



Judgment No. 2019-UNAT-918



Counsel for Appellant: Szilaghi Alina

Counsel for Respondent: Wambui Mwangi

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/095, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 27 November 2018, in the case of *Nadasan v. Secretary-General of the United Nations*. Mr. Calin Nadasan filed the appeal on 24 November 2018, and the Secretary-General filed his answer on 28 January 2019.

Facts and Procedure

2. Mr. Nadasan, then a staff member of the United Nations Mission in Liberia (UNMIL), first met Ms. X (name redacted for privacy), then a Project Manager at the French Embassy in Liberia, in January 2012 at a restaurant in Liberia. Mr. Nadasan developed romantic feelings for Ms. X and in April or May 2012 he called her office phone inviting her for a drink. Ms. X did not accept the invitation and hung up the phone. Between 21 June 2012 and 6 August 2012, Mr. Nadasan telephoned Ms. X multiple times and sent her text messages communicating his sexual attraction. Ms. X ignored the calls and sent Mr. Nadasan a text message in July 2012, which stated that she was not interested in his advances and that if he did not stop contacting her she would call the police. Mr. Nadasan, however, continued his advances by sending her over one hundred messages on Facebook from 21 June to 22 November 2012.

3. In November or December 2012, Ms. X made a complaint against Mr. Nadasan to the Chief Security Adviser of UNMIL. Ms. X alleged that Mr. Nadasan had begun to harass her after they had first met in January 2012 by sending her numerous texts and Facebook messages of an intimidating and sexual nature.

4. In December 2012, as a consequence of the complaint, and at the request of Ms. X, the Chief Security Adviser, in an effort to resolve the matter informally, met with Mr. Nadasan and requested that he stop contacting Ms. X. Mr. Nadasan persisted, however, and the Chief Security Adviser, warned him again. The Chief Security Adviser had also enlisted the assistance of a colleague of the same nationality as Mr. Nadasan in an effort to impress upon him the importance of leaving Ms. X alone and the need to abide by the rules of the Organization.

5. On 6 February 2013, the French Ambassador to Liberia sent a letter to the Special Representative of the Secretary-General (SRSG) of UNMIL, requesting UNMIL's assistance with regard to Mr. Nadasan's continued harassment of Ms. X. On 11 February 2013, the matter was referred for investigation to the UNMIL Special Investigations Unit (SIU).

6. In December 2013, Ms. X left Liberia to become a staff member of the United Nations International Children's Emergency Fund (UNICEF) office in Haiti. In February 2014,

12. On 26 November 2015 Mr. Nadasan received a memorandum dated

16. The UNDT also found that Mr. Nadasan's due process rights had been respected. Mr. Nadasan was interviewed in all material aspects of this case, he had the opportunity to review the record of his interview and make amendments, and he had the opportunity to introduce new material. Mr. Nadasan signed the amended record of his interview to certify its accuracy and was provided with the allegations of misconduct memorandum together with all supporting documentation. He was informed of his right to seek counsel and he was given an opportunity to comment. Having been given extensions and the Panel taking further fact-finding exercises resulting in no exculpatory evidence, the UNDT found that Mr. Nadasan had been given adequate time and opportunity to provide comment and supplemental information. The Tribunal further found that Mr. Nadasan failed to submit evidence supporting his alleged claim that he could not fully respond to the charges because he had no e-mail access to the third set of questions sent to him by OHRM. The UNDT took the view that the third set of questions would not have changed the final outcome.

17. Regarding Mr. Nadasan's claim that his proposed witnesses were not interviewed by the Panel, the UNDT noted that the Panel maintained the discretion to determine how to conduct its investigation and it had discharged its obligations by diligently investigating Mr. Nadasan's account of events including the witnesses he had proposed. Regarding Mr. Nadasan's claim that the Panel did not properly count the number of Facebook messages, the UNDT found the numerical discrepancy was immaterial. Mr. Nadasan admitted to sending 140 messages. While content and quantity of communications are relevant factors, the UNDT noted that even one sexually inappropriate message could have amounted to sexual harassment. The Panel had considered the totality of the evidence.

18. The UNDT found that Mr. Nadasan had failed to provide any evidence to suggest that Ms. X was not credible and found, to the contrary, that her testimonies were corroborated by documentary evidence. The UNDT found the evidence was clear that Mr. Nadasan's conduct was continuous, sexual in nature, and was not welcomed.

19. As to the Organization's imposed disciplinary measure, the UNDT found the sanction was proportionate and noted that the USG/DM had considered mitigating factors in setting the sanction, such as the period of time it took to resolve the matter, Mr. Nadasan's long service with the Organization, and his claimed stress from work

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23. The UNDT further erred in determining that Mr. Nadasan continued to contact Ms. X, besides his last text message sent on 26 July 2012 and his last Facebook message sent on 22 November 2012, he had last contacted Ms. X on 24 January 2013. The Panel and the UNDT erroneously ignored evidence that on 6 August 2012 Ms. X messaged him and unblocked him on Facebook, which he understood as her being agreeable to him contacting her and demonstrated a “seduction and a teasing game”. The UNDT’s finding that Ms. X had consistently rejected him was never proven as the only time Ms. X rejected him was in Yoga class in January 2013. Mr. Nadasan further argued that the Panel had failed to consider the testimony of Ms. Z, who indicated in her e-mail that Mr. Nadasan had visited her at her compound. The Panel instead accepted Ms. X’s allegation that he was trying to get into the complex to see her. Ms. Z also indicated there was no interaction between him and Ms. X at a local social establishment, which refuted Ms. X’s allegation. Further, Ms. Z, Mr. K, and Ms. S provided a favorable character description of Mr. Nadasan. Mr. Nadasan also argues

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29. Third, the UNDT did not err in its decision not to hold an oral hearing. In this regard, Mr. Nadasan's reliance on *Mbaigolmem*¹ is misplaced. In that case, the Appeals Tribunal provided for a situation whereby the record arising from an investigation may be sufficient for the UNDT to render a decision without a hearing. Furthermore, the UNDT had ordered the parties to either file their closing submissions if the parties agreed for the matter to be heard on the papers or file a joint submission listing the witnesses they intended to call and the evidence they intended to introduce. Mr. Nadasan had bilaterally agreed with the Secretary-General for the matter to proceed on the papers and had filed his closing submission choosing not to request an oral hearing. Mr. Nadasan, thus, should be estopped from making this argument as he chose not to request a hearing before the UNDT. As for the e-mails, which Mr. Nadasan indicated came from colleagues who spoke to his character, they do not amount to evidence detracting from the documentary evidence of his sexual harassment. Mr. Nadasan ultimately fails to demonstrate how the UNDT's findings of fact are not supported by the evidence or are unreasonable.

30. Lastly, the Secretary-General argues that the UNDT correctly upheld the imposed disciplinary sanction as proportionate since sexual harassment is serious misconduct for which the more serious sanction of dismissal is warranted. The Administration took into consideration aggravating and mitigating factors and rendered the sanction of compensation in lieu of notice and termination indemnity. The UNDT considered these factors and found the less severe sanction was proportionate.

31. With regard to Mr. Nadasan's request for compensation, the Secretary-General asserts this is not legally sustainable as it exceeds the statutory limit of Article 9(1)(b) of the Appeals Tribunal's Statute (Statute). Furthermore, Mr. Nadasan has not produced evidence of an exceptional circumstance. Mr. Nadasan's claim for stress-induced sick leave was correctly rejected by the UNDT as it considered the opinion of a physician who opined that there was no causal link between Mr. Nadasan's medical condition and the complaint filed against him.

¹ *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. UNDT/2017/051.

Considerations

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not substitute its own judgment for that of the Secretary-General. It will only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based. Before the UNDT issued its judgment in *Mbaigolmem*,³ it was not disputed that the UNDT has the authority to rehear the witnesses of the disciplinary proceedings in order to assess whether there is sufficient evidence to conclude that misconduct occurred, and the UNDT has done that several times.⁴

ii. Whether the established facts legally amount to misconduct

41. The judicial review of decisions of whether or not misconduct has been established dictates that due deference be given to the Secretary-General to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Administration in the exercise of its rule-making discretion. The Administration is better placed to understand

also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

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

43. With regard to due process, we have consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.⁶

Application to the present case

44. By letter dated 4 October 2016, Mr. Nadasan was separated from service with compensation in lieu of notice and with termination indemnity, for having, between January 2012 and October 2015, sexually harassed Ms. X, a staff member at the French Embassy in Liberia and thereafter a staff member of UNICEF in Haiti, by making unwanted advances and sending improper messages, some of which were of a sexual nature, despite Ms. X's requests to cease such behaviour, and by continuing to attempt to contact Ms. X despite the complaints and efforts to informally resolve the case.

45. Applying the above-mentioned standards and criteria to the present case, we find that the UNDT did not err as there was clear and convincing evidence that Mr. Nadasan indeed committed sexual harassment against Ms. X and that the disciplinary sanction of

⁶ *Muindi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-782.

separation from service with compensation in lieu of notice and with termination indemnity was proportionate and lawful.

i. Clear and convincing evidence for sexual harassment

46. We find that the UNDT did not err in holding that the documentary evidence was sufficient to conclude that Mr. Nadasan ha

48. Furthermore, in Mr. Nadasan's appeal, he himself stated that he promised, at the end of November 2012, after he had been informed that Ms. X had complained about his inappropriate behavior, to never contact Ms. X again. Despite this promise, he continued to attend the same yoga class as Ms. X although she had made it clear to him, and he knew that she resented his presence in the class. Despite this promise, he approached and addressed Ms. X when they incidentally met at the airport in Monrovia in October 2013. Despite this promise, he even took up a new position in Haiti in July 2014 where he knew that Ms. X had been working for UNICEF since December 2013 and contacted her via e-mail. Despite this promise, Mr. Nadasan contacted Ms. X several times in September and October 2015.

49. Mr. Nadasan's application to the UNDT also renders clear and convincing evidence that he sexually harassed Ms. X with intent. It becomes clear from his submissions that he kept following Ms. X and sent messages with sexual content although she had made it clear to him that she was not interested and he knew that his advances were unwelcome.

50. Mr. Nadasan stated in his application before the UNDT (Emphasis in original):

... I had her business card and phone number, spoke 2 times on the phone and 7 or 8 times in person and I had told her several times we should 'have coffee together'. She kept postponing.

... At the end of July 2012, after returning from a home leave, with my divorce pronounced I sent her a SMS trying to reconnect where we have left, to organize a 'coffee together' so we can get to know each other better. She replied with a very angry tone, in a very poor and broken English and totally opposed to what I had been used to have from her, that she "already had a boyfriend" and I should stop contacting her. By that time I had also sent her a few (7 messages from 21 June to 24 July) Facebook messages trying to get closer, but did not get any answer from her. Also my [Facebook] friend request to her had remained unanswered for a few days and I finally cancelled it.

... On 11 August 2012, a weekend, I made a small experiment to make sure that her "blocking" was real and tried to send a message made up of just a dingle dot. To my amazement, it was delivered. Same was the one sent a couple of hours later. Things were clear, she HAD unblocked me on Facebook messenger and although she did not reply to my messages, I took it as an encouragement as she clearly WANTED to "hear" from me. From that moment and until 20 September 2012 I kept writing to her on Facebook, **a total of 131 messages**, showing my deep attraction to her and trying to organize a 'tete-a-tete'. Finally, when I noted she continued to ignore me, although she gave clear signs she was receiving my messages, I switched to trying to get her to talk to me and have a casual, civilized, free of any shade of romance

55. We also find that it was a reasonable exercise of the Secretary-General's discretion to determine that Mr. Nadasan's behaviour towards Ms. X rendered him unfit for further service with the Organization. Mr. Nadasan harassed Ms. X for a substantial amount of time although she had clearly told him that his advances were unwelcome. Mr. Nadasan had been advised, by several people, to stop, and warned that if he did not stop he would risk losing his job. Although he had promised that he would not contact Ms. X again, he did not keep that promise but kept on harassing her. Even up to the present day, Mr. Nadasan has not understood and does not accept that he did anything wrong but rather feels like the victim of the whole matter. As Ms. X was a staff member first of a member state of the United Nations, later of UNICEF, Mr. Nadasan's actions affected the reputation of the United Nations Secretariat. We are, thus, satisfied that separation from service with compensation in lieu of notice and with termination indemnity was fair and proportionate to the seriousness of the offence.

iii. Due process

56. The main requirements of due process are met. Mr. Nadasan was informed about the allegations against him and had an opportunity to respond and defend himself. There is no merit in Mr. Nadasan's submission that he was never shown a formal complaint against him. It is clear from the documentary evidence that he was given a charge letter and supporting documents, had several opportunities to comment on the allegations and was informed of his right to seek counsel. His allegation that he could not comment on the third round of questions because he had no access to his work e-mail account is without merit. His e-mails dated 7 July and 14 August 2016 clearly show that he knew about the inaccessibility of his work account and the possibility that communication regarding the disciplinary

... This is also one of those cases where the so-called “no difference” principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an

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59. The appeal is dismissed and Judgment No. UNDT/2018/095 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Halfeld

(Signed)

Judge Murphy

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar