
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/096

Judgment No.: UNDT/2020/094

Date: 22 June 2020

Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Katya Melliush, OSLA

Counsel for Respondent:

Nusrat Chagtai, ALD/OHR, UN Secretariat

Nicole Wynn, ALD/OHR, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant, a former staff member of the International Residual Mechanism

8. On 1 January 2017, a new Registrar was appointed to the IRMCT.
9. On 6 February 2017, the new Registrar notified the Applicant of his decision stating that he did not find, based on the report of the fact-finding panel, that there was sufficient evidence to indicate sexual harassment or other prohibited conduct under ST/SGB/2008/5. The Registrar further informed the Applicant that he would not refer the case for disciplinary action in accordance with sec. 5.18(b) of ST/SGB/2008/5 and that managerial action would be sufficient to address the matter. It was later revealed that the managerial action consisted of a five hour training course for the Medical Officer on pre-employment medical examinations.
10. On 7 April 2017, the Applicant requested management evaluation of the Registrar's decision.
11. On 17 October 2017, the Under-Secretary-General for Management accepted the recommendation of the Management Evaluation Unit ("MEU") and upheld the Registrar's decision.
12. On 17 July 2017, the Applicant filed the present application with the Nairobi Registry.
13. On 5 December 2019, at the Applicant's request, the case was transferred to the New York Registry and assigned to the undersigned Judge on 1 April 2020.
14. On 7, 8 and 18 May 2020, the Tribunal conducted a hearing. The following witnesses testified: the Applicant; the Registrar of the IRMCT; the Chief, HRS; a Legal Officer who was close to the Applicant at the time of the events; the Alternate Focal Point for Women/Gender Officer of the IRMCT; the Director of the then- Division of Medical Services ("MSD") and an Officer of UN Women as an expert witness on the application of ST/SGB/2008/5.

about her interviews with the fact-finding panel, she did not raise the issue of the inappropriate questions until 17 August 2017 when she submitted her request for management evaluation.

20. The contemporaneous record of the Applicant's interviews of 27 and 28 January 2016, signed by the Applicant, does not reflect any such question or remark. The Applicant explained during her testimony that she chose not to raise any concerns at the time because she wanted to remain respectful, particularly given that the members of the fact-finding panel were senior staff members. Moreover, she was already concerned that her filing the complaint may have a negative impact on her career in the IRMCT and did not want to increase such a risk by complaining about the members of the fact-finding panel.

21. The Tribunal finds the Applicant's testimony on this issue was credible, while the Chief, HRS was evasive in her response, claiming that she did not remember having heard that statement because the interview took place more than four years ago. The Tribunal finds no evidence, however, to support the Applicant's concerns that her career would be negatively impacted by her filing of this complaint. The Respondent disputes this statement and recalls that the Applicant had routinely contacted senior officials, including both panel members, the Registrar, the Assistant Secretary-General for Management and the Under-Secretary-General for the Department of Management concerning her case.

22. The Applicant further claims that the Administration did not properly respect the confidentiality of the process. She states that the Chief, SSS, while standing in the hallway of the IRMCT premises, told her that allegations of sexual misconduct were commonplace in the United Nations. The Applicant feared that if that statement had been overheard by passers-by, it would have revealed that she had made a complaint of sexual misconduct. The Respondent counters that there is no evidence that the Administration breached the confidentiality of the process and that it was the Applicant

competency as a doctor also extended to his behavior regarding prohibited conduct such as sexual harassment”. The Director testified that she did not believe that the panel was capable of making a finding concerning the Medical Officer’s professional competency. Not only were the members of the panel not subject-matter experts, but the overview of the investigation was too narrow. The Director explained that to make a reasonable determination of a medical practitioner’s competency, it was usually required to review at least nine cases handled by the medical practitioner.

26. The Director further stated that if a medical practitioner in the United Nations was found to have committed sexual misconduct which is an extremely serious professional misconduct, the Medical Division would have been obligated to report the practitioner to the regulator in his or her home country. The Director testified that she was not satisfied that the fact-finding panel had given the Medical Officer the appropriate professional consideration in reaching their conclusion.

27. The Tribunal notes further that in her email to the Registrar on 31 January 2017, the Director stated that, having reviewed the supplemental report of 22 December 2016, she was “comfortable with no further action” as regards to the possible referral of the Medical Officer to his national regulator. She further recommended that the Medical Officer be professionally counselled in the matter of record-keeping and further recommended a course in breast pathology. In terms of organizational learning, the Director requested a review of the Medical Officer’s personal history form as it “seems possible that [the Organization] did not recruit a practitioner with the requisite skills and experience for this type of role”. She further offered to “draft a letter to [the Medical Officer] (or advise on the content of same) regarding the professional standards issues”. During her testimony in court, the Director added that she should have been consulted to determine an appropriate remedial plan for the Medical Officer and to determine whether additional managerial steps were required to ensure the institutional accountability of the Organization. She stated that her offers to the Registrar to assist in this matter went unheeded.

28. The Tribunal recalls that the managerial action undertaken in this case was a five-hour training on pre-employment medical examinations. The Registrar testified that he was satisfied that the matter of the Medical Officer's suitability for his job was properly handled with only a short training regiment because another candidate had been selected for the fixed-term position of medical officer at the IRMCT and therefore, the Medical Officer was to separate from the Organization soon thereafter. However, the Registrar stated that the selected candidate eventually withdrew his acceptance of the position and the vacancy had to be re-advertised. Eventually, this Medical Officer was successful in his application and was selected for the fixed-term position.

29. In light of this evidence, the Tribunal finds that by not seeking the Director's feedback in a timely manner, the Registrar failed to take into consideration relevant matters before making the contested decision. From the Director's

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circumstances, taking a common sense approach, the testimony of the applicant of his mental anguish supported by the facts of what actually happened might be sufficient.

53. In the present case, with respect to the Applicant's claim regarding the impact of the contested decision on her professional career, the Tribunal recalls that she accepted her selection to a P-3 level post in a permanent office of the Secretariat in New York. Compared to her P-2 level position with the IRMCT, an institution which is meant to shut down once its operations are completed, her current post is a promotion to a more stable position.

54. The Tribunal is sympathetic to the Applicant's view that her true calling was to work in support of victims of the Rwandan genocide and that the contested decision caused her to leave the IRMCT to what she considered a less interesting job. It clearly transpired from her testimony and her submissions that she finds her new position somewhat beneath her capabilities and motivation. The Tribunal finds that these statements not only do not prove an impact to her career, but also are inconsiderate to the staff members of this Organization that the Applicant is meant to support and advise in her current role, as well as towards the many colleagues whose posts were downsized in both branches of the International Criminal Tribunals who could not transition to the IRMCT.

55. This notwithstanding, the Tribunal is persuaded that the contested decision

Applicant's distress while testifying about this matter before the Tribunal, over four years after the events, was clearly visible. Additionally, the Tribunal heard corroborating evidence from a Legal Officer who worked at the IRMCT at the time of the events and shared accommodation with the Applicant for a period of time. The Legal Officer, who appeared credible and consistent in his testimony, stated that for months after the incident, the Applicant would constantly bring it up in conversation

- d. If payment of the above amount is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable;
- e. All other claims are dismissed.