
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/073
Judgment No.: UNDT/2020/014 Corr.1
Date: 30 January 2020
Original: English

10. On 1 December 2015, OAIS issued its investigation report, in which it concluded that the allegations against Applicant were established and that the
in violation of staff regulation 1.2(b), staff rule 1.2(f) and
(g).
retaliation found in the PaR policy.

11. UNFPA requested the Applicant to comment on the investigation report in June 2016 and Applicant duly replied with her comments on 10 July 2016.

12. On 3 August 2016, UNFPA notified the Applicant that she will be charged with misconduct and set out the charges of misconduct made against her.

13. The Applicant responded to the allegations of misconduct in the charge letter on 14 September 2016.

14. On 13 April 2017, the Executive Director of UNFPA informed the Applicant that the investigation carried out by OAIS did not substantiate the allegation that the Applicant may have purposely given to Ms. OC an unjustified performance rating in her 2014 Performance Appraisal and Development report, and therefore the allegation was dismissed. The Executive Director further informed the Applicant that the OAIS investigation had established that the Applicant had committed abuse in the workplace and retaliated against Ms. OC for making complaints about the
fine in the amount of two months net base salary was
imposed on Applicant as a disciplinary measure, in accordance with staff regulation 10.1(a) and rule 10.2(a).

15. On 20 July 2017, Applicant filed an application with the UNDT contesting the decision to impose a disciplinary measure based on retaliation.

16. The case was initially assigned to Judge Ebrahim-Carstens. Following the end of Judge Ebrahim-Carsten tenure with the Dispute Tribunal, this case was re-assigned to the undersigned Judge on 1 July 2019.

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27. Staff rule 1.2(f) provides 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.

28. Staff rule 1.2(g) provides that staff members shall not disrupt or other-n1e in any form at the w

the audio recordings which Ms. OC made using her cell phone without the at the two 16 December 2014 meetings.

32. The Tribunal notes that OAI had transcripts made of both recordings and played both recordings for the Applicant during her interview and allowed the Applicant to review the transcripts during her interview and sent her copies of the transcripts. The Applicant verified that it was her voice on each of the audio files and confirmed that she twice met with Ms. OC on 16 December 2014. The record confirms that the Applicant began the discussions in the first meeting at approximately 1:00 p.m. by telling Ms. OC that mediation would negatively affect Ms. career because Ms. OC would then be seen as somebody who did not get along with others. The Applicant then distinguished between her own permanent appointment and Ms. O s fixed-term appointment, [The mediation] will hurt your candidacy too if you are looking for any national positions and things like that. It will hurt you more. Me (...) I have permanent contract. I am in the system for many years. I know people. So, you know, I wanted, before we make an agreement, I wanted to make sure that you that it goes on record . The Applicant cautioned, But my thing is th -term contract. I have permanent. That also is an issue . Ms.

huh? [...] I do not know how directly I should tell you. There was a one-time contractual review happened. In that process the definition of fixed-term contract changed immensely. Before fixed-term contract there is an expectation of renewal. Today fixed-t

Ms. OC and dissuade her from seeking mediation and were detrimental to Ms. OC. However, the Tribunal finds nothing in the recordings to suggest, let alone prove by clear and convincing evidence, a link. The Tribunal is therefore unable to find that the protected activity was the cause of the detrimental action.

Due process

40. The Applicant contends that the disciplinary measure imposed upon her was unlawful by pointing to a number of alleged flaws

recordings. The Tribunal finds no indication that the recordings are not authentic or have been tampered with. As the recordings present an accurate representation of the conversations between Applicant and Ms. OC, they are *prima facie* admissible.

46. Second, the Tribunal finds that the recordings are clearly relevant and probative of the issues in this case.

with Ms. OC on 16 December 2014 and her efforts to persuade Ms. OC to forego perusing mediation of their interpersonal dispute.

47. Third, the Tribunal finds no prohibition in the applicable legal framework against recording conversations without the consent of one or more of the parties to that conversation.

48. Fourth, although the Tribunal considers that secret recordings in the workplace undermine the important relationship of trust and confidence and are to be strongly discouraged, in this case the Tribunal finds that the recording was not an unreasonable intrusion into the privacy of the participants to the conversation for the following reasons. The conversations between the Applicant and Ms. OC were held during two business meetings held during normal working hours at the offices of UNFPA. In these circumstances, the Tribunal accepts that in its consideration of whether there has been intrusion into the privacy of Applicant, the Tribunal may balance the rights with the rights of Ms. OC as a subordinate to be free from retaliation and abuse in the workplace by senior managers. There was a power imbalance between the parties with the Applicant being the supervisor of Ms. OC as well as the most senior staff member in the country office. The Tribunal notes that Ms. OC explained to OASIS that she recorded the meetings because I did not feel comfortable. I was scared basically. And it was one-to-one meeting. And I expected anything could have been discussed. And I would not have any witnesses if she says otherwise later on .

49. Fifth, the Tribunal considers that it would not be in the interest of justice to exclude the audio recordings as they provide

Alleged flaws that occurred during the investigation

54.

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Conclusion

64. In light of the foregoing, the application is dismissed.

(Signed)

Judge Joelle Adda

Dated this 30th day of January 2020

Entered in the Register on this 30th day of January 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York