JUDGE JOHN RAYMOND M

... At some point during the same retreat, the Applicant received a meme on his mobile phone. He describes it as an advertisement for a wristwatch, "depicting a blurred out naked man in the background with a large gold watch prominent in the foreground". He showed the meme to several colleagues, including Ms. S. Most laughed it off as funny, but Ms. S took offense at having been showed the meme.

... There was a staff party at the retreat on the evening of 24 May 2019. As the party was winding down, the Applicant joined a group of people, including his colleagues, as they went around the hotel knocking on doors to get others to join the party.

... The Applicant cannot say for sure if the knock on Ms. S's door was by him or one of the other revellers; it could have been any of them, he says. Whereas she took offence at her door being knocked, several others testified that the knocking on their doors did not annoy, offend or harass them.

... It is in the investigation report, that at an unspecified time the Applicant stopped Ms. A along the corridors of the UNHCR Office in Budapest and said that his friend was selling a watch and insisted that she look at the photo on his phone which was a picture of a watch with a penis underneath it.

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

... On 20 June 2019, the Inspector General's Office ("IGO") received allegations of sexual harassment implicating the Applicant. An investigation into the allegations was opened on 28 June 2019.

... The IGO interviewed 11 individuals. On 1 April 2020, the Applicant was interviewed as the subject of the investigation.

... On 20 April 2020, the IGO shared the draft investigation findings with the Applicant. The Report states that the Applicant "engaged in prohibited conduct by: a) using inappropriate and offensive language; b) showing inappropriate pictures on his mobile phone; and, c) knocking on hotel room doors of female staff members late at night."

... The Applicant was given the opportunity to respond to the draft investigation, which he did on 1 May 2020.

... The Respondent submits that those comments "were taken into account for the finalization of the investigation report ("IR") dated 5 May 2020."

... On 8 June 2020, the Applicant was notified of the allegations of misconduct.

... The Applicant responded to the allegations on 24 August 2020 and submitted a supplemental response with the assistance of counsel on 18 September 2020.

... The Respondent considered the Report and the Applicant's response to it, and found that there was clear and convincing evidence that he

a) Made comments of a sexual nature

behaviour, it can take the form of a single incident. Sexual harassment may occur between or amongst persons of the opposite or same sex.

13. The UNDT accepted that the

19. However, due deference does not entail uncritical acquiescence. The ultimate test, or

... In its practice, the Administration often applied the sanction of dismissal or separation from service...for cases of sexual harassment that entailed touching intimate parts of a person's body, or for inappropriately touching colleagues in different occasions outside working hours, especially when the behaviour was repetitive or connected with other facts of misconduct (such as discriminatory or insulting comments, comments on physical appearance or abuse of authority).

... (...) [W]e note that there have been cases where the Administration applied only a censure for verbal and physical assault.

... As to sexual harassment (not combined with other additional facts of misconduct), in its case law the Tribunal considers relevant factors such as whether the behaviour of the offender is objectively unlawful or harsh, fearful, repetitive, persistent, intolerable and incompatible with a direct and continuous supervision of the victim. These factors, especially if combined, although of course not relevant fo misa Th onaln,ieta((o)-0.9

> Applicant can lead to the conclusion that the facts had no impact (or at least a very limited impact) on the work environment.
>
> ... 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).
>
> ... 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*.

27. On this basis the UNDT opted to rescind the contested decision, replaced it with a written censure, and set a sum equivalent to two years' net base salary, based on his salary at the time of his separation, as compensation in lieu of rescission.

28. The Secretary-General filed his appeal against the Judgment on 17 May 2022. Mr. Szvetko filed his answer on 18 July 2022.

Submissions

The appeal of the Secretary-General

29. The Secretary-General submits that the UNDT exceeded its jurisdiction by usurping and substituting the High Commissioner's discretion with its own in setting aside the imposed sanction and ordering a more clement sanction. He argues that it is within the sole discretion of the High Commissioner to decide among the disciplinary measures available, and to set policy priorities by deciding that there is zero tolerance with regard to certain behaviour.

Mr. Szvetko's Answer

37. Mr. Szvetko submits that the Secretary-General has failed to demonstrate that the UNDT erred in any way in its determination that the sanction was unfair and disproportionate. In this regard, he aligns fully with the findings of the UNDT that taking all the relevant factors into consideration dismissal was not an appropriate sanction in this case.

38. While Mr. Szvetko accepts that it cannot be reasonably or appropriately argued that sexual harassment misconduct is not exceptionally serious and need not be dealt with in a firm and expeditious manner, the "zero tolerance" policy remains subject to the formal processes established under the legal authorities within the Organization's internal justice system. There is no indication that the zero-tolerance policy has been promulgated, as part of the issuances of the Organisation, at least to the extent that zero-tolerance means automatic loss of employment where sexual misconduct is established following a duly constituted investigation and disciplinary process that respects all elements of procedural fairness.

39.

Considerations

43. The submission of the Secretary-General (oft repeated before us in disciplinary cases) that the UNDT exceeded its jurisdiction, by setting aside the imposed sanction because it is within the sole discretion of the Administration to decide among the disciplinary measures available, isono5o5oT,naT.1 (naT.1 (na 5t)-5.2 (i)a5.2 (i)d[(av)-ck.6 ( )-6.2 (i)-3.1 (ou 20.94 5.46 (o5)Td[(G)-2

touch. A gradation in sexual harassment offences necessarily implies a gradation of possible sanctions. And the existence of a zero-tolerance policy to sexual harassment does not alter that. As the UNDT correctly reasoned, the zero-tolerance policy does not rule out the use of progressive discipline. Zero tolerance merely refers to the attitude of the Organization to pf 9t[(to)-3 (l)0.8 (no)-3 (t)-0.9 (g/Subtype0)5051-3.3(s)-26uJ0.(f)-3.9 n s/(l)0.8 (y)ay

53. The UNDT likewise erred in its appraisal that the picture of a penis lacked shocking content and was not pornographic or prurient. Showing a colleague a picture of a penis can cause offence or humiliation, and whether it was shocking, prurient, or pornographic, although relevant, is not decisive. The behaviour was puerile and offensive; and offence was taken. It was compounded by the comments about breasts and the water jets, as well as the unwelcome knocking on the door of Ms. S. The two women confirmed to the investigators that they felt uncomfortable, shocked, and disgusted by the prohibited conduct. All individuals are entitled to be free of this kind of puerile behaviour in the work context. Making unwelcome, suggestive, sexual comments or innuendos to colleagues and showing them photographs of genitalia is unbecoming and disregarding of sensibilities, it violates the obligation of an international civil servant to uphold the highest standard of integrity and naturally would undermine professional confidence. Persons of mature character would know this.

54. Further, and importantly, at the time of the incidents the two complainants worked with Mr. Szvetko in the UNHCR's Budapest office in the same section of the office. The objectionable behaviour, and the complainants' responses to it, as just said, inevitably would have impacted on the work relationship with possible lasting effects. Mr. Szvetko's very presence at the office would have been an ongoing reminder to the complainants of his upsetting distasteful actions.

55. The behaviour of Mr. Szvetko thus reflected poor judgement and a deficient consciousness on his part about its potential for harm to his relationship with his colleagues. The offensive conduct looked at cumulatively (the inappropriate remarks, sharing the photograph of genitalia and the knocking on the door late at night) went beyond the limits of acceptable flirtation or playful banter. The conduct was inconsistent with the applicable ethos expected by the Organisation from those responsible for executing its mandate. The damage to trust and confidence accordingly rendered a continued employment relationship with Mr. Szvetko less tenable. This factor was a highly relevant consideration in determining a proportionate sanction. As we stated in *Mbaigolmem*,[5] the Organisation is entitled and obliged to pursue a severe approach to sexual harassment. The message needs to be sent out clearly that staff members who sexually harass their colleagues normally should expect to lose their employment.

[5] *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, para. 33.

56. Accordingly, the UNDT erred in fact in finding that the sexual harassment had no substantial effect and in its assessment of the nature and severity of the misconduct, which was persisted in for the duration of a significant part of the retreat, caused obvious discomfort, anxiety, humiliation and embarrassment to the complainants, and, in the final analysis, undermined the collegial professional relationship.

57. In so far as Mr. Szvetko has argued that the sanction is disproportionate for want of consistency, it must be agreed that the principle of equality of treatment of staff members (the parity principle) is always an important consideration. Similar cases should be treated in the same way. However, there are limits to the parity principle and perfect consistency will be difficult to achieve in a multiple agency Organisation operating in different contexts around the globe. No approach will provide clear cut answers as to what constitutes a suitable disciplinary sanction in every single case. The imposition of a sanction is not a mechanistic process which leads to easily predictable solutions. The Administration has to consider a wide range of often conflicting considerations which may be difficult to resolve. Sanctions applied in previous cases are no more than a guide, and the Administration, in accordance with the principle of deference, should enjoy a margin of appreciation to flexibly impose different sanctions provided they fall within a reasonable range of proportionate options. This will especially be the case where there has been a shift in social *mores* in the workplace, as is the case with conduct of a sexual nature in the current climate, and where the Organisation has communicated unequivocally to staff members that a very high standard of behaviour is expected of them in such regard.

58. Hence, while the conduct in this case was less egregious than other instances of sexual harassment that have led to dismissal in the past and may reasonably have been sanctioned with a lesser penalty, it does not follow that dismissal was not reasonably appropriate in light of the damage to confidence it caused. In these circumstances, the decision to impose the sanction of separation fell within the reasonable range of disciplinary options and was one to which the UNDT ought to have deferred. The sanction was proportionate and the UNDT erred in holding otherwise.

59. The appeal must be granted.

Judgment

60. The appeal is granted and a1ant2.764.599 Tf The