

UNITED NATIONS DISPUTE TRIBUNAL



6. At the 8 May 2020 CMD, the Presiding Judge indicated the preliminary view that this matter will require either an oral hearing of expert medical evidence or that supplemental medical evidence could be submitted in writing. However, there was no request by the Applicant to submit further evidence. The Respondent expressed the view that the matter should be determined on the papers including the medical reports based on which the decision was made. The Applicant preferred that there be a trial with oral testimony to support his case that there was no conscious misconduct and there should be withdrawal of the charges, annulment of the sanction and

11. In the context of the mental health

2015 in accordance with ST/AI/2005/3 (Sick leave) based on medical report dated 4 December 2014. In this medical report, addressed To Whom It May Concern , Dr. El Khoury stated that the Applicant suffers from MDD. The Report made no mention of substance abuse, nor of the treatment with Revia referred to by the Applicant.

15. Subsequently, on 23 March 2015, Dr. El Khoury advised that the Applicant was in remission, fit to return to work and no longer required intensive treatment at that stage. He cautioned

19. On Friday, 9 October 2015, between 00:44 and 23:15, the Applicant sent approximately 60

WhatsApp. Between 21:42 on 10 October 2015 and 19:07 on 11 October 2015, the Applicant sent approximately 50 messages by WhatsApp, from his new number, including at least six obscene photographs of male genitalia. Examples include the  
gry, it is not a big deal if I

24. On Sunday, 11 October 2015, the Complainant submitted a complaint against the Applicant to the Special Investigations Unit ( SIU ). She left Mali on the same day. The Respondent is that the Applicant attempted to contact her again on Thursday, 26 November 2015, via Facebook Messenger; and at the end of November 2015, using Skype.

25. The Applicant admits to, and apologises for, all the unwanted, offensive communications sent and calls made over the period 9-11 October 2015. The Applicant disputes the suggestion that he attempted further contact in November 2015.

26. The Applicant remained at the mission until the end of 2015. From January 2016, the Applicant was absent on rest and recuperation leave, followed by paternity leave, then certified sick leave ( CSL ). This further sick leave was supported by an MS 24 Form and a letter from Dr. El Khoury, both dated 19 January 2016. At this stage, the Doctor s 0 1 260.69 328.85 Tm0 g0 G[(C)-2(S)-13(L)] TJET00.000003/0 G20000A\*BT87.45





32. On 13 April 2018, the Office of Staff Legal Assistance ( OSLA ), on behalf of the Applicant, provided comments to the Allegations Memorandum, with supporting documentation. Included among the documentation were the initial 23 March 2015 medical report that had cleared the Applicant -incident return to work, the 8 August 2016 report clearing his return to work months after the incident, and a medical report dated 5 April 2018. It was in this final report that the Doctor specifically addressed the Applicant pending sexual harassment investigation.

33. In the 5 April 2018, medical report, Dr. El Khoury said that in 2014 the Applicant had turned to substance use and his employers who became aware of the problem allowed him to return home for treatment. As it relates to the sexual harassment allegation, the Doctor said that chances of him being intoxicated under the influence of a controlled substance at that time were high up to the end of December 2015. He stated,

It is well known that cocaine impairs judgement, encourages impulsive behaviour and inflates confidence disproportionately. An effect experienced by [the Applicant] and that played a key part in his addiction. While this clinical information in no way excuses any inappropriate behaviour on his part it is nonetheless relevant especially given that as far as I am aware [the Applicant] does not have a history of displaying aggressive or grossly inappropriate behaviour outside this context.

34. The Doctor certified that the Applicant was, as at April 2018, in full remission.

35. On 5 July 2018, the Applicant provided OHRM with additional medical records pertaining to the period of December 2014 to August 2016.

36. By letter dated 16 August 2018, the Applicant was informed that, based on a review of the enti1 0 0 1 1u4s35 Tm3-69(12 0 612 792 reW\*nB)5i Tf1 0 G[re11/F3 E609111pF7nnB (6n T

Case No. UNDT/NBI/2018/112

Judgment No. UNDT/2020/111



see the counsellor, Ms. Ivetic, who recommended his visit to Doctor El Khoury. According to W2, the Applicant was treated for substance abuse from that time but in order to avoid possible incarceration, as this was an illegal activity in Lebanon, the use of drugs was not included in his medical report.

She said the Applicant was doing well in Lebanon but on his return to Mali he relapsed. She said that the Applicant substance abuse and deterioration was a matter of concern to all his friends and supervisors in Bamako. She said under cross



50. Counsel for the Respondent submitted that investigation revealed that on a review of the Applicant's actions during the incident there was no indication that his actions were based on a lack of control due to substance abuse. The Respondent had, during the disciplinary process, fully considered the possibility that the Applicant may have had no control or been unconscious during the incident. That there was a lack of control/consciousness was rejected based on the number of times he attempted communication with the Complainant, the fact that different methods were used and that it continued for several days. Further, the actions of purchasing a new sim card to get around his number being blocked indicated that his actions were deliberate.

51. The Respondent further contends that the Applicant cannot be absolved from blame because of his own substance abuse, for which he did not seek support from the Organization or outside sources.

52. In the Respondent's submission filed on 22 May 2020, and in closing submissions, the Respondent addressed the contention that the Applicant's conduct ought to have been treated as an illness caused by substance abuse for which the Organization should have offered the Applicant due care instead of termination. Counsel underscored that although there is provision in the regulatory framework at ST/AI/372 (Employee assistance in cases of a



members.<sup>3</sup> As such the applicability of art. IV.16 of the Mental Health IC is subject to the provisions of ST/AI/1999/16 (Termination of appointment for reasons of health).

Sections 2 and 3 provide as follows:

incapacity must be established by conclusive medical evidence that results in the award of a disability benefit under the UNJSPF Regulations.

3.1 When a staff member has used all his or her entitlement to sick leave with full pay, the executive or local personnel office shall bring the situation to the attention of the Medical Director or designated medical officer in order to determine whether the staff member should be considered for a disability benefit under article 33 (a) of the UNJSPF Regulations, while the staff member is on sick leave with half pay.

3.2 If the medical conclusion is that the staff member's injury constitutes an impairment to health which is likely to be permanent or of long duration, the Medical Director or designated medical officer shall so advise the relevant human resources officer at Headquarters or the local personnel office for notification to the staff member.

3.3 Where the conclusion by the Medical Director or designated medical officer is either not contested by the staff member or is confirmed by the independent medical practitioner or medical board selected to review the matter, the relevant human resources officer at Headquarters or the local personnel office shall submit as soon as possible a request to the United Nations Staff Pension Committee.







mental health issue. He may talk to the staff member or his doctor or request more detailed reports. On 1 April 2015,

that this was a recommendation that the Applicant not be given sick leave beyond 8 March 2015. The Sick Leave Team, she said, had a discretion whether to accept the advice of Mr. Brody and could diverge from the recommendation.

As to the point made in the 23 March 2015 medical report from the Applicant Doctor, Dr. Ascitti commented on the indication therein that the Applicant would require therapeutic support and monitoring of his mental state every three months. She said that the Organization has no role to provide therapeutic care. It is between the staff member and his doctor.

## Considerations

63. review of the challenged decision in this case considered not only the remedies of withdrawal of charges, annulment of sanction and return to work sought by the Applicant, but also whether the Respondent could have considered an alternate approach to treating the Applicant based on his illness. It is my finding that such an approach could have been considered.

64. There is no doubt that, as submitted by Counsel for the Respondent, the acts of sexual harassment committed by the Applicant were of such a persistent and offensive -tolerance policy he could not remain on the job. However, the Organ for persons suffering with mental illness is also clear. ST/IC/1999/111 provides in sections 1 and 2 as follows:

Mental health issues are increasingly recognized throughout the world, including in large organizations that share and reflect the characteristics of society at large. This is also the case for the United Nations where staff, whether at Headquarters or in the field, often serve in duty stations far removed from their countries of origin and familiar cultural or family settings. Adjustment to living in a different host country and working with multiple cultures and languages is not always easy. Some assignments and missions involve extensive travel, and at times presence in crisis situations and danger spots.

There are many types of mental health conditions or diseases, which vary greatly from individual to individual in degree of severity and in the manner in which they manifest themselves. When one or more of these conditions occur, health professionals and professionals participating in employee assistance programmes agree on the benefits of early detection, acknowledgment of the situation and action so that individuals may recover their ability to engage in normal activities as soon as and whenever possible.

65. I severe mental illness. The illness ought to have been addressed in a more timely and considerate manner by the Respondent by denying his clearance to return to work in March 2015 and in August 2016. He may then have retired due to ill-health with disability benefits and a record clean of misconduct. This is a matter of concern; the

care, support and treatment that should be afforded to persons with mental illness  
must be addressed b

Dr. Ascitti, that the Organiz

Case No. UNDT/NBI/2018/112

Judgment No. UNDT/2020/111



*(Signed)*

Judge Eleanor Donaldson-Honeywell

Dated this 8<sup>th</sup> day of July 2020

Entered in the Register on this 8<sup>th</sup> day of July 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi