proof

23. In the present case, the Applicant's contract was terminated as a result of the application of the disciplinary sanction of separation from service.

24. The ILO Convention, C158 on Termination of employment (1982), which is applicable to all branches of economic activity and to all employed persons (art. 2) states in art. 9.2:

In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation ... shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of valid reason for the termination ... shall rest on the employer

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for termination having regard to the evidence provided by the parties and according to procedures ... and practice.

25. Similarly to the principle of the burden proof in disciplinary cases in the ILO Convention, the Tribunal, in *Hallal* UNDT/2011/046, held that:

30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred. (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

31. Where a *prima facie* case of misconduct has been established, the burden is on Applicant to provide satisfactory evidence justifying the conduct in question

32. Thus, it is for the staff member who is challenging a decision of the Administration to show sufficient grounds to interfere in the disciplinary measure. In other words, the staff member is required to produce evidence to show that the Administration's decision was biased, improperly motivated or flawed by procedural irregularity or error of law.

26. Further, as expressed in *Fernandez de Cordoba Briz*the

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(*Parker* 2010-UNAT-012) who has to discharge his burden on a preponderance of evidence (*Azzouni* 2010-UNAT-081)”.

27. In *Zoughy* UNDT/2010/204 and *Hallal* UNDT/2011/046, the Tribunal decided that it is not sufficient for an Applicant to allege procedural flaws in the disciplinary process. Rather, s/he must demonstrate that these flaws have affected her/his rights.

Applicant’s grounds for contesting the administrative decision

28. The Tribunal will analyze the Applicant’s contentions regarding the regularity of disciplinary procedure; the facts and evidence established for each of the three allegations of sexual harassment, harassment and abuse of authority; and finally the proportionality of the disciplinary sanction.

29. The Tribunal notes that it reproduces parts of the Respondent’s Reply from 30 March 2011 which extensively presented the facts and supporting evidence related to each of the Applicant’s allegations and, where applicable, states the ones that it adopts.

Regularity of the procedure

30. The Applicant stated that the complaints filed against him are not legally receivable because the Staff Counselor for Asia, instead of being a mediator, abused his position by adopting the position of a partisan and conducting his own vendetta with *mala fide* intentions. After receiving the complaints, the Staff Counselor disregarded the mandatory channels established in the 1 October 2003 memorandum concerning “Sexual Exploitation and Abuse Complaints and Investigation Protocols by, instead of forwarding the complaints to OSI, sending the complaints to the Regional/Country Head of Office and Head of DHR together with his own comments thereby retaliating and attempting to destroy the Applicant’s reputation and career.

31. According to WFP's Policy on Harassment, Sexual Harassment and Abuse of Authority adopted on 14 February 2007, the first step in the formal process consists of the submission of a complaint as follow:

Step 1 – Submission of complaint

27. The complainant must submit a complaint in writing to the Director ADH, the Inspector General, the local human resources officer at the duty station, a peer support volunteer, a staff counselor, or the confidential WFP Hotline operated by [OSI].

28. Whichever route is used, the complaint must immediately and confidentially be notified to the Director ADH”

29. A formal complaint must be submitted within six months from either the date of the incident of alleged harassment or abuse of authority or the most recent alleged incident, if the complaint is about a persistent pattern of inappropriate behaviour.

32. The Tribunal concludes that the staff members respected the procedure and they exercised their legal option to send the complaints in writing to one of the persons identified in the legal provisions, namely the Staff Counselor.

33. After receiving the written complaints, the Staff Counselor respected his mandatory obligations: he preserved the confidentiality of the documents and immediately informed both Human Resources and OSI. He was also not allowed to inform or speak with the Applicant about the complaints that had been filed and there is no evidence that he acted in a “partisan” manner.

34. The Applicant also stated that he conveyed his concerns when, during one of his visits, the Staff Counselor started to preach his religion in front of other staff members.

35. As expressed by the Respondent,

OSI specifically investigated the Applicant's claim that he was the victim of an ethnic conspiracy to manufacture complaints and ... established through independent testimonial evidence that [the Applicant] engaged in similar complained of behaviour when dealing with several staff of the [Sub-Office], whether they were from the Hazara community or the Punjabi community.

36. The Tribunal finds no evidence that the Staff Counselor did not respect his duties and abused his position in order to manipulate the complainants and to retaliate against the Applicant.

37. The Applicant also stated that the investigation procedure was arbitrary and unfair because he was placed on administrative leave with pay pending investigation with effect from 31 December 2009 with the allegation of “improper misconduct” on account of violation of WFP Policy on HSHAP and this abrupt act violated the law.

38. The Applicant states that, consequently, the staff members who had filed a complaint were left free to manipulate the evidence which affected the fairness and the impartiality of the process. He claims that the confidentiality of the investigation was not respected by two of the complainants because one of them—Mr. ZA— informed the security guards and drivers on 31 December 2009 that the Applicant was suspended and the same information was provided by another complainant, Ms. TR, to a person who called at the office and wanted to discuss the allegations with the Applicant. Approximately forty witnesses were interviewed by OSI in the absence of the Applicant thereby depriving him of his due rights.

39. Pursuant to staff ru

41. The Applicant was informed on 29 December 2009 that WFP was conducting an investigation into allegations of improper conduct. Consequently, taking into consideration the seriousness of the allegations, the Applicant was placed with immediate effect on administrative leave with full pay, pending the completion of the investigation. The investigation had already started when the Applicant was placed on administrative leave and the Applicant has submitted no evidence that would suggest that the Administration abused its discretion in placing the Applicant on administrative leave pending the completion of the disciplinary process.

42. Taking into consideration the complexity of the case and the Applicant's position in relation to the complainants, it was correctly determined that, in order to conduct a neutral fact-finding investigation and to obtain the relevant preliminary evidence, the Applicant had to be placed on administrative leave without access to emails or mobile phones. There is no reference in the rule that such a measure cannot be implemented prior to the Applicant having had the opportunity to respond to the allegations.

43. The Tribunal notes that even though the Applicant was informed that he had the right to challenge his suspension in accordance with Chapter XI of the Staff Rules, he never contested it prior to the filing of the present application. Consequently he cannot invoke any irregularities related to it as a ground of appeal against the disciplinary sanction.

44. The Respondent correctly stated that the former Administrative Tribunal "rejected an applicant's argument of improper administrative leave that was implemented before the applicant had the opportunity to respond to the allegations. See, e.g., former United Nations Administrative Tribunal Judgment No. 1498, *Abu El Fahem* (2009), p. 9)".

45. The Tribunal held in *Applicant* UNDT/2011/054 that the disciplinary part of the process, including the interview of the alleged offender, should only occur

his arguments. Furthermore, in the present case, as correctly expressed by the Respondent:

87. ... the Applicant was provided

56. In conclusion, the Tribunal considers that there is no evidence that the complainants manipulated the evidence held against the Applicant during his suspension, both the investigative and disciplinary proceedings in this case were conducted fairly, neutrally and in accordance with WFP's procedure and the Applicant's due rights were respected.

57. In *Molari* 2011-UNAT-164, the United Nations Appeals Tribunal recalled that when a disciplinary sanction is imposed by the Administration, and when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing evidence means that the truth of the facts asserted is highly probable.

58. In order to determine whether the facts were established, and in light of the Applicant's submissions, the Tribunal will analyze the facts and the relevant evidence presented by the Respondent.

Sexual harassment and abuse of authority against Ms. TR and Ms. AA

59. As stated by the Respondent,

19. The Applicant supervised [Ms. TR], an administrative assistant in the Quetta Sub-Office. In her written complaint and interview with OSI, [Ms. TR] stated that the Applicant repeatedly subjected her to unwelcome sexual comments, touching and requests for sex, starting in December 2008.

20. ... the Applicant offered her his "friendship", which she refused. [Ms. TR] stated that her refusal "did not stop him, he persisted", asking for her "friendship" again in January 2009. [Ms. TR] stated that, "[j]udging from his attitude, [she] felt that he did not want just general friendship, but more such as sexual relationship.

21. ... the Applicant would ask her to shake his hand. When she refused, "[h]e would argue with [her]" and tell her "you must shake hand". On one occasion in March 2009, the Applicant "forcefully kissed [her] hand". [Ms. TR] understood the Applicant's insistence on shaking her hand and kissing her hand to be "about his intentions, that he [was] step-by-step going ahead towards what he wanted).

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...

60. Prior to their last conversation of 17 December 2009, Ms. TR decided to record it. Following the events, Ms. TR decided to use the recording of the conversation in support of her allegations against the Applicant. The Tribunal considers that, in view of the content of the transcript of the recording, Ms. TR might have provoked the Applicant by suggesting the topic of conversation. The Tribunal will therefore not take the content of the audio recording into consideration.

61. The Tribunal notes that even if there is some uncertainty with regard to the exact date on which the above conversations took place, the imputations are not generic. Ms. TR presented sufficient and credible details about the conversations initiated by the Applicant during the time period of December 2008–December 2009.

62. In his interview from 7–8 April 2010, the Applicant stated that he completed the training course on harassment, sexual harassment and abuse of authority and he instructed the female staff never to come into his office unaccompanied by a male colleague. The Tribunal notes that the Applicant recognized in his interview that he “shook her hands twice” even though he knew that in Pakistan these gestures are not allowed. Ms. SR declared that the Applicant used to receive female staff members alone in his office and Mr. FR declared that “Mr. AK said that she [Ms. TR] would directly report to him”...

63. 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 Ms. TR’s statements that on several occasions, the Applicant directly expressed his intentions and that there was no other possible interpretation as to the intent behind them other than the one presented by her.

64. Consequently, the Tribunal considers that it is clear from the evidence that the Applicant’s verbal and physical conduct was continuous and was sexual in nature and was neither welcomed nor desired by Ms. TR.

65. In conclusion, Ms. TR was a victim of sexual harassment and her statements, even without the recorded conversation from 17 December 2009, are relevant in the present case. As expressed by the Respondent:

38. [Ms. TR's] statement is also corroborated by two other staff members who told OSI that she had previously confided in them regarding the Applicant's sexual harassment. [A] Program Officer in the Quetta Sub-Office, stated that she told him in early December about the non-extension of her contract and [he] understood that she was saying the Applicant was requ

her for a “friendship” and asked her to meet him outside the office at hotels in the evening or during office hours to “make a relationship which [was] totally based on sexual de Ts/es”.

behaviour started in July 2008 and the last incident was in December 2009, the complaint was made within the deadline established by WFP's Policy on HSHAP.

The Applicant also stated that Ms. AA made the complaint in order to avoid the payment of a loan to the Applicant. Regardless of whether or not Ms. AA made any false statements, the Tribunal has not been provided with any evidence that would support this claim. Further, Mr. FR stated that Ms. AA paid back the money, giving a check to the Applicant after her wedding.

73. The Tribunal considers that the Respondent correctly appreciated that

45. ... [Ms. AA and Ms. TR's] statements corroborate each other and are also corroborated by other women, who testified to having received similar requests from the Applicant. [Ms. HG], Field Monitor in Quetta Sub Office, stated that the week after she joined the office, the Applicant called her into his office and "pinched her cheek and tried to sit very close to [her]. [Ms. MK], Field Monitor in Quetta [stated that] the Applicant also offered her his "friendship" and that he "could get [her] a very good position if [she] became [his] friend". [Ms. SK], a Field Monitor and Peer Support Volunteer, stated that the Applicant asked her for her "friendship" and invited her to his home for tea.

74. In conclusion, as summarized by the Respondent,

47. ... the Applicant's numerous requests for [the complainants'] "friendship" ... constituted sexual harassment in violation of WFP's HSHAP Policy as they amounted to "unwelcome sexual advance[s] or unwanted verbal or physical conduct of a sexual nature [and] this sexual harassment was aggravated by the fact that the Applicant was "in a position to influence the career or employment conditions of [Ms. TR]" and threatened to exer

by the two female staff members, Ms. TR and Ms. AA in December 2009, within, as required by the para. 29 of WFP's Policy on HSHAP, six months of the date on which the latest events occurred.

76. The Tribunal finds that WFP correctly determined that the Applicant breached the mandatory legal provisions and that he committed sexual harassment.

Harassment of staff members

77. The Applicant was accused of using offensive language against Mr. IA, a Logistics Assistant in the Quetta Sub-Office. As stated by the Respondent, Mr. IA "complained that the Applicant used offensive and insulting language with him on several occasions. During an office meeting in December 2008, in response to a work-related suggestion by [Mr. IA], the Applicant [made a very insulting statement]. [Mr. IA] said that this statement was made in front of others and "shocked" him. He stated that he considered it "the biggest insult [he] ever ha[d] in [his] whole career".

78. The Tribunal notes that this incident which took place in December 2008 was an isolated incident and had no connection with the one from October 2009. Further, it was not reported within six months from either the date of the alleged incident of harassment, abuse of authority or the moon wit Te6(hh 15ich took pTJ-16.826.065725 TD.0002 T

house three times during working hours to tutor the Applicant's daughter. However, in August 2009, [Ms. SA] refused to go to the Applicant's home to tutor his children. She stated that in response, the Applicant was "seriously harsh" with her and stated to her "[y]ou have refused me very officially; don't take any expectations from me". In October 2009, she received a call from the Applicant telling her "[i]f you want your job, you should teach my daughter or find a new tutor for her". [Ms. SA] stated that shortly after this conversation, the Applicant informed her that he was not renewing her employment contract.

70. The Applicant admits that he brought his daughter to the office as an "intern", in violation of WFP's Directive Governing the Internship Programme, and that he asked [Ms. SA] to tutor his daughter during that time, [but] he denies that he asked [Ms. SA] to tutor her or his son, however.

71. He asserts that [Ms. SA's] claims must be false because she was absent from the office for a significant part of the year and "no such request could be made to a person who is absent from the venue".

86.

ED2007/003 (Policy on Harassment, Sexual Harassment and Abuse of Authority). The Applicant willfully committed acts that qualify as misconduct, namely sexual harassment. His actions were aggravated by the fact that as the Head of the Sub-Office, in Quetta, Pakistan, he was in a position to influence the employment conditions of the staff members towards whom he exhibited the prohibited conduct. Furthermore, the Applicant has not provided the Tribunal with any evidence that could support a finding that there were exonerating or mitigating circumstances that would justify some of his actions.

112. As the Tribunal stated in *Hallal*

Proportionality of the sanction

117. Staff rule 10.3(b) states that one of the rights in the disciplinary process is that “any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”. This legal provision is mandatory since the text contains the expression “shall”. The Tribunal must therefore ensure that a staff member’s right to a proportionate sanction was respected and that the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct.

118. The Tribunal considers that the rule reflects not only the staff member’s right to a proportionate sanction, but also the criteria used for individualization of the sanction.

119. The nature of the sanction is related to the findings of conduct which is in breach of the applicable rules.

120. The “gravity of misconduct” is related to the subjective element of misconduct—guilt and to the negative result/impact of the illegal act/omission. If there is no guilt, there cannot be a misconduct and consequently no disciplinary liability.

121. In order to appreciate the gravity of a staff member’s misconduct, all of the existing circumstances that surround the contested behaviour are of equal importance and have to be analyzed in conjunction with one another. Namely: the exonerating, aggravating and mitigating circumstances.

122. The Tribunal notes that there are some circumstances which can exonerate a staff member from disciplinary liability such as: self-defense, state of necessity, force majeure, disability or error of fact.

123. As stated by in *Yisma* UNDT/2011/061:

Both aggravating and mitigating circumstances factors are looked at

in assessing the appropriateness of a sanction. Mitigating circumstances may include long and satisfactory service with the Organisation; an unblemished disciplinary record; an employee's personal circumstances; sincere remorse; restitution of losses; voluntary disclosure of the misconduct committed; whether the disciplinary infraction was occasioned by coercion, including on the part of fellow staff members, especially one's superiors; and cooperation with the investigation. Aggravating factors may include repetition of the acts of misconduct; intent to derive financial or other personal benefit; misusing the name and logo of the Organisation and any of its entities; and the degree of financial loss and harm to the reputation of the Organisation. This list of mitigating and aggravating circumstances is not exhaustive and these factors, as well as other considerations, may or may not apply depending on the particular circumstances of the case.

124. The consequences of the misconduct, previous behaviour, as well as any previous disciplinary sanctions imposed can either constitute aggravating or mitigating circumstances.

125. The sanctions which can be applied to a staff member are listed under staff rule 10.2. They are listed from the lesser sanction to the most severe and must be applied gradually based on the particularities of each individual case:

Rule 10.2

Disciplinary measures

- (a) Disciplinary measures may take one or more of the following forms only:
 - (i) Written censure;
 - (ii) Loss of one or more steps in grade;
 - (iii) Deferment, for a specified period, of eligibility for salary increment;
 - (iv) Suspension without pay for a specified period;
 - (v) Fine;
 - (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
 - (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

126. In *Applicant* UNDT/2010/171, the Tribunal held that, given the range of permissible sanctions for serious misconduct, it is necessary to consider the totality of the circumstances, including any mitigating factors, to assess where to pitch the appropriate sanction.

127. The Tribunal finds that the Respondent correctly determined that:

77. ... the Applicant's conduct amounted to abuse of authority in

Aggrieved individuals are encouraged to notify the offender of their complaint or grievance and ask him or her to stop as, in some instances, the alleged offender may not be aware that his or her

were dealing with an offensive, hostile and intimidating working environment created by the Applicant and the lack of prior official complaints was due to the fact that the concerned staff members feared that they could be subject to potential repercussions and/or retaliation from the Applicant.

133. The Tribunal considers that the disciplinary sanction applied to the Applicant—separation from service with compensation in lieu of notice and without termination indemnity—is proportionate with the nature and gravity of the misconduct. He was correctly found guilty of sexual harassment, harassment and abuse of authority, and each of these allegations, according to the applicable law, constitutes serious misconduct.

134. In the present case, the Secretary-General legally exercised his discretion to separate the Applicant after taking into consideration all of the relevant mitigating and aggravating circumstances. Indeed, the fact that the Applicant was never sanctioned before was balanced against the serious nature and length of his

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70. Separation without notice is proportionate to a finding of serious misconduct on the grounds of sexual harassment according to UNICEF's practice, particularly with regard to staff rule 101.2(d), which is a prohibition on harassment.

140. The Tribunal concludes that the contested disciplinary decision was taken by the Secretary-General in accordance with the applicable regulations and rules that govern disciplinary matters. Furthermore, the Tribunal notes that the sanction applied in the present case was in line with sanctions applied in other matters of similar nature.

141. The Applicant's due process rights were respected throughout the preliminary investigation and the ensuing disciplinary process; he had access to all of the documentary evidence (including the witness testimonies) and he had the opportunity to make comments and to propose witnesses in his defense while also being assisted by counsel. The Applicant's presumption of innocence was respected and the disciplinary process, including the investigation, was conducted in an objective manner. The contested decision contained the legal reasons and factual explanations and was neither biased nor improperly motivated or flawed by procedural irregularity or errors of law. The reasons were sufficient to justify

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