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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/012

Judgment No.: UNDT/2022/014

Date: 15 February 2022

Original: English

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**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

DESBOIS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

## **Introduction**

1. On 8 April 2019, the Applicant, a former staff member in the United Nations Environment Programme (“UNEP”) in Paris, France, filed an application to contest the imposition of disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity, for physical assault.
2. The Respondent replied that the application was without merit.
3. For the reasons stated below, the application is rejected.

## **Facts**

4. Before her separation, the Applicant served as a Programme Management Assistant at the G-6 level in UNEP in Paris.
5. On Friday, 25 November 2016, a farewell party for a departing staff member was held at the UNEP office in Paris, which was attended by, among others, the Applicant and MK (name redacted). Towards the end of the party, the Applicant and MK had a heated conversation that led to physical altercations. SK (name redacted) and EK (name redacted), staff members of UNEP’s office in Paris, were present when the incident occurred.
6. Over the weekend, both MK and the Applicant reported the incident to their manager, SN (name redacted). On 26 November 2016, MK reported to UNEP management that the Applicant “physically assaulted [her] by hitting [her] four very strong slaps in the presence of other colleagues”. On the next day, the Applicant reported to SN that there was a “violent altercation” as MK was “extremely aggressive”, “pushed [her]”, and she “had no choice than to respond to defend” herself.



15. By memorandum dated 14 June 2018, the Applicant was requested to respond to the formal allegations of misconduct.
16. On 23 July 2018, the Applicant provided her comments thereon.
17. On 13 November 2018, the Applicant was provided with further information OHRM received from OIOS.
18. On 28 November 2018, the Applicant provided her further comments.
19. On 7 January 2019, the Applicant received the sanction letter informing her that

was based have been established; (b) whether the established facts legally amount to misconduct; and (c) whether the disciplinary measure applied was proportionate to the offence (see, for example, *Nyawa* 2020-UNAT-1024). When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, for instance, *Molari* 2011-UNAT-164, and *Ibrahim* 2017-UNAT-776).

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

26. The Administration concluded in the sanction letter that the Applicant had physically assaulted MK by pushing her and slapping her in the face. This finding was mainly based on the testimonies of MK (the complainant) and SK (a staff member, who testified that she witnessed the Applicant's slapping of MK), as well as medical reports of MK's injury. The Administration found that EK, a staff member, who testified that she did not see the Applicant slapping MK, was not credible.

27. The Applicant submits that the facts were not established by clear and convincing evidence, since MK and SK's testimonies were contradicted by other evidence and therefore not credible.

28. The Respondent argues that, based on interview records and oral testimonies of MK, SK, and EK, MK's statements submitted to UNEP, and medical reports documenting MK's injury, there is clear and convincing evidence that on 25 November 2016, the Applicant physically assaulted MK by slapping her in the face and by pushing her.

29. In order to determine whether the underlying facts are established, the Tribunal will review evidence provided by MK, SK, EK and the Applicant, as well as MK's

November 2016, the Applicant started shouting at her that she should “shut-up” and then “violently slapped [her] on [her] both cheeks”. She was very shocked and told the Applicant to stop but the Applicant continued “hitting [her] on the chest and shoulder provoking [her], she continued pushing [her] violently until [she] bumped into the conference screen”. When she moved away and stood next to EK, the Applicant came after her and “violently slapped [her] again twice”. SK went out running to call other colleagues for help and she left the room and went down to her office. She was “very emotionally shaken and distressed after just being assaulted by [the Applicant]”.

31. The Tribunal finds that the testimony that MK provided to OIOS investigators and during the hearing before the Tribunal regarding the 25 November 2016 incident was consistent with her initial statement provided to UNEP.

32. MK also submitted medical reports to OIOS. In particular, the UNESCO doctor’s medical report dated 17 January 2017 indicates that he examined MK on 29 November 2016, a few days after the incident, and he noted that MK’s right cheek was sensitive to touch, and she was stressed.

33. MK also submitted her private doctor’s medical reports dated 3 and 10 December 2016 in which he prescribed ten sessions of physiotherapy for a sore knee, in addition to medication to assist her sleep. MK told OIOS investigators that she “started developing some pains all over” after the slapping incident, which she did not have before. She told OIOS investigators that her private doctor explained that “it could be because of just the nervousity and the medicine that [she] was prescribed”.

34. At the hearing, the Applicant’s Counsel pointed out to MK that her medical records showed that she had a pre-existing medical condition in her knee and vertebrae caused by bone spurs and joint problems for which she had been taking arthritis and rheumatism medications and that she had been taking anxiety medication over three weeks before the date of the incident. When asked if MK claims that her knee pain and joint problems were caused by the slapping incident, MK testified that she was not saying that these conditions were caused by the incident, but that she started developing pain all over from bad headache to pain on the left side after the incident.

SK's evidence

35. In an initial statement submitted to UNEP, SK wrote that after most colleagues left the farewell party, EK and she started cleaning up the room while MK and the Applicant were still chatting. At some point, she noticed that “they were raising voices





slapped whom. EK stated that she was under the impression that SK did not see the slapping incident but that SK could have seen it. She further confirmed that MK and the Applicant did not push each other.

41. At the hearing, EK testified that she heard rapid “clapping sound”, which was followed by MK stating, “hit me again and I will kill you” and the Applicant stating “[MK], wake up”. EK stated that she did not see any physical contact between MK and the Applicant. EK stated that she had two big glasses of red wine, but she did not think that she was impaired. When questioned by the Applicant’s C



the slapping by the Applicant, but the Applicant's version of the event cannot explain how both SK and EK mentioned from the initial statements slaps/slapping sound. At the hearing, when asked how she could explain the contradicting testimonies of SK and EK, she only said that SK repeated what MK said, but regarding EK's testimony, the Applicant stated that she did not know why EK had said that. The Applicant also denied that MK stated, "hit me again and I14 (ps)-1bg6(e)]TJ0 Tc 0 Tw -2n 2.53 0 4(i)-2 ( w)-2.002 Tw -2002 yw -2

slapped MK on 25 November 2016 but the rest of the allegations by MK are not established.

*Whether the established facts legally amount to misconduct*

52. In the sanction letter, the Administration found that the Applicant's actions constituted serious misconduct in violation of staff regulation 1.2(f) and staff rule 1.2(f), which provide that:

**Regulation 1.2**

**Basic rights and obligations of staff**

...

(f) ... [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations ...;

**Rule 1.2**

**Basic rights and obligations of staff**

...

(f) 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.

53.

55. The Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behavior 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” (see *Portillo Moya* 2015-UNAT-523, paras. 19-21; and also *Sall* 2018-UNAT-889, *Nyawa* 2020-UNAT-1024).

56. The Appeals Tribunal held that “the Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose” (see *Toukolon* 2014-UNAT-407, para. 31).

57. The Appeals Tribunal has further stated, “But due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its ow(i)-6 (.9.2n(523h( A)

61. As mitigating factors, the Administration considered the Applicant's partial admission of her conduct, that she pushed MK and held her cheeks, and her long service with the Organization.

62. The Applicant submits that the Administration erred in finding the following as an aggravating factor given the unreliability of MK and SK's evidence: "[the Applicant] continued to provoke [MK], after two staff members, and [MK], had asked [the Applicant] to stop, and followed [MK] as she attempted to walk away".

63. Having considered the evidence in this case, the Tribunal finds that it does not support the Administration's conclusion that the Applicant kept provoking MK. Both SK and EK testified that MK repeated, "if you hit me again, I'll kill you" and the Applicant repeated, "[MK], wake up, wake up", and they asked both MK and the Applicant to stop. In addition, SK stated that they were shouting at each other.

Therefore, the evidence does not establish that the Applicant continued to unilaterally provoke MK after she had asked her to stop.

*Whether the staff member's due process rights have been respected*

66. Finally, the Tribunal will review the Applicant's claim that OIOS investigation was biased and flawed, and it violated the Applicant's due process rights. Before reviewing the Applicant's specific allegations, the Tribunal recalls that the Appeals Tribunal held that "only substantial procedural irregularities will render a disciplinary measure unlawful" in *Sall* 2018-UNAT-889, paras. 33 and 39:

... under our consistent jurisprudence, only substantial procedural irregularities will render a disciplinary measure unlawful. Even a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of grave misconduct, especially if the misconduct consists of a physical or sexual assault.

... Irrespective of any irregularities, the [Dispute Tribunal] should have conducted a further review of the disciplinary measure ... Save exceptional cases involving major violations of due process rights, it is not sufficient for [the Dispute Tribunal] to find procedural errors in a disciplinary process but, where necessary, it has to conduct a de novo review of the facts and a judicial review of the remaining aspects of the case.

67. Bearing in mind the above jurisprudence, the Tribunal will review the Applicant's allegation that the following procedural irregularities occurred during the investigation process:

a. OIOS failed to obtain an existing audio recording of the meeting held in the morning of 28 November 2016 that involved MK, which was relevant to the credibility of MK's testimony;

b. OIOS failed to verify the medical records submitted by MK in support of her assertion that the slapping incident caused her to have pains in her knee and left side that she had never experienced before;

c. OIOS investigator found EK to be not credible when she said that she did not see the Applicant slapping EK based on his approximation of distance between EK and the Applicant/MK but this was flawed;





70. In light of the above, the Tribunal upholds the disciplinary measure imposed on the Applicant.

**Conclusion**

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

*(Signed)*

Judge Joelle Adda

Dated this 15<sup>th</sup> day of February 2022

Entered in the Register on this 15<sup>th</sup> day of February 2022

*(Signed)*

Nerea Suero Fontecha, Registrar, New York