Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SZVETKO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Jason Biafore, OSLA

Counsel for the Respondent:
Louis Lapicerella, UNHCR
Marisa Maclennan, UNCHR

Introduction

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15. The Applicant unequivocally denies this allegation, and queries why Ms. A did not report it given the offence that the Respondent now charges his action caused her.

16. On 20 June 2019, the Inm ' ' Inm É

c) Showed a "watch" photograph or "meme" which contained male genitalia to Ms. S and Ms. A, on separate occasions (at the May 2018 retreat and in the UNHCR office in Budapest, respectively); and

d) Knocked on Ms. S's hotel room twice, late at night (during the May 2018 retreat).

24. The Applicant was found to have violated staff rule 1.2 (f), paragraph 4.2 of UNHCR Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (UNHCR/HCP/2014/4) and Principles 2, 4 and 9 of UNHCR Code of Conduct.

25. On 18 December 2020, the Applicant was notified of the decision to separate him from service with compensation *in lieu* of notice and without termination indemnity pursuant to staff rule 10.2(a)(viii).

Submissions by the parties

26. The Applicant emphatically argues that charges (b), (c) and (d) have not been established to the requisite standard. He concedes to the facts alleged in the remaining charges.

27. He submits that the charges he concedes may constitute "inappropriate conduct" but *not* misconduct under the applicable rules.

28. The sanction was wholly disproportionate to the offence. The Respondent failed to properly consider mitigating circumstances and took irrelevant and aggravating factors into account.

29. It is the Respondent's case that the offences alleged were properly established; that the Applicant was afforded his due process right and that the sanction meted out to him was proportionate. The Respondent makes particular reference to the charges which the Applicant concedes to and submits that separation would have been justified relying solely on the facts admitted by the Applicant, "which minimally qualify as two instances of sexual harassment and one instance of harassment."

35. While the Applicant admitted the facts above at (a) and in substance the facts above at (c) and (d) too (see investigation report paras. 93, 70 and 99, and 74 respectively), facts under (b) result from the testimony to the investigators rendered by Ms. S. And Ms. A. Paragraphs 92 and 93 of the investigation report state as follows:

> The IGO also notes that Ms. A. stated that the Applicant made sexual comments about the water jets in the pool being pleasurable for women between their legs, and that she found his comments inappropriate. The IGO further notes that in his response to the draft investigation findings, the Applicant denied that he made such comments. The IGO considers that Ms. A's comments are commensurate to the same behaviour Ms. S reported of the Applicant […] The IGO is of the view that although the Applicant could not recall making any further sexual comments, it is very likely that he did so.

36. In *Mbaigolmem* 2018-UNAT-819, the Appeals Tribunal held that the undisputed facts, the evidence of a credible report, coherent hearsay evidence pointing to a pattern of behavior, the consistency of the witness statements and the inherent probabilities of the situation, taken cumulatively, constituted a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred.

37. The Tribunal is aware that the sentences at stake were not heard by anyone other than the alleged victims, but considers that the testimony by the Complainant (on the sentences heard and on the meme shown) is reliable and credible, and it is corroborated by the behaviour of the Applicant in the same situation towards other colleagues.

Do the established facts legally amount to misconduct?

38. The sanction letter states that the established facts amount to misconduct as the Applicant failed to comply with his obligations under the rules.

39. Staff regulation 1.2(b) provides that

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54. In the present case, the sanction imposed on the Applicant was separation from service, with compensation *in lieu* of notice, and without termination indemnity.

55. According to the sanction letter, the Administration identified aggravating and mitigating circumstances and took them into consideration for the imposition of the disciplinary measure.

56. The Tribunal is of the view that, while in the assessment of accusations of harassment the test focuses on the conduct itself - and requires an objective examination as to whether it could be expected or perceived to cause offence or humiliation to a reasonable person, being not necessary instead to establish that the alleged offender was ill-intended (see *Belkahbbaz* UNAT-2018-873, para. 76) -, the lack of ill-will by the offender could be relevant instead in the assessment of the proportionality of the sanction.

57. In the case at hand, the facts under scrutiny (as limited in para. 44 above) cannot be considered severe, as they were made in jest and without the aim of harming or harassing anyone.

58. As to facts (a) and (b), they were definitely inappropriate. They are of a sexual nature because they refer to an intimate part of a woman's body. Regardless of whether the Applicant had sexual intent or interest when he spoke, the comments nonetheless were sexually suggestive.

59. However, these acts are to be evaluated in the factual circumstances, where colleagues were having a rest in a pool during a retreat; it seems they were euphoric jokes and quips, "*boutades*" by an elated person (like a boy in a school trip) with no intention to harm or harass or humiliate (and it is significant that only one of the addressees of the sentences found the words offensive).

60. The Tribunal is cognizant that, while typically involving a pattern of behavior, harassment can take the form of a single incident; it does not require that the alleged harasser was aware of the offending character of his or her behavior, but the conduct must be reasonably perceived as offense or humiliation; in the case, the

sentences were inappropriate but the Applicant immediately stopped after having seen the cold reaction to his "*boutade*".

61. As to allegation/charge (c), admitted as mentioned by the Applicant, the Tribunal notes that there is no evidence of any shocking content of the meme (not seen by the investigators and by decision makers and not in the records) and that the meme undisputedly contained only a sexually explicit (but not pornographic or prurient) picture.

62. Showing it was certainly inappropriate, but it was in a framework of humour amongst colleagues in moments of relaxation in the office, without sexual advances and in no targeted way.

63. According to the testimonies collected by the investigators, the nature of the meme was silly and fun, with sexual connotations only in the background.

64. Coming to the aggravating and mitigating factors, it has to be noted that the Applicant was reproached also for having blamed the victims of his conduct, saying their reactions were exaggerated and unreasonable. The Tribunal is of the view that the Applicant's victim blaming was only a way to question the legitimacy of the reaction, found exaggerated given the context, in order to defend himself and to demonstrate that there was no aim to offend the victim at all. It was not an aggravating factor.

65. In order to properly determine the sanction, the Tribunal considers that not all misconduct must result in termination, and that a gradual assessment of the possible measures should be undertaken on a case-by-case basis.

66. In accordance with staff rule 10.3(b), ible

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> including sexual harassment. The interpretation of the policy allows the Appeals Tribunal to conclude that, as a general rule, it aims to tackle the issue of harassment in the workplace mainly by means of two methods. The first and more immediate one has the corrective purpose of addressing any possible inappropriate behaviour and applying the necessary measures according to the situation. The second and broader one has the preventative aim of promoting a positive work environment and preventing inappropriate behaviour in the workplace.
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> 42. Because suitable deterrent sanctions are meant to be applied to ensure that incidents of sexual harassment are not treated as trivial as a result of the "zero tolerance" policy, it is fundamental that this policy is widely disseminated to all relevant persons, as it was the case at UNHCR, where the respective issuance UNHCR's HCP/2014/4 was published on its website".

74. This Tribunal of the view that, in a legal assessment of the case, the reference to the administrative "zero tolerance" policy refers to the attitude of the Organization to promptly and seriously

76. Indeed, the discretion of the Administration is not unfettered since it is bound to exercise its discretionary authority in a manner consistent with the due process principles and the principle of proportionally.

77. These principles were described by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084 (paras. 39-40 and 42), as follows:

> In the present case, we are concerned with the application of the principle of proportionality by the Dispute Tribunal. In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality essary

for the misconduct to occur but only for the proportionality test, deserve the maximal sanction, that is the offender's dismissal or separation. However, absent globally those factors the sanction should be milder, especially when, like in the present case, none of them occurred.

92. It is also relevant to recall the judgment by UNAT in case *Michaud* 2017-UNAT-761, where a staff member was only sanctioned with a written reprimand for allegedly similar conduct (in the case, making sexually suggestive inappropriate comments to a supervisee).

93. In light of the above considerations, the Tribunal finds that the disciplinary measure imposed in this case – separation from service with compensation *in lieu* of notice and no termination indemnity - is unfair and disproportionate to the established misconduct, which deserves a more clement disciplinary sanction. It should properly have been more lenient than *Gelsei* and more similar to that applied in *Michaud*.

94. Accordingly, the Tribunal rescinds the disciplinary measure imposed on the Applicant.

95. The Appeals Tribunal recognizes the jurisdiction of this Tribunal in replacing the disciplinary sanction (after an assessment of its unlawfulness) with a different one, more adequate to the real gravity of the offense (*Abu Hamda* 2010-UNAT-022; see also *Yisma* UNDT/2011/061).

96. The Tribunal finds that in the present case the sanction imposed should be replaced by the disciplinary measure of a written censure.

97. In accordance with art. 10.5(a) of its Statute, the Tribunal shall also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission as the contested decision concerns termination.

98. It is clear from art. 10.5(a) of the Dispute Tribunal's Statute, as consistently interpreted by the Appeals Tribunal, that compensation *in lieu* is not compensatory damages based on economic loss, but only the amount the Administration may decide to pay as an alternative to rescinding the challenged decision or execution of the ordered specific performance (see, for instance, *Eissa* 2014-UNAT-469).

99. As to the amount of the compensation *in lieu*, the above recalled article of the Dispute Tribunal's Statute sets a general framework for its determination, stating