Judge Joelle Adda

New York

Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

Omar Yousef Shehabi, OSLA

Lucienne Pierre, ALD/OHR, UN Secretariat
Isavella Maria Vasilogeorgi, ALD/OHR, UN Secretariat

1. The Applicant, a former staff member with the United Nations Secretariat, filed the application in which he contests "the decision to impose the disciplinary measure of separation from service with compensation in lieu of notice, and with termination indemnity in accordance with Staff Rule 10.2(a)(viii)".

2. In response, the Respondent contends that application is without merit.

3. For the reasons set out below, the application is rejected.

4. The contested decision, taken by the Under-Secretary-General for Management Strategy, Policy and Compliance ("the USG"), was conveyed to the Applicant by an inter-office memorandum dated 21 March 2019 from the Assistant Secretary-General for Human Resources ("the ASG"). In this memorandum, it was stated that "[b]ased on a review of the entirety of the record, including your comments, [the USG] … concluded that … the allegations against [the Applicant]halshedhalenht

c. "grabbed [BB's] face, held her closely, leaned forward and attempted to kiss her";

d. "tried to move physically close to [AA] and [BB] while dancing, despite their attempts to keep [him] at a distance";

e. "attempted to grab [CC's] face; when she blocked her face with her hands, [the Applicant] grabbed her hands and tried to pull them apart; when she resisted, [he] fell on her forcefully"; and

f. "took and pulled [CC's] hands to try to get her to dance, despite her resistance".

Standard of review in disciplinary cases

6. The Appeals Tribunal has consistently held the "[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration". In this context, [the Dispute Tribunal] is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". See, for instance, para. 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT-1024.

7. The Appeals Tribunal has

"merit-based review, but a judicial review", explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

8. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal has stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

9. Specifically regarding disciplinary matters, the Appeals Tribunal has held that the Administration enjoys a "broad discretion … with which [the Appeals Tribunal will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi*, at para. 40, "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

Whether the facts on which the sanction was based have been established?

Basic jurisprudence on the evidentiary burden and how to assess evidence in sexual misconduct cases

10. In disciplinary cases "when termination is a possible outcome", the Appeals Tribunal has held that the evidentiary standard is that the Administration must establish the alleged misconduct by "clear and convincing evidence", which "means that the

11. Regarding the meaning of clear and convincing evidence, the Appeals Tribunal has

15. The Respondent, in essence, submits that the facts stated in the disciplinary decision have been "clearly established".

16. The Tribunal notes that the Applicant does not contest the facts set out in the contested disciplinary decision regarding AA, which are therefore settled. Similarly, the Respondent does not deny the Applicant's submissions regarding AA subsequently reconciling with the Applicant. All these facts are therefore appropriately established and do not require any further review.

The facts regarding the incidents involving BB and the significance of her not appearing as a witness before the Tribunal

17. The Applicant submits that the Tribunal had directed BB to testify at the hearing and that the Respondent "was to lead the hearing" of her "in direct evidence, in recognition of the Administration's burden to prove its case by clear and convincing evidence". As the Respondent's witness, he "was responsible for ensuring her participation", but she did not appear before the Tribunal, and the Applicant was therefore "denied the opportunity to 'challenge the veracity' and reliability of [BB]" with regard to her interview with the Office of Internal Oversight Services ("OIOS").

18. The Applicant contends that "[h]/TTg63[pihe'T (a(nge)4 ([(T)-9 (he)4219(e A)-2 (p)-4 (p)-0 nt2.

manifestly unfounded", and "[n]o one—not even [BB] herself—alleges that the Applicant kissed her, or even tried to kiss her".

19. The Respondent, in essence, contends that "no adverse inference should be drawn from the Respondent's inability to produce [BB] for the hearing", who "never replied to Respondent's invitations to testify before the Tribunal" and is not a United Nations staff member.

20. The Tribunal notes that in *Mbaigolmem* (para. 29), the Appeals Tribunal held that the Dispute Tribunal should "*ordinarily* hear the evidence of … material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and convincing evidence has been discharged on the evidence adduced (emphasis added).

21. BB not appearing before the Tribunal was, however, not an ordinary situation. Despite the Tribunal's explicit instructions in Order No. 153 (NY/2020) dated 8 October 2020 for the Respondent to lead BB as a witness in direct evidence, she did not reply to the Respondent's messages. BB, however, is not a United Nations staff member (this fact is not contested by the Applicant) and has no obligation to participate in the hearing, and neither the Tribunal nor the Respondent have any means to compel her to do so.

22. In *Mbaigolmem* (para. 29), the Appeals Tribunal further held that while it will "often … be safer" for the Dispute Tribunal "to determine the facts fully itself", occasions may occur "where a review of an internal investigation may suffice". In line herewith, in *Sall* 2018-UNAT-889 (para. 39), the Appeals Tribunal held that "[t]he requirement of a *de novo* review of the facts does not mean that [the Dispute Tribunal] will have to re-hear all the witnesses of the investigation … [i]f there is sufficient and substantial evidence in the written record, [the Dispute Tribunal] may also base its findings on this record". In *Nadasan*, the Appeals Tribunal also stated that the Dispute Tribunal "is not allowed to investigate facts on which the disciplinary sanction has not been based and may not substitute its own judgment for that of the Secretary-General",

and instead "[i]t will only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based".

23. The Tribunal also notes that cross-examination is not an absolute right without which a witness' statement to an investigatory entity becomes invalid (see also the Appeals Tribunal in

The parties' submissions regarding the incidents involving BB

27. The Applicant submits that "[e]ven if [BB's] witness statement could be credited as testimony, her account defies credulity and is belied by the testimony of other witnesses". BB told "investigators that the Applicant grabbed her face so abruptly and so publicly (but without attempting to kiss her) that she likened it to an out-of-body experience". A short time later, she claims, "she accepted a dance with the Applicant as a way of 'defusing' the situation; and that the Applicant insisted upon dancing in uncomfortably close proximity, which she again defused with humour". No one "testified to seeing anything unusual about their dance" or "witnessed the events as described" by BB. If BB was "traumatised by these experiences, however, she presumably would have avoided the Applicant thereafter", but according to another person, BB "thereafter was engaged in conversation with the Applicant" and was "having good fun" and "getting a good kick out of the whole thing". That conversation "would be far beyond what any reasonable person would consider necessary to defuse a tense situation", and BB also "acknowledged having increased work-related interaction with the Applicant after the party, entirely without incident". Since BB's "allegations cannot be credited, neither can they serve as evidence a 'pattern of behaviour' by the Applicant towards female colleagues".

28. The Respondent, in essence, submits that the factual findings involving BB are "clearly established" by the transcript of the OIOS interviews.

29. The Tribunal notes that in BB's testimony to OIOS, she explained that she was at the farewell party on 8 November 2017 because she worked on a UN project as a consultant frohcthch2 (pr)

> … […] I was standing there catching up with them, just chatting about day to day work stuff and what not, when [the Applicant] came and grabbed my face in front of everyone and he basically put his two hands right on my cheeks and he was holding me as if he was going to kiss me in front of everyone and my instinct at that moment was to freeze, I don't know it was just… It almost, well, could have been like a bit of an out of body experience when you are standing there and looking down and you're seeing that this person is just grabbing your face ready to kiss you in public, I wasn't the only one who had this reaction, my two colleagues also stood there in shock because it just like came out the field, he was not even in my periphery at that moment, I was having this off-sided conversation, I think the shock registered on my face, just I think... I don't know, I think he noticed just how shocked I was and how uncomfortable and how I froze… well, he let go and walked away and then I just kind of tried to play it off, it's different when you are on the consultant side and not the [United Nations] because at the end of the day these are my clients and while we do have to abide by UN protocols, so I also have to abide by corporate policies as well so… and we always kind of talk to finesse or defuse a situation, so I just kind of pushed it to a side, we were in the middle of this very big get together and I just didn't want to call any of attention to myself or cause any type of reputable damage to the firm, so I just kind of brushed it off and he was just very pressy the rest of the evening and it wasn't just with me, there were other colleagues, both UN and non-UN staff members whom he was just beyond the pillar of what is acceptable behavior, yeah, so...

30. When BB was then asked, "So when [the Applicant] grabbed you he was grabbing you on the face?", she stated:

> … He hold [*sic*] my face with his two hands open, I know that this is audio recording but he had his two hands around my cheeks and he was just holding my face and extremely close … and I know that sometimes there is cultural differences of what's appropriate space, but it was obscenely close and I just thought he was going to kiss me in public.

31. EE, who according to BB was one of the two colleagues that had witnessed the incident, was also interviewed by OIOS under oath. The Tribunal notes that the Applicant did not request him to appear before the Tribunal for direct examination or cross-examination or has otherwise tried to challenge EE's credibility as a witness. The Tribunal further observes that at the time of the incident and interview, he was employed by the same private sector firm as EE and that he also worked on an

35. The day after the farewell party, BB and CC reported the Applicant's conduct at the party to two different United Nations staff members, who gave the following accounts of these reports:

a. One witness described their report as follows, "'Hey, we [BB and CC] were at the party last night. [The Applicant] became very aggressive either on the dance floor with either grabbing or touching and I believe they both had indicated that he had come and to try to kiss them but they had pushed him away and that ... it was a repeated action, it was ... it seemed to me like ... it wasn't like okay, my bad, it was more of he kept on trying and trying and then I think either ... I'm not even sure if anyone intervened, I believe [name redacted] had told me that she had talked to [name redacted] about 'Hey, this guy is getting a little bit out of line'".

b. The other staff member explained that when BB and CC reported the alleged incidents to her, BB "was visibly shaken, visibly and they told me that there had been some harassment, I can't remember the actual words they used but certainly they felt that they had been assaulted in some way". The witness further stated that "[o]ne of them [BB or CC] described [the Applicant] trying to kiss them, I think perhaps both of them said that".

36. The Applicant did not himself wish to testify before the Tribunal. In his OIOS interview, he stated that he had "two-three beers", "some shot of whisky", and had felt "overexcited" at the farewell party as it was a special occasion. The Applicant, however, denied that he had touched or attempted to kiss BB. The Applicant, however, admitted that he had kissed AA and another woman and described that it was not unusual for him to do so when he was dancing.

37. Based on the above, the Tribunal concludes that the Respondent has substantiated with clear and convincing evidence that the factual finding of the contested decision that the Applicant had "grabbed [BB's] face, held her closely, leaned forward and attempted to kiss her" was appropriate. In reaching this conclusion, the Tribunal has, in particular, taken into consideration:

… There was a whole cluster of peop

occurred "as she stood just in front of the desk of [another person], which was the centre of the party and bordered the dance floor", and she described the Applicant's "advances forcing her to bend back over [the other person's] workspace and to use all her strength to parry the Applicant to the side". Yet the investigation "did not resolve, nor could it be explained even after the hearing, why none of the witness OIOS interviewed saw this physical, almost violent, encounter (which, had it occurred as [CC] described, should have caused both [her] and the Applicant to fall to the floor)". CC, moreover, "did not notify anyone of this incident, which seems incongruent with her testimony that she feared for her safety afterwards".

43. The Applicant contends that the Respondent had found that "the Applicant's alleged misconduct at the crowded party could be established, by clear and convincing evidence, even in the absence of witnesses". The Administration reasoned that "for the witnesses' lack of knowledge of the conduct to be determinative, the witnesses would have had to have a much keener interest in, and more continuous view of the relevant parties", which did not "survive the hearing testimony". It is "incontrovertible, given the layout of the party as confirmed at the hearing, that virtually anyone on the dance floor, and anyone mingling in the cubicles area, would have a 'continuous view' of [the other person's] desk". If the Applicant's "gratuitous physical contact" with CC and her resistance thereto occurred as CC purported [illegible]

other participants in the dance were doing", and the Respondent "does not contest that the Applicant made no further efforts of this sort once [CC] made clear that they made her feel uncomfortable".

48. The Respondent contends, in essence, that the findings involving CC in the contested decision are proved by clear and convincing evidence and that the testimony provided to the Tribunal is consistent with the one she gave to OIOS.

49. The Tribunal notes that the situation regarding the Applicant allegedly attempting to kiss CC was indeed not witnessed by any other person. CC's account of events is, however, appropriately reflected in the transcript from her OIOS testimony, and at the hearing before the Tribunal, where she credibly explained the situation both in direct evidence and cross-examination. In addition, the Tribunal notes that CC would have no reason to try to implicate the Applicant; on the contrary, this would only appear to complicate her work situation as she was hired by the United Nations as a private consultant in a more precarious position than a United Nations staff member because she had no standing to challenge any employment-related decision(s) through the internal justice system. Also, CC's testimonies describe a behavioral pattern of the Applicant at the farewell party that is in line with what AA and BB had experienced and which has been corroborated by other witnesses.

50. The Tribunal notes that the actual incident was not a prolonged interaction between the Applicant and CC, but simply occurred in the blink of a moment. Also, it follows from all the witness testimonies and the pictures from the farewell party that the atmosphere was indeed very festive with animated people dancing to loud music in a very crowded area. This incident could therefore easily have escaped everyone else's attention

52.

Did the Applicant's behavior amount to misconduct?

55. The Tribunal notes that the applicable Secretary-General's bulletin at the time of the farewell party is ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) in which "sexual harassment" is defined as follows (see sec. 1.3):

> … Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

56. The Tribunal finds that as a point of departure, kissing or attempting to kiss someone in the workplac.9 (x.)107k be r2 (on)-2 (t)-2 (e)4 (d D1f0 Tc)-7 (r2 (on).0)Tj/TT0002 Tc -

58. Regarding AA's case, it does not matter whether it was normal for the Applicant to kiss his dancing partner after a dance—what is important is how AA perceived the kiss and she clearly did not welcome it. Concerning BB and CC, it took them entirely by surprise that the Applicant tried to force a kiss with them and none of them had given any gesture whatsoever that a kiss from the Applicant would be welcomed. Also, both were private consultants hired by United Nations and therefore in a delicate position vis-à-vis a United Nations manager at the P-5 level such as the Applicant.

59. Concerning the Applicant's dancing with AA and BB and his attempts to pull CC into a communal dance, while these incidents are less intrusive than the kiss and/or attempted kisses, they only add to the overall gravity of Applicant's offenses in the circumstances.

60. Accordingly, the Tribunal finds that it appropriately fell within the USG's discretion to decide that the established facts amounted to misconduct.

Was the sanction proportionate?

61. The principle of proportionality in a disciplinary matter is set forth in staff rule 10.3(b), which provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

62. Regarding the Administration's discretion in sanctioning misconduct, the Appeals Tribunal has held that "the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case and to the actions and behaviour of the staff member involved", and the Tribunal should not interfere with administrative discretion unless "the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" (*Portillo Moya* 2015-UNAT-523, paras. 19-21; see also *Sall* 2018-UNAT-889, *Nyawa* 2020-UNAT-1024).

63. The Appeals Tribunal has further stated, "But due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair". The Appeals Tribunal has further explained that this means that the Dispute Tribunal should "objectively assess the basis, purpose and effects of any relevant administrative decision" (*Samandarov* 2018-UNAT-859, para. 24).

64. In light of these established facts and the finding of misconduct, the six incidents outlined in the contested disciplinary decision essentially can be summarized as the Applicant committed sexual harassment when as a P-5 level manager, he either kissed or intended to kiss three women, of which, at least, two were in a subservient work-related power position, and otherwise acted inappropriately towards all of them at a workplace party.

65. The past practice of the Organization in cases involving sexual harassment shows that disciplinary measures have been imposed at the strictest end of the spectrum, namely, separation from service or dismissal in accordance with staff rule 10.2(a), which has been affirmed by the Appeals Tribunal in various judgments, such as, for instance, *Applicant* 2013-UNAT-280, *Applicant* 2013-UNAT-302, *Khan* 2014-UNAT-486 and *Nadasan* 2019-UNAT-918. The Appeals Tribunal stated in *Mbaigolmem* 2018-UNAT-819 (see para. 33) that:

> … Sexual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment.

66. Accordingly, the Tribunal finds that the sanction of termination with compensation in lieu of notice with termination indemnity fell within the scope of discretion of the USG.

70. The application is rejected.

(Signed)
Judge Joelle Adda
Dated this 3rd day of February 2021

Entered in the Register on this 3rd day of February 2021

(Signed)
Nerea Suero Fontecha, Registrar, New York