



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2018-UNAT-889

Sall

(Appellant/Respondent on Cross-Appeal)

v.

Secretary-General of the United Nations
(Respondent/Appellant on Cross-Appeal)

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge John Murphy Judge Martha Halfeld
Case No.:	2018-1182
Date:	26 October 2018
Registrar:	Weicheng Lin

Counsel for Mr. Sall: Abbe Jolles

Counsel for Secretary-General: Wambui Mwangi

JUDGE SABINE KNIERIM , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal

that the matter be referred to the Office of Human Resources Management (OHRM) through the Under-Secretary-General, Department of Field Support (DFS), for appropriate action against Mr. Sall. On 16 June 2013, the UNAMID/SIU referred the matter to the Office of Internal Oversight Services (OIOS) for assessment. OIOS sought clarifications from the UNAMID/SIU on 28 October 2013, including an evidential statement of Mr. WH, the Chief of the Conduct and Discipline Team (CDT), UNAMID. On 11 December 2013, the UNAMID/SIU sent an amended report to OIOS. The report contained additional evidence gathered during the course of the investigation against Mr. Sall, including a copy of an interview conducted with a team leader, UNAMID/SIU, on 23 November 2013. The report mentioned that the investigator had, for a second time, failed to obtain a statement from Mr. WH, whom the report describes as a witness who visited the scene after the incident before the UNAMID/SIU arrived. The investigation continued until April 2015. A former UNAMID staff member, Mr. AR, was interviewed on 26 January 2015 and Mr. WH was interviewed on 7 April 2015 by the UNAMID/SIU, as requested by ID/OIOS.

6. On 31 March 2015, the complainant left UNAMID.

7. On 25 August 2015, the Investigations Division, OIOS (ID/OIOS) submitted an "Assessment of the [SIU] report on a physical and sexual assault by a staff member at [UNAMID]" in which it concluded as follows: "[I]n as far as circumstances allowed it, [UNAMID/SIU] conducted a full and thorough investigation of the reported misconduct. (...) OIOS considers this case closed." Based on this report, the Director ID, OIOS, issued a confidential memorandum dated 25 August 2015 titled "Completion on referral response (ID Case No. 0300/13 [C])" which, *inter alia*, states as follows: "[ID/OIOS] acknowledges receipt of the responses from [UNAMID] (...). OIOS notes the clarifications and further evidence provided, and considers the case closed."

8. By memorandum dated 11 September 2015, the Assistant Secretary-General (ASG), DFS, referred the matter to the ASG, OHRM, finding that, based on the investigation report dated 10 January 2013 together with the supporting materials, there was clear and convincing evidence that Mr. Sall had physically and sexually assaulted the complainant on 3 November 2012, which constituted *prima facie* evidence that he had engaged in misconduct and violated the Staff Regulations and Rules including Staff Regulation 1.2 and Staff Rule 10.1. "DFS therefore concur[red] with the recommendation of UNAMID that Mr. Sall be subject to appropriate disciplinary action" and recommended his dismissal.

9. By a memorandum dated 15 December 2015, the Chief of the Human Resources Policy Service, OHRM, issued formal charges of misconduct against Mr. Sall and requested him to provide comments within two weeks. Mr. Sall claims to have effectively received the memorandum on 19 January 2016. Subsequently, his counsel was provided several extensions of the time limit to submit comments. On 20 April 2016, Mr. Sall filed his comments on the allegations of misconduct, requesting that the investigation be closed because no action was required as OIOS had closed the matter and indicating, *inter alia*, that the complainant had withdrawn her complaint.

10. On 4 May 2016, the ASG/OHRM informed Mr. Sall of the decision of the Under-Secretary-General for Management (USG/DM) to impose the disciplinary measure of separation from service with compensation in lieu of notice without termination indemnity in accordance with Staff Rule 10.2(a)(viii), for having physically assaulted the complainant.

11. On 29 July 2016, Mr. Sall filed an application with the UNDT contesting the decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity and requesting “reinstatement with back pay and benefits”.

12. By joint submission filed before the UNDT on 9 November 2017, the parties agreed that no oral hearing be held in this case.

13. The UNDT rendered its Judgment on 4 May 2018, granting the application in part. It found that the contested decision to impose the disciplinary sanction of separation from service was unlawful because it had been taken on the basis of the evidence and recommendations contained in the January and December 2013 reports although the investigation was not finalized at the time as additional interviews were conducted in January and April 2015. No new investigation report was prepared in 2015 and there was no mention of the additional 2015 witness statements in the referral to the ASG/OHRM on 11 September 2015 or the ASG/OHRM's 4 May 2016 letter conveying the contested decision by the USG/DM. The UNDT found that the confidential ID/OIOS assessment report dated 25 August 2015 was not communicated to the UNAMID/SIU, was not part of the documentation presented to the ASG/OHRM and/or the USG/DM, and therefore, remained unknown to the decision-maker. The UNDT further found that no exculpatory evidence, such as the alleged withdrawal by the complainant of her complaint

evaluated or taken into consideration during the investigation and disciplinary process. Mr. Sall was not informed after his last interview in 2012 that the investigation was still ongoing and he was not re-interviewed in relation to the factual elements presented by the witnesses in 2015 and therefore had no opportunity to present any additional explanations or evidence in his defence. Moreover, the UNDT considered that the plain language used in the ID/OIOS memorandum dated 25 August 2015, together with the non-communication of the strictly confidential OIOS assessment report, created the appearance of a *tabula rasa* of the case. Consequently, the ensuing disciplinary action was unlawful. The UNDT stated that in light of these procedural irregularities, there was no need to further review whether the facts in question had been established, whether those facts constituted misconduct and whether the sanction imposed was proportionate to the misconduct committed.

14. By way of relief, the UNDT ordered rescission of the decision to separate Mr. Sall from service and removal of any reference related to this disciplinary sanction from his official status file as well as USD 5,000 compensation in lieu of rescission. Furthermore, the UNDT awarded material damages in the form of Mr. Sall's net base salary for the period of 8 May 2016 (the date he was separated from service) to 30 June 2016 (the date of the expiry of Mr. Sall's appointment) minus the compensation in lieu of notice received by Mr. Sall. It rejected Mr. Sall's request for reinstatement, considering that his appointment would have expired on 30 June 2016 and that fixed-term appointments do not carry any expectancy of renewal. The UNDT further noted that Mr. Sall did not request moral damages.

Submissions

Mr. Sall's Appeal

15. Mr. Sall submits that he was denied due process during the investigation and disciplinary proceedings. He asserts that such denial of due process rendered his separation defective and, as such, he must be reinstated with back pay. He submits that if no reinstatement was granted, due process requirements would be systematically voided as only reinstatement constitutes an effective remedy.

16. Moreover, Mr. Sall asserts that he is entitled to moral damages. As he was "discarded (...) like the trash", left without employment in a foreign country and his family was "left to destitute, to starve to death", this constitutes harm *per se* from which moral damages are inferred. He also

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is now estopped from requesting moral damages. Second, it is a misrepresentation of the facts for Mr. Sall to claim that he was separated from service and abandoned in Darfur. In fact, he was paid one-month salary in lieu of notice and all the benefits and entitlements associated with separation such as repatriation and relocation grants. Third, as there was no fundamental breach of Mr. Sall's rights and he has failed to present evidence of harm, his request for moral damages before the Appeals Tribunal is legally unsustainable.

20. Consequently, the Secretary-General requests that the Appeals Tribunal reject the appeal.

The Secretary-General's Cross-Appeal

21. In his cross-appeal, the Secretary-General argues that no procedural irregularities warranted the rescission of the contested disciplinary measure and the subsequent award of compensation in the present case.

22. According to the Secretary-General, the UNDT erred in fact and in law in finding that the contested decision was unlawful and therefore it erred in resc6.6(h)-ted dNlh-appeal, I and t onetary-0162 Tc -4.55

As it was not relevant to the matter at hand, the statement was not shared with Mr. Sall but he nonetheless had an opportunity to comment on the allegations of assault dating from 2011 which were part of the investigation report. In addition, the statements given by Mr. WH and Mr. AR did not warrant a re-interview of Mr. Sall as there was no new material evidence in their statements which merely corroborated previous accounts. The main fairness requirement in a subject interview, namely that the subject has an opportunity to respond to all allegations presented against him, had been respected and the fact that Mr. Sall was not re-interviewed consequently does not amount to a procedural irregularity. Even if it did, such irregularity would not have affected the contested decision as the evidence of physical assault, in particular the consistent and credible evidence given by the complainant in her five interviews, which was corroborated by other witness statements and the medical reports, was overwhelming.

24. Second, the UNDT erred in concluding that the investigation had been closed by OIOS and should therefore not have resulted in a disciplinary measure. The UNDT misunderstood the nature and legal effect of the 25 August 2015 OIOS assessment report which was an internal, strictly confidential document for the decision-makers. The UNDT erred in law by referring to Section 6.3.1 of the OIOS Investigations Manual as it was not an investigation report arising from an investigation carried out by OIOS but rather an assessment by OIOS of an investigation carried out by UNAMID/SIU. The UNDT further erred in law and on a question of fact when it concluded that a closure notice had been issued in this case. A closure notice is sent to a subject who was interviewed and investigated by OIOS informing him or her that the investigation is closed. In this case, however, there was no communication between OIOS and Mr. Sall. OIOS did not interview him or any of the witnesses and did not issue an investigation report but only assessed whether UNAMID/SIU had carried out a thorough investigation. As the 25 August 2015 communication was not sent to Mr. Sall, it could not create any misunderstandings or expectations for him. In accordance with its consistent practice, the language used by OIOS was to be understood as meaning that OIOS would close the case in its case management system and the investigation was to be continued by other investigatory bodies, as was clarified by the Director, ID/OIOS, in his witness statement before the UNDT.

25. The Secretary-General further argues that, irrespective of the procedural irregularities the UNDT may have found in this case, which he argued did not occur, the UNDT failed to exercise its jurisdiction in not conducting a judicial review of the disciplinary measure to render a fully reasoned judgement as required by the Appeals Tribunal jurisprudence on the standard of review

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clearly defined by the parties. We note, further, that before the UNDT, the parties agreed not to have a hearing and to let the case be decided on the papers. It is only before the Dispute Tribunal as the court of first instance that oral hearings form a common part of the proceedings while the Appeals Tribunal will only hold hearings under exceptional circumstances.

Receivability of the cross-appeal

31. The Secretary-General's cross-appeal is receivable. The admissibility of cross-appeals is governed by Article 9(4) of the Rules, which reads as follows:

... Within 60 days of notification of the ap

disciplinary measure unlawful.¹ Even a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of grave misconduct, especially if the misconduct consists of a physical or sexual assault.

34. The UNDT erred in finding that the contested 4 May 2016 decision was taken exclusively based on evidence contained in the January and December 2013 UNAMID/SIU reports although the investigation continued until April 2015 with interviews of two additional witnesses. We are convinced that the totality of the evidence was taken into account as OHRM stated in its 4 May 2016 letter that the allegations were based “among other things” on the explicitly listed evidence and referred to the “entirety of the record”. Further, the relevance of the two additional witness statements was minimal as they did not contain any material evidence (Mr. AR’s statement was not related to the 3 November 2012 incident and Mr. WH’s statement provided, if anything, a further confirmation of the incident as described by other witnesses and the complainant).

35. The UNDT also erred in holding that the decision-makers failed to consider exonerating evidence, in particular the reference in the interview conducted with Mr. AR on 26 January 2015 to a possible change of the complainant’s account of the facts so as to match Mr. Sall’s version and Mr. Sall’s indication in his submission filed on 20 April 2016 that the complainant had withdrawn her complaint. There is no exonerating evidence in the present case. Mr. Sall has advanced no evidence of a withdrawal of the complaint other than his bare assertion and the complainant’s consistent statements show that she did not intend to retract her complaint despite threats by Mr. Sall. Mr. AR in his 26 January 2015 statement, after making clear that he had no knowledge of the 3 November 2012 incident as he had already left UNAMID, referred to another incident of alleged assault by Mr. Sall prior to November 2012 where the complainant had subsequently changed her account of the facts.

36. The UNDT further erred in holding that Mr. Sall’s due process rights were violated because he was not informed of the continuation of the investigation after his last interview on 9 December 2012, was not re-interviewed in light of the witness statements of January and April 2015 and had no opportunity to defend himself against them. Following

¹ *Muindi v. Secretary-General of the International Maritime Organization*, Judgment No. 2017-UNAT-782, para. 48. See also *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819.

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dated 7 November 2012, both stamped and signed by a medical doctor employed by UNAMID, are consistent with the assault described by the complainant. Additionally, one UNAMID staff member provided a statement on the situation she found the complainant in immediately after the incident and three other UNAMID staff members provided statements related to the complainant's apparent physical state shortly thereafter. These various evidentiary statements consistently relayed the complainant's version of the events which added to their credibility. Finally, several witnesses testified that Mr. Sall had already physically assaulted the complainant prior to November 2012 (in August 2011 and February 2012). By contrast, Mr. Sall's statements reveal that he was vague, evasive and contradictory in his account. His credibility has been additionally damaged by countervailing evidence, including a statement of a UNAMID staff member who refuted Mr. Sall's account of the morning preceding the incident.

41. The disciplinary measure of separation from service is proportionate. According to the established jurisprudence, the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case and to the actions and behaviour of the staff member involved.⁷ For that reason, it is only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, that the judicial review would conclude its unlawfulness and change the consequence⁸. Given the kind and degree of misconduct, namely severe and repeated physical assault involving a sexual element, if not sexual assault, inflicted upon a former United Nations volunteer, separation from service lies within the discretion of the Secretary-General and is not disproportionate.

42. As the disciplinary decision is lawful, there can be neither rescission nor reinstatement.

⁷ *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, para. 19.

⁸ *Ibid.*, para. 21.

Compensation for material damages

43. The UNDT erred in awarding Mr. Sall compensation for material damages in the amount of his net base salary for the period from the date of his separation from service to the expiration date of his employment contract. As there was no illegality, there can be no compensation for harm under Article 10(5)(*b*) of the UNDT Statute.

Compensation for moral damages

44. Mr. Sall is not entitled to compensation for moral damages as he did not request compensation for moral damages before the UNDT nor did he present evidence of alleged harm to him and his family as required by Article 9(1)(*b*) of the Appeals Tribunal Statute. Additionally, the impugned administrative decision is not unlawful.

Judgment

45. The appeal is dismissed and the cross-appeal is upheld. Judgment No. UNDT/2018/056 is reversed to the extent that it ordered rescission, in-lieu compensation and compensation for material damages, and it is affirmed to the extent that it rejected Mr. Sall's request, (HE)8.3()]