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Judgment No. 2023-UNAT-1384



Counsel for Appellant: Oscar Asima Taulo

Counsel for Respondent: Sylvia Schaefer

JUDGE

19. The UNDT noted that although the Secretary-General accuses Mr. Shumba “of having provided financial support to [the Complainant] over several years in spite of the Organization’s policies pertaining to relationships with the beneficiaries of assistance”, this element “[was] not under scrutiny by [the UNDT], as it ha[d] not been specifically pleaded in any of the counts charged”.¹⁷

20. However, the UNDT held that it was crucial to analyze the relationship between Mr. Shumba and the Complainant. It further noted that they “met each other frequently over the years in relation to the development of the United Nations support program” and that he demonstrated a “constant financial support” to the Complainant, a vulnerable “young woman living with HIV/AIDS from a very poor and unstable family background” that was “partially financially dependent” on him.¹⁸ The UNDT also observed that “[a]ccording to the investigators, there were several exchanges of Facebook communications between [the Complainant] and [Mr. Shumba] (...) suggest[ing] that there was a time when [he] built a relationship of trust with [her], where she was able to rely on him for support and was comfortable to meet with him outside UNFPA Malawi [CO]”.¹⁹

21. The UNDT then examined the facts in support of each count of misconduct.

22. First, the UNDT found that the Complainant’s testimony during her interview with the OAIS investigators was “very clear and detailed”. Therefore, relying on the Complainant’s recollection of the event to the OAIS investigators, the UNDT found that the facts to support the allegations under count one were established by clear and convincing evidence²⁰

23. From 29 November to 4 December 2015, the Complainant and Mr. Shumba both attended the ICASA Conference in Zimbabwe. One evening Mr. Shumba asked the Complainant to come to his hotel room to have dinner with him (or to give her the money for dinner). However, once the Complainant arrived in his room, Mr. Shumba was “aroused” and started touching her on the bed, trying to touch and “squeeze her everywhere”. The Complainant tried to push him away, but she could not as he was heavier than her. The event, which lasted a few minutes, ended when

¹⁷ *Ibid.*, para. 69.

¹⁸ *Ibid.*, paras. 43-46 and 69.

¹⁹ *Ibid.*, para. 58. See also i

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Submissions

Mr. Shumba 's Appeal

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ask her to go and look for condoms”, especially a person responsible for working with people with HIV who is used to carrying condoms.

40. Fifth, Mr. Shumba submits that the UNDT erred in law and in fact when it failed to apply

decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand”³⁷

45. The Secretary-General further observes that, contrary to Mr. Shumba’s submission, the fact that the allegations of misconduct raised against him had a sexual element is not a factor to be considered by the UNDT when determining if an oral hearing is warranted.

46. Moreover, the Secretary-General contends that Mr. Shumba’s reliance on *Liyanarachchige* is misplaced because that decision related to a disciplinary measure imposed solely on the basis of statements given by anonymous witnesses.³⁸

47. Second, the Secretary-General submits that the UNDT correctly concluded that the facts on which the dismissal was based had been established by clear and convincing evidence. The Secretary-General observes that Mr. Shumba’s disagreement with the UNDT’s findings as well as its evaluation of the witnesses’ credibility does not amount to errors of law or fact.

48. In particular, with regard to count one, the Secretary-General submits that the UNDT correctly found that the Complainant’s version of the facts was “in itself convincing evidence of the facts” and that her evidence was corroborated, although noting that a credible witness does not require corroboration in order to meet the standard of proof required to support a finding of misconduct.

49. The Secretary-General also observes that, contrary to Mr. Shumba’s contention, the UNDT and the OAIIS investigators took into consideration the fact that the WhatsApp messages to which the Complainant referred to were not presented before it.

50. With regard to counts two and three, the Secretary-General submits that the UNDT correctly concluded that the Complainant’s oral testimony before the OAIIS investigators, even if not corroborated, was sufficient to conclude that the facts on which these counts were based had

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51. Furthermore, the Secretary-General argues that, contrary to Mr. Shumba's arguments, the UNDT did not base its findings of clear and convincing evidence on the fact that he provided constant financial support to the Complainant or ignored his argument that their relationship was like those of father and daughter, but rather "rightfully found that [those] facts (...) support[ed] a 'sexually exploitative nature' of their relationship".

52. Third, the Secretary-General submits that the UNDT correctly concluded that Mr. Shumba's due process rights had been respected. The Secretary-General observes that Mr. Shumba's arguments with regard to the investigation does not identify any error by the UNDT, but are rather largely a repetition of the ones that he made before the Dispute Tribunal. However, relying on Appeals Tribunal jurisprudence,³⁹ the Secretary-General recalls that it is not sufficient for Mr. Shumba to indicate that he disagrees with the impugned Judgment, that the appeals procedure is not an opportunity for a party to reargue the case and that his arguments should be dismissed on this ground alone.

53. In any event, even if the Appeals Tribunal were to consider Mr. Shumba's argument, the Secretary-General submits that the OAIIS conducted a thorough investigation and that there was no indication of bias against him during the investigation (and the disciplinary) process. The Secretary-General also notes that Mr. Shumba did not have a right to meet or confront the Complainant during the investigation process.

54. Last, the Secretary-General submits that Mr. Shumba cannot request comnst

[were] clear” and “there [was] no need to conduct a hearing on the merits as the matter[could] be determined on basis of the documents”.

64. As previously stated by the Appeals Tribunal, Article 2(1) of the UNDT Statute contemplates a wide appeal or merit-83642 06.3.359717 dnn0r2p411d p41ps 0ha p1(07.f n0r2p41r16(s 0h e)2

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was produced to corroborate the truth of the events alleged by the Complainant. The Dispute Tribunal relied on this evidence significantly not only to make its findings that misconduct occurred but also to deny Mr. Shumba an oral hearing.

72. The Appeals Tribunal has opined that “the admission of adverse hearsay evidence by definition denies a party the right to challenge it effectively and fairly since the declarant is not before the tribunal and cannot be cross-examined”.⁵⁰ In the present case, the prejudice to Mr. Shumba in admitting and relying upon this evidence is significant .

73. For that reason, hearsay is usually given lesser weight. Moreover, hearsay evidence is normally not admitted or relied upon if it is used to prove the truth of the hearsay statement but only to support the fact that the statement was made.

74. We have previously opined that, in similar cases, the UNDT will (likely) find that the Administration can discharge its burden before the UNDT to establish the relevant facts by clear and convincing evidence based solely on the investigation report and entirely hearsay evidence, without an oral hearing. But this will depend on the circumstances of the case before the UNDT. ~~aehec~~

such evidence has not been produced. Moreover, that witness also says that “she could not remember very clearly” but “thought” this man was “offering [the Complainant] money”.⁷¹

87. Despite the weaknesses of the evidence and inconsistencies in the record, the UNDT

Judgment

92. Mr. Shumba's appeal is granted, and Judgment No. UNDT/2022/103 is hereby reversed.

93. The following orders are issued:

- i) The contested decision is rescinded
- ii) The Secretary-General is directed to expunge the name of Mr. Shumba from the relevant registers including the ClearCheckdatabase
- iii)