



UNITED NATIONS

Case No. UNDT/NY/2023/017

Judgment No. UNDT/2024/068

Applicant] lost, [he] would kiss [AA's] bottom; and repeatedly offering to pay [AA] money if he forced [the Applicant] to fulfil the bet”;

b. “The Applicant continued to bring up the matter despite [AA's] multiple requests that [he] drop it”;

c. “Even though [the Applicant was] aware that [AA] was not receptive to [his] proposal, [he] kept insisting to provoke a response until 13 September 2021, when [he] sent [AA] a picture of [himself] with [his] face pressed against another man's bare bottom”.

7. In the investigation report the relevant WhatsApp messages between the Applicant and AA were summarized as follows (the language translations stated in the report are indicated in {...} in this Judgment for editorial purposes, and all references to footnotes have been omitted):

... On 17 October 2019, [AA] invited [the Applicant] to an event where [AA] planned to sing in Arabic. [The Applicant] responded on the same day by calling [AA] a “shitshow” and asking, “Seriously? Ha”. [The Applicant] also said in Arabic, “[a stipulation in Arabic]” {God wills what}. [AA] told [the Applicant] that it was the first time the venue asked him to sing in Arabic.

... On 29 January 2021, [the Applicant] told [AA] that [the Applicant] needed to make a decision on his future in relation to a bet. He continued, “I will have to show the yes/no at the end of the conversation, but without your clear name”. [AA] did not understand

It was what I told you}”. [AA] responded, “*Pagaste \$2.000?* {Did you pay \$2.000?}”.

... [The Applicant] responded, “*Si. Pero como no iba a hacerlo* {Yes. But how could I not}”. [AA] responded with three smack-my-head emojis. [The Applicant] continued, “*A ti te lo dije* {I told you}”. At 12:59 hours, [the Applicant] said, “*Y que hubiera podido hacer si fue esa la apuesta* {And what could I have done if that was the bet}. *Ahora lo que me preocupa es lo de la foto pero bueno* {Now what worries me is the [photo] but well}”. [AA] responded, “*Yo no te obligaría a hacerlo jaja valoro mi dignidad más que \$2.000 (aunque no me hubieran venido mal el lunes cuando perdí mi vuelo en Moscú porque nadie en ese bendito aeropuerto hablaba inglés y tuve que comprar un pasaje carísimo a última hora con otra aerolínea para poder venirme)* {I would not force you haha I value my dignity more than \$2.000 (although it would not have hurt me on Monday when I missed my flight in Moscow because no one in that blessed airport spoke English and I had to buy a very expensive ticket at the last

todavía te sientes con la obligación de cumplir con tu apuesta febrero, te puedo mandar mi cuenta UNFCU jajaja {If you still feel obliged to fulfill your bet in February, I can send you my UNFCU account hahaha}. He then advised [the Applicant] not to bet.

that bet basically. }. [AA] told him again not to bet and [the Applicant] said, “*Lo sé. Tu lo hubieras hecho? Me refiero que te hubiese tenido que dar los 2000?* know. Would you have done it? I mean would I have had to give you

pareció una apuesta super tonta pagarme, pero me has seguido trayendo el tema 1298548065908 veces. Por eso digo que si sigues con esa carga emocional, te mando mi cuenta UNFCU y listo On top, I thought it was a really stupid bet

it up 129854806590 that emotional topic, I will send you my UNFCU account and that is it ”.

... At 13:05 hours, [the Applicant] responded, “ *Lo que dije*

nece {Haha. What I said was that if you forced me to kiss your ass and I would have paid you. But I needed the photo}”. [AA] my

“*Lo hubiera tenido que hacer de verdad* {I really had to do it}”. [AA] did not understand what photo [the Applicant] referred to and asked if [the Applicant] meant a picture of who came with him on the daytrip

...

Consideration

highly probable” (see para. 30 of *Molari* 2011-UNAT-164). In this regard, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred” (see para. 32 of *Turkey* 2019-

that those messages within the context of their relationship and all exchanges should not have [landed] him in any hot water”.

l. Indeed, the Respondent “has applied two different binoculars on the jokes from both individuals”, and “contrary to the Respondent’s statement, [AA] did not make the two jokes only once or twice for each”. The “joke about the bathroom (the Applicant exposing himself naked to the world including [AA]), was repeated on more than two occasions even though the Applicant clearly told him to stop”. The “similarity with what the Applicant has been sanctioned for is extensive, even without considering the totality of their relation”.

m. The “two witnesses exchanged on two different lines of WhatsApp and on other platforms, including in person”. Only “the interaction on one single WhatsApp line was presented in this case because the Applicant does not have access to the archives on the other platforms anymore”. AA “never presented the totality of the exchange on this single line” and “did not try to introduce any evidence from other platforms that they exchanged on”. AA “has done his best to frame the Applicant and the Respondent fully fell into the trap”.

n. The Applicant “knew about AA’s sexual orientation and never intended his joke to be a sexual advance of any kind”. AA “never stated

4.1.3 In implementing the present policy, the Organization shall act consistently and take the appropriate administrative, investigative, and disciplinary action required regardless of the function, title, length of service or contractual status of the Alleged Offender. Applicable standards on confidentiality will be respected. UNHCR's partners shall be informed of the policy.

...

4.2 Duties of UNHCR Personnel

UNHCR Personnel, including Staff Members and Affiliate Workforce, are expected to:

- a) maintain a harmonious working environment for other colleagues by behaving in a manner which is free of disrespect, intimidation, hostility, offence and any form of discrimination, harassment, sexual harassment or abuse of authority;
- b) not to condone discrimination, harassment, sexual harassment and abuse of authority;
- c) familiarise themselves with this policy, the Code of Conduct and educate themselves through mandatory as well as optional training;
- d) be aware of the various options and internal channels available to them for addressing discrimination, harassment, sexual harassment or abuse of authority;

18. The Tribunal further notes that “sexual harassment” is defined as follows in para. 5.3 of the UNHCR Policy (emphasis in the original):

... **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. Sexual harassment is particularly serious when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. Sexual harassment may be unintentional and may occur outside the workplace and/or outside working hours. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between or amongst persons of the opposite or same sex.

Did the Applicant's conduct qualify as sexual harassment?

19. In AAT 2024-UNAT-1412, para. 99, the Appeals Tribunal made a number of findings in another a sexual harassment case from UNHCR, which are relevant to the present case. The Tribunal must follow these findings under the doctrine of *stare decisis* (see, for instance the Appeals Tribunal in *Igbinedion* 2014-UNAT-410, paras 23 and 24).

20. Generally concerning “a finding of sexual harassment” under the UNHRC Policy, the Appeals Tribunal held in AAT that this requires four “elements” to be present (see, para. 99). Each element is stated in quotation marks in the following sub-headings and reviewed individually as relevant to the present case:

“[T]he conduct in question occurred”

21. The Tribunal notes that the Applicant fully admits that the conduct in question, namely the WhatsApp exchanges, occurred—the content and translation of these exchanges follow from the above facts.

“[The conduct] falls within the legal understanding of sexual harassment and is of a sexual nature”

22. In AAT, para. 102, the Appeals Tribunal underscored (with reference to *Gonzalo Ramos* 2022-UNAT-1256, para. 68) that sexual harassment “can encompass numerous types of conduct, some overtly sexual in nature and others more subtle”, and there “is a wide spectrum of conduct that can be defined as sexual harassment and its determination is entirely context specific”. Whether “a particular type of conduct constitutes sexual harassment will depend on a number of factors and the circumstances of each case”.

23. In this regard, the Appeals Tribunal highlighted that “a determination of whether a particular type of conduct is sexual in nature does not turn on the intentions of the perpetrator but on the circumstances surrounding the conduct, the type of conduct complained of, the relational dynamics between the complainant and the

perpetrator, the institutional or workplace environment or culture that is generally accepted in the circumstances, and the complainant's perception of the conduct".

24. The Appeals Tribunal also held in *AAT* that, depending on the circumstances,

AA's UNHCR supervisor and that the bathroom had a large window from where one could look down to the road. AA therefore only made a joking comparison between his supervisor and the Applicant. The Applicant, on the other hand, testified that AA's remarks, which he had also often made in person, had surprised and offended him. As such, the Applicant felt that AA's comments were of similar standard, if not lower, than his remarks concerning kissing AA's bottom and sending the photo.

32. Concerning the comments on an Egyptian princess, AA testified that since he had previously been studying in Egypt, it was a joke among UNHCR colleagues in Caracas that he would find himself a princess when returning there. When inviting the Applicant to visit him in Cairo, AA had therefore, also as a joke, offered to find him an Egyptian princess. The Applicant's testimony was that this proposal had caught him by surprise as AA would otherwise never speak about the men and women, and the Applicant had therefore tried to change the topic.

33. The Tribunal notes that the testimonies of the Applicant and AA are in line with the documentary record, which the Tribunal reviewed in accordance with art. 9.4 of its Statute.

“[The conduct] interfered with work or created an intimidating, hostile, or offensive work environment”.

40. The Tribunal notes that under the UNHCR Policy’s legal definition of harassment, impact on work or the work environment is stated as an aggravating circumstance rather than requirement for a finding of sexual harassment. This is evident from the reference: “is particularly serious”.

41. In the present case, when the Applicant was sending AA many of the relevant WhatsApp messages, including the photo, they were not working together as AA was

