

Introduction

1. The Applicant, a former staff member in the Field Office of the United Nations Children's Fund ("UNICEF") appealed the decision to impose on him the disciplinary measure of dismissal.
2. The Respondent replies that the application is without merit and should be dismissed.
3. For the reasons stated below, the application is rejected.

Relevant facts and procedural history

4. UNICEF's Office of Internal Audit and Investigations ("OIAI") initiated an investigation on allegations of misconduct concerning the Applicant.
5. On 16 June 2020, OIAI completed its investigation and referred the matter to the Deputy Executive Director, Management for appropriate action.
6. On 21 July 2020, the Deputy Executive Director, Management, charged the Applicant with misconduct concerning the allegation that on 24 August 2019 the Applicant attempted to kiss V01 against her will and then grabbed her, lifted her off the ground and kissed her ("charge letter"). The Applicant was notified of the opening of a disciplinary process against him and was given a deadline to submit his response to the allegations.
7. By letter dated 18 September 2020, the Deputy Executive Director, Management, notified the Applicant that, at the completion of the disciplinary process, it was determined that the charges against him had been established by clear and convincing evidence and that he would be imposed the disciplinary measure of dismissal in accordance with staff rule 10.2(a)(ix) ("sanction letter").
8. The Applicant was separated from service on 20 October 2020.

Case No. UNDT/NY/2021/045/T

Judgment

16. The Applicant

22. In such cases, the Respondent relies on *Ekofo* UNDT/2011/215 to conclude that the complainant's evidence is sufficient absent evidence of ill-motivation or any other evidence that may cast doubt on the complainant's account.

23. The Respondent states that V01's evidence was clear, detailed and internally consistent. Moreover, she reported the incident to a colleague shortly after it occurred.

24. The Respondent recalls that the Appeals Tribunal has held in *Mbaigolmem* 2018-UNAT-819 that in misconduct of sexual nature, immediate reporting is considered to hold considerable evidentiary weight.

25. The Respondent goes on to refute the Applicant's argument that his neighbours would have been able to hear V01's cries as she tried to release herself from the Applicant's embrace in his apartment as purely speculative.

26. The Respondent also deems the Applicant's argument that had V01 been uncomfortable with the Applicant's conduct, she should have fled at the first opportunity, rather than kiss him goodbye on the cheek, to be purely speculative.

Whether the facts on which the disciplinary measure was based have been established

27. The sanction letter states:

There is clear and convincing evidence that, on 24 August 2019, you attempted to kiss V01 in your apartment in Bamako, Mali, and then, against her will, grabbed her, lifted her off the ground and kissed her.

28. The Applicant's main contention with respect to the evidence relied on to impose the contested disciplinary measure on him is the lack of corroboration of V01's testimony, which he refutes.

29. The Tribunal notes that to determine that the facts are established to the required standard, the Administration relied on V01's account as stated in her 23 September 2019 complaint of harassment which she then corroborated during her interview with OIAI of 28 February 2020.

30. The Administration further relied on the account by a colleague of V01 to whom she had reported the incident on 4 September 2019 and who, in turn, reported this incident to OIAI shortly thereafter. V01's colleague was interviewed by OIAI on 13 March 2020, where she corroborated her original statement, which was generally consistent with V01's description of the events.

31. The Applicant was also interviewed by OIAI on 17 March 2020. During his interview, he admitted having welcomed V01 in his apartment on 24 August 2019 in Bamako but denied having attempted to kiss her or made any unwelcome advance on her.

32. The Tribunal notes that, as the Respondent avers, in *Haidar* 2021-UNAT-1076 (para. 43), the Appeals Tribunal confirmed that in cases of sexual harassment, the alleged conduct often takes place in private, without direct evidence other than from the complainant. The Appeals Tribunal found that the Dispute Tribunal had been correct in finding the complainant's testimony of high probative weight when it is detailed, coherent and consistent and where there is no evidence that the complainant had an ulterior motive to wrongly accuse the applicant.

33. The Appeals Tribunal further accepted that evidence from persons to whom the complainant reported the incident promptly can be considered as indirectly corroborative of the complainant's statement.

34. The Tribunal finds that *Haidar* applies squarely to the case at hand.

35. In this case, the Applicant did not request V01's testimony and therefore waived his right to cross-examine her despite being allowed the opportunity to make such request in due course during these proceedings. Notwithstanding this, the Tribunal notes that V01's account remained detailed, coherent and consistent in her complaint and in the interview with OIAI. It was also largely corroborated by the statement of the colleague to whom she promptly reported the incident.

36. The Tribunal also notes the absence of any evidence suggesting ill-motive on the part of V01.

37. In this respect, in his interview with OIAI, the Applicant suggested that V01's complaint may have been made in retaliation for the Applicant having reported irregularities in the selection of a post while he was posted in Bamako.

38. The Tribunal does not find this argument credible. As noted in the investigation report, by his own account, the Applicant submitted his report of recruitment irregularities on 9 December 2019. As both V01's and her colleague's reports of harassment were filed in September 2019, it cannot be concluded that they were intended to retaliate against the Applicant's report, which had not yet been filed by then.

39. The Tribunal also finds the Applicant's argument that his neighbours would have heard V01's cries when trying to release herself unfounded and speculative.

40. The Applicant's argument that had V01 really felt uncomfortable by his conduct, she would have fled at the first opportunity rather than kissing him goodbye on the cheek is equally unfounded. As the Respondent points out, there is no rule as to how a victim of sexual harassment is meant to behave following the incident.

41. Moreover, the Tribunal notes that V01's colleague stated that V01 appeared upset when she reported the incident to her shortly after it occurred.

42. In sum, the Tribunal accepts that V01's statement meets the required standards to be deemed credible and probative. The Tribunal is further satisfied that the evidence of V01's colleague, to whom she reported the incident days after it occurred, serves as indirect corroboration as accepted by the Appeals Tribunal.

43. Finally, the Tribunal finds no evidence to indicate that V01 may have been untruthful or harboured bad faith against the Applicant.

44. Accordingly, the Tribunal is satisfied that the facts upon which the contested decision is based were established by clear and convincing evidence.

Whether the established conduct amounts to misconduct

53. In light of the above, the Tribunal is satisfied that the applicable procedure was followed to ensure that the Applicant's due-process rights were respected.

Conclusion

54. In light of the foregoing, the Tribunal rejects the application.

(he