



Case No.: UNDT/NY/2010/020/
UNAT/1623

Judgment No.: UNDT/2011/046

Date: 9 March 2011

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Judgment No.

embarrassed to shout for help. All I could say was say 'HEY' and he retorted, 'WHY NOT?' and I said, 'NO, NO, NO'."

5. The Complainant did not immediately raise the incident with the Applicant at the project site. During the drive to the next site, the Complainant wrote a description in her notebook of the incident that had just occurred.

6.

7. On 10 October 2007, at 7:52am, the Applicant replied to the Complainant's email (mistakenly addressing it to "Nora") stating, "I am very sorry. I did not mean what you have mentioned, let's discuss." On 10 October 2007, at 7:55am, the Applicant wrote another email to the Complainant, apologising for getting her name wrong, stating that the incident was a misunderstanding and that he was sorry.

8. The Applicant then called the Complainant and she agreed to meet him at the canteen that morning. They, in fact, did meet and they discussed together what had occurred. During the substantive hearing, the Applicant and the Complainant gave differing accounts of what had transpired during the meeting. At the very least, it appears uncontradicted that the Applicant and the Complainant came to an understanding that the matter would be handled between themselves only, on a private basis.

9. Notwithstanding the understanding between the Applicant and the Complainant to handle the matter on a private basis, on 11 October 2007 the Applicant forwarded the series of emails dated 10 October 2007 between himself and the Complainant (referenced in paras. 6 and 7 above) to Mr. Edouard Beigbeder, Chief of Field Office, UNICEF Banda Aceh, and Mr. Alaa Al-Alami, Operations Manager, UNICEF Banda Aceh. Since the Chief of Field Office was not in Banda Aceh at the time, the Chief of Field Office forwarded the correspondence to Ms. Ingrid Kolb-Hindarmanto, Planning Officer, UNICEF Banda Aceh, and requested her to meet with the Applicant and the Complainant.

10. On 22 October 2007, a preliminary investigation panel consisting of the Planning Officer, the Operations Manager and Ms. Marianne Kelly, Human Resources Officer, met with the Applicant and the Complainant.

11. On 13 November 2007, the Complainant submitted a formal written complaint of sexual harassment to the Human Resources Officer.

12. On 15 November 2007, Mr. Gianfranco Rotigliano, Representative, UNICEF Jakarta, submitted the Complainant's sexual harassment complaint to

Mr. Steven Allen, Director, Division of Human Resources, UNICEF's New York headquarters ("NYHQ").

13. On 7 December 2007, the Applicant responded to the written complaint of sexual harassment.

14.

16. In January 2008, the appointed investigation team went to Banda Aceh and investigated the sexual harassment complaint. As part of the investigation, both the Applicant and the Complainant were interviewed by the investigation team, as well as Ms. Anne Njuguna, Human Resources Officer, and a witness, Mr. Sabirin (first name not indicated), identified as a “teacher” or “caretaker” who may have witnessed the incident in question.

17. On 6 February 2008, the formal investigation team issued its final report, concluding “we believe that [the Applicant] sexually harassed the Complainant as described above”.

18. By a letter dated 5 March 2008 from the Director of the Division of Human Resources, the Applicant was charged with misconduct. The letter described the charge concerning the Complainant as follows (a second charge of misconduct contained in the letter is omitted):

You engaged in sexual harassment by your unwelcome sexual advances and touching in an inappropriate manner of [the Complainant], UNV Site Monitoring, Construction Unit, UNICEF Banda Aceh, Indonesia, that caused her offence and humiliation which created an intimidating, hostile, and offensive work environment in violation of UNICEF’s Administrative Instruction, Working with Respect in the UNICEF Workplace, UNICEF’s Policy on Preventing Harassment, Sexual Harassment and Abuse of Authority (CF/AI/2005/017), dated 16 December 2005.

The letter concluded that:

The action described in the charges above, indicates serious violations of the basic requirements of international civil servants to uphold the highest standards of conduct in the performance of their duties. On this basis, the Executive Director has decided to charge you with allegations of misconduct.

19. On 5 May 2008, UNICEF informed the Applicant that his case would be referred to an *ad hoc* JDC, as per the UNICEF Human Resources Policy and Procedure Manual, Chapter 15, section 5, on JDCs.

Case No. UNDT/NY/2010/020/UNAT/1623

Judgment No. UNDT/2011/046

d. Whether the disciplinary measure imposed was proportionate to the misconduct.

Consideration

Burden of proof

30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi*(1998)).

31. Where a *prima facie* case of misconduct has been established, the burden is on the Applicant to provide satisfactory evidence justifying the conduct in question (see UN Administrative Tribunal Judgment No. 1023, *Sergienko*(2001)). In *Abu Hamda* 2010-UNAT-022, at para. 20, the Appeals Tribunal stated:

Abu Hamda failed to produce any evidence to show that the decision was biased, improperly motivated, or flawed by procedural irregularity or error of law.

32. Thus, it is for the staff member who is challenging a decision of the Administration to show sufficient grounds to interfere in the disciplinary measure. In other words, the staff member is required to produce evidence to show that the Administration's decision was biased, improperly motivated or flawed by procedural irregularity or error of law.

33. UNDT/2010/185 *M'Bra* similarly states the role of a tribunal in disciplinary cases (at paras. 58–59):

The Tribunal's task in disciplinary matters is to review the evidence,

Case No.

displayed ambivalence over the Complainant's attempts to privately resolve the matter at the canteen and then proceeding with a formal complaint several weeks later. The Applicant also criticises the Banda Aceh formal investigation team and the ad hoc JDC for their alleged failure to take into account other, external evidence, such as the account given by the teacher/caretaker Mr. Sabirin.

38. The Applicant's criticisms of the evidence in this case simply are unfounded, for: (a) the Complainant's version of events has remained consistent from the time of her initial complaint through her testimony to the Tribunal; (b) the Complainant's version of events has been analysed independently by three different investigating bodies (the UNICEF managers in Banda Aceh who conducted a preliminary investigation in October 2007, the formal investigation team in January 2008, and the JDC in 2008), all of which found the Complainant's version of events to be true; (c) the Complainant's version of events is corroborated by physical evidence in the form of her notebook description, in the form of emails sent to the Applicant, and by the layout of the project site itself; (d) the Applicant's differing versions of events renders him not at all credible (set out below); and (e) the testimony of the teacher/caretaker actually weakened the Applicant's case, rather than strengthening it.

39. The Tribunal itself heard the Complainant's testimony by telephone link and assessed her credibility. Her testimony continued to be consistent with her previous statements made during the preliminary and formal investigations that the Applicant engaged in sexual harassment through an unwelcome sexual advance. The Complainant's statements made throughout the investigation of the incident reveal the following:

- a. At the project site the Applicant "gripped" the Complainant on her breasts and that she was too shocked to say or do anything then;
- b. During the drive to the next site, the Complainant wrote in her notebook a description of the incident that had occurred at the school site;

c. During the evening of 9 October 2007 the Complainant wrote an email to the Applicant entitled “Sexual Harassment”—the description of which was consistent with the notation in her notebook;

d. On 10 October 2007 the Complainant informed the UNICEF Human Resources Officer, UNICEF Banda Aceh, and on 16 October 2007 the UNICEF Planning Officer, UNICEF Banda Aceh, the details of the sexual harassment incident—information that again was consistent with her notebook and eventual formal sexual harassment complaint;

e. The Complainant testified about the incident to a preliminary investigation panel on 22 October 2007—testimony that, again, was consistent with the facts in her notebook and with her eventual formal sexual harassment complaint;

f. On 13 November 2007 the Complainant wrote a formal written complaint with the same version of events described in her notebook and version given to the UNICEF [human resources] managers investigating the incident;

g. The Complainant testified to the Banda Aceh formal investigation team regarding the incident, which yet again was consistent with the details previously given.

Applicant’s testimony

40. The Tribunal heard the testimony of the Applicant. Many difficulties were noted in the Applicant’s testimony, and these discrepancies (as well as the Applicant’s general lack of credibility) do not render his version of events credible:

Whether the Applicant touched the Complainant

a. Throughout the entire investigation, the Applicant admitted to touching the Complainant at the project site, but claimed he only touched her “shoulder”. During the substantive hearing, however, the Applicant testified

that he did not touch the Complainant at all. Such inconsistent statements show that Applicant's version of events is not credible and cannot be believed;

The need for an apology

b. The day after the incident, the Applicant apologised to the Complainant—if the Applicant had not touched the Complainant in an inappropriate manner, why did he then apologise to her the next day? What would be the reason for an apology, if the Applicant did not engage in unacceptable behaviour towards her? The Applicant testified that he forwarded the Complainant's email to his senior manager, the Chief of Field Office. If the Applicant did not "touch" the Complainant, why would the Applicant initiate the involvement of his senior managers, who are obligated to respond to sexual harassment complaints? Although the Applicant had agreed with the Complainant at the canteen to handle the matter privately between them, it was the Applicant himself who initiated the actions which involved UNICEF senior management and which escalated the situation. Upon hearing that other UNICEF staff members had become aware of the incident through the Applicant, the Complainant felt obligated to submit a formal sexual harassment complaint to have her position known to management;

A conspiracy against the Applicant involving outside vendors

c. During the substantive hearing, the Applicant testified that the Complainant's complaint was based on a conspiracy against him either involving the UNICEF Banda Aceh Office or outside vendors. The Applicant did not proffer any evidence to support this defence and this part of the testimony should be disregarded. It is discussed further below at paragraph 65.

Other testimony

41. The Tribunal heard testimony from Ms. Turmel, one of the investigators from the Banda Aceh formal investigation team. She testified as to the procedures of the investigation and the interview process of the witnesses. She stated that the Complainant “described precisely” what had occurred and that she had provided “a lot of details”. The team interviewed the teacher/caretaker Mr. Sabirin; Ms. Turmel noted that Mr. Sabirin did not notice whether the Applicant had touched the Complainant and that he did not speak English, so he would not have understood any conversation between the Applicant and the Complainant at the project site. The physical layout and her accurate description of the disabled toilet corroborated the Complainant’s version of events.

42. The Banda Aceh formal investigation team had “no doubt” that the Complainant’s version of events was true, and that the Applicant’s version was untrue, as the Applicant needed to be prompted and changed his interview statements several times. Ms. Turmel and Mr. Christensen, the other investigator, concluded that Applicant had sexually harassed the Complainant.

43. The Tribunal also heard the testimony of Ms. Mitchell, former Chairperson of the *ad hoc* JDC constituted to review the allegations of misconduct against the Applicant. Ms. Mitchell stated that the *ad hoc* JDC took note that the Complainant had been consistent throughout her account of the incident and that she documented the incident in her notebook and that night via email to the Applicant. The *ad hoc* JDC noted the contradictory evidence reported by Applicant. The *ad hoc* JDC agreed with the findings of the formal investigation report. Ms. Mitchell noted that the *ad hoc* JDC could have recommended summary dismissal for the Applicant. However, considering the Applicant’s service to the Organization and his reputation, the *ad hoc* JDC nevertheless recommended a less severe disciplinary measure of separation from service without notice, which entitled the Applicant to some financial entitlement.

44. The Tribunal finds that, based on the testimony at the substantive hearing and based on the entire file evidence in this case, the facts, on which the disciplinary measure was based, have been established.

Did the established facts amount to serious misconduct under applicable staff regulations and rules?

45. The Applicant's second challenge to the evidence in this case is both factual and legal: the Applicant contends that the Complainant was erroneous in her subjective "belief" that she was the victim of sexual harassment and that what occurred did not amount to a violation of sexual harassment as set out in the UNICEF Sexual Harassment Policy (CF/AI/2005/017).

46. The UNICEF Sexual Harassment Policy defines sexual harassment as:

[a]ny 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 may occur when it ... creates an intimidating, hostile, or offensive environment. It can include a one-time incident ... Sexual harassment may also occur outside the workplace

47. The Applicant relies upon what he terms "the problem of subjectivity" and quotes the former UN Administrative Tribunal Judgment No. 707, *Belas-Gianou* (1995):

IX. A belief in good faith that one has been the victim of sexual harassment, however strongly held, does not automatically mean ... that sexual harassment occurred Sexual harassment would become self-defined by anyone claiming in good faith to be a victim.

48. The facts of *Belas-Gianou*, however, are not similar to the case before the Tribunal and the Applicant, as well, has only provided the Tribunal with a partial quote from the judgment, omitting relevant language that would eliminate *Belas-Gianou* as persuasive authority.

49. In *Belas-Gianou*, the conduct complained of included visits to the complainant's office unrelated to her work responsibilities, unsolicited discussion with her of the manager's personal life, "frequent sexual innuendos", and the use of personal terms of endearment. Given arguably ambiguous conduct for the purposes of ST/AI/379 (Procedures for dealing with sexual harassment) of 29 October 1992, the former UN Administrative Tribunal there was concerned with whether the conduct in question constituted actual sexual harassment under ST/AI/379, and it is in that context that the former Administrative Tribunal's comments were made regarding a victim's "strongly held" belief in sexual harassment. Because of the ambiguous nature of the conduct complained of in *Belas-Gianou* the former Administrative Tribunal observed that it was required to carefully examine claims of alleged sexual harassment to ensure that they are soundly based.

50. Unlike *Belas-Gianou*, the Applicant's conduct in the case before this Tribunal was unambiguous and has been clearly established: the reaching across the Complainant's shoulders and "gripping" her breasts in the workplace clearly constitutes an "unwelcome sexual advance, 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" as defined in the UNICEF Sexual Harassment Policy.

51. Under the UNICEF Sexual Harassment Policy, it is clear that the subjective belief of the victim must be taken into account in determining whether sexual harassment, as defined, has occurred. Under the UNICEF Sexual Harassment Policy, a victim's perceptions are both valid and necessary to determine that the conduct in question was sexual in nature and has caused offense and humiliation. The Policy prohibits "unwelcome sexual advance[s]", which only can be ascertained against the perceptions of the person experiencing the behavior. Similarly, the Policy announces a prohibition against "behavior of a sexual nature that might reasonably be expected to or be perceived to cause offense or humiliation to another". As the facts of this case amply demonstrate, the Complainant here was greatly offended and humiliated

by the Applicant's actions towards her. The Tribunal only could evaluate the criteria of offense and humiliation by eliciting testimony on those points from the Complainant. The "problem of subjectivity" claimed by the Applicant to be a problem in this case is not a problem at all, and perceptions of a victim are not to be dismissed as being irrelevant in a case of sexual harassment.

52. The Applicant has tried to explain away his conduct in this case by alternately contending that the Complainant misunderstood his actions or that, culturally, he had a different understanding of his actions. At the merits hearing, the Applicant stated, "I have a habit of touching people when I talk to them", as if that would justify his actions. The Tribunal unequivocally rejects such an interpretation, for as a United Nations employee, the Applicant surely was aware of his obligation under former staff regulation 1.2(f) that he was to conduct himself at all times in a manner befitting his status and should not engage in any activity that is incompatible with the proper discharge of his duties.

53. Furthermore, under former staff rule 101.2(d), the Applicant was charged with knowing that "[a]ny form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited".

54. Thus, the Applicant's defense of the "problem of subjectivity" (on the part of Complainant) and his own defence of cultural differences both fail.

55. The Tribunal wishes to emphasise that, in sexual harassment cases, credible oral victim testimony alone may be fully sufficient to support a finding of serious misconduct, without further corroboration being required. Indeed, in this particular case where the Complainant has provided such reliable and credible oral testimony, the Tribunal would be justified in rendering its judgment relying on this oral testimony alone. It is not always the situation in sexual harassment cases that corroboration exists in the form of notebook entries, email communications, or other similar documentary evidence, and the absence of such documents should not

automatically render a complaining victim's version as being weak or meaningless. As is always the case, any witness testimony should be evaluated to determine whether it is believable and should be credited as establishing the true facts in a case.

56. The Tribunal nevertheless observes that, in this case, the Complainant's account has been verified by the three investigating bodies that looked into the matter which independently assessed the Complainant's statement of facts, as well as her credibility. When measured against the Applicant's version of events, in particular his weak and unconvincing testimony, the Complainant's statement of facts is fully established as being true.

57. By any objective measure, the Applicant's conduct in this case was prohibited by UNICEF rules and regulations and amounts to serious misconduct.

58. The Tribunal finds that the established facts amounted to serious misconduct under the UNICEF Sexual Harassment Policy.

Was the UNICEF Executive Director's decision to separate the Applicant a valid exercise of her discretionary authority?

Was the Applicant afforded due process?

59. Under Abu Hamda it is a general principle of administrative justice that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law. As a normal rule, tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality or procedural impropriety. Abu Hamda found the former UN Administrative Tribunal Judgment No. 941, Kiwanuka (1991), to be of persuasive authority.

60. Discretionary authority may be subject to review and reversal if it is shown to be based on a mistake of fact, a lack of due process, or if it is arbitrary or motivated by prejudice or other extraneous factors (see the former UN Administrative Tribunal

the more severe measure of summary dismissal), so that the Applicant would receive repatriation benefits—which are substantial.

72. Since the *ad hoc* JDC specifically considered alternate sanctions, since it rendered a lesser sanction than the Applicant could have been given, and since the Applicant did not receive the most severe sanction that could have been given to him (summary dismissal without notice), the Tribunal finds that the disciplinary measure imposed was proportionate to the misconduct that the Applicant engaged in.

Conclusion

73. The Applicant's claim is rejected in its entirety.

(Signed

Judge Marilyn J. Kaman

Dated this 9th day of March 2011

Entered in the Register on this 9th day of March 2011

(Signed

Santiago Villalpando, Registrar, New York