



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

GELSEI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Evelyn W. Kamau, OSLA

Counsel for Respondent:

Elizabeth Brown, UNHCR

Francisco Navarro, UNHCR

Introduction

1. The Applicant, a staff member of the United Nations High Commissioner for Refugees (“UNHCR”) in Budapest, Hungary, contests the Administration’s decision to impose the disciplinary measures of loss of three steps and deferment, for a period of four years, of eligibility for consideration for promotion, as well as a “managerial action” to provide him with training and coaching in matters related to professional conduct.

2. For the reasons stated below, the application is rejected.

Facts

3. The Applicant joined UNHCR in 2007. At the relevant time, the Applicant was serving as a Senior Recruitment Associate at the G-7 level in Budapest, Hungary.

4. AA (name redacted) joined UNHCR in January 2017 as a Senior Data Management Assistant on a temporary appointment at the G-5 level.

5. In April 2017, AA, during her visit to Greece for official business, sent a Facebook message to the Applicant asking him if he wanted anything. The Applicant then sent a link to a webpage with the Google image search results for “Greek phallus opener” and wrote that he wanted “one of those”. He then added “just kidding”.

6. In May 2017, the Applicant sent AA a link to the “orgasms sound library” through Facebook Messenger. The webpage offered audio-recordings of women’s orgasm sounds.

7. On 23-31 May 2017, the Applicant, AA, and BB (name redacted), another female staff member, travelled to Addis Ababa for official business where AA and BB shared a room and the Applicant stayed in a separate room. They were scheduled to travel from Addis Ababa to Nairobi for official business, but BB fell ill and could no longer go to Nairobi. It was therefore only the Applicant and AA who went to Nairobi.

According to AA, the initial idea was for her, BB and the Applicant to share a hotel room in Nairobi, but since BB did not join them due to health issues, AA and the Applicant shared the same room for two nights, using separate beds.

8. In June 2017, the Applicant sent AA a video titled “Funny Handjob!! Heinz Commercial”. In the video, a boy first asks a girl to give him a “blow job”, and when she refuses, asks her to give him a “hand job” and the boy says, “You hold it and imagine you are holding a bottle of ketchup and you want to get the ketchup out”. After that, the girl hits the boy’s penis (of which the image is blurred) with the palm of her hand and the video ends with an image of a Heinz Ketchup bottle.

9. In August 2017, the Applicant and AA went to Ankara for official business. The Applicant and AA had a verbal altercation after AA accused the Applicant of flirting with a female staff member in Ankara, CC (name redacted). According to DD (name redacted), another staff member in Ankara and a former colleague of the Applicant, the Applicant might have said that CC was “pretty”, but she did not recall the exact words that he used. According to the Applicant’s supervisor, the Applicant told her that he made a joking comment along the lines of “she is beautiful, don’t leave me alone with her”, in reference to CC.

10. On 3 May 2018, AA filed a complaint of sexual harassment and abuse of authority against the Applicant.

11. From May to August 2018, the Inspector General’s Office (“IGO”) investigated the allegations of sexual harassment and abuse of authority against the Applicant.

12. On 14 August 2018, IGO issued an Investigation Report. In the Investigation Report, IGO concluded that “[the Applicant] has not sexually harassed [AA] and did not abuse his authority when he included some negative comments about [AA’s] performance in [AA’s] draft [performance] report for 2017”, but that “[the Applicant] failed to act as a role model, to uphold the highest standard of conduct and to maintain an environment where hurtful behaviour has no place”.

13. By memorandum dated 22 October 2018 (“the allegations letter”), the Director of the Division of Human Resources presented the Applicant with the allegations of misconduct to which he was invited to provide comments. In particular, the Applicant was asked to provide comments in response to the following allegations:

- a. “[The Applicant’s] decision to share a hotel room with [AA] while on mission exhibited poor judgment and may have exposed [his] unit and UNHCR to allegations of conflict of interest or improper behaviour”;
- b. “[His] comments about a local colleague during a mission to Ankara in August 2017 created a hurtful environment, as demonstrated by the altercation [he] had with [AA]”; and
- c. “The content and the tone of the links that [he] shared with [AA] on Facebook Messenger, which included an ‘Orgasm Sound Library’ and other communications of a sexual nature, are not consistent with the behaviour expected from a supervisor towards a supervisee”.

14. On 27 November 2018, the Applicant provided his comments.

15. By memorandum 28 May 2019 (“the sanction letter”), the High Commissioner of UNHCR concluded that the following facts have been established on clear and convincing evidence:

- (i) [The Applicant’s] relationship with [AA], former Senior Data Management Assistant who worked under [his] supervision, included elements of a sexual and intimate nature that went beyond the boundaries of regular interaction between a supervisor and a supervisee, although [he] did not know [AA] before she joined UNHCR in December 2016 and did not become friends with her;
- (ii) [He] sent three messages to [AA] on Facebook Messenger that had sexual content or a clear sexual innuendo. Specifically, the messages included a link to webpage with the Google image search results for “Greek phallus opener”, to a website hosted by a sex shop containing an “orgasm sounds library”, and to a video entitled “Funny Handjob!! Heinz Commercial”;

(iii) [He] accepted to share a hotel room with [AA] while traveling on official mission to Nairobi in May 2017 because [he] did not see a problem with the arrangement, not out of concern for [AA's] health or security;

(iv) [He] had an altercation with [AA] during an official mission to Ankara in August 2017 after making comments on the physical appearance of a female colleague;

(v) [His] relationship to [AA] deteriorated significantly after the altercation in Ankara.

16. The High Commissioner considered that “[the Applicant’s] conduct fell short of the standards of conduct required of [him] as a manager and supervisor” and he failed to comply with his obligations under staff regulations 1.2(b) and (f), para. 4.3 of Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (“the Policy”), and paras. 16 and 17 of the Standards of Conduct for the International Civil Service.

17. The High Commissioner found that “[his] engaging in exchanges of a sexual nature with [AA] was inappropriate and in breach of [his] obligations under the Policy” considering “[his] supervisory responsibility, the disparity of power between [him] and [AA] on account of [his] difference in age, seniority and experience with UNHCR, and [his] obligation to act as a role model”. The High Commissioner wrote that “the fact that [AA] appeared to engage in the exchanges of a sexual nature or did not reject them [did] not alter that finding” since as an “older, more senior and more experienced” supervisor, “it was [his] primary responsibility to maintain professional boundaries in accordance with [his] duty to uphold the highest standards of conduct and serve as a role model”.

18. The High Commissioner identified as aggravating circumstances that “[the Applicant has] not expressed any remorse for [his] conduct” and his submissions during the disciplinary process “cast doubt on [his] full understanding and sharing of UNHCR values as well as on [his] ability to hold managerial responsibilities in a diverse environment”. The High Commissioner considered the Applicant’s 11-year long satisfactory service record as well as an unblemished disciplinary record as mitigating circumstances.

19. In conclusion, the High Commissioner imposed the disciplinary measures of loss of three steps and deferment, for a period of four years, of eligibility for consideration for promotion. The High Commissioner also requested that appropriate managerial action be taken to provide him with training and coaching in matters related to professional conduct.

20. On 4 September 2019, the Applicant filed the present application.

21. On 20 November 2019, by Judgment No. UNDT/2019/165, the Dispute Tribunal rejected the application for being time-barred (not receivable *ratione temporis*).

22. On 26 June 2020, the Appeals Tribunal published Judgment No. 2020-UNAT-1035, remanding the case to the Dispute Tribunal for decision on its merits.

23. On 12 May 2021, pursuant to Order No. 33 (NY/2021), the Respondent filed the reply.

24. On 26 May 2021, pursuant to Order No. 49 (NY/2021), the parties filed submissions agreeing to the case being adjudicated on the papers without an oral hearing.

25. On 14 June 2021, pursuant to Order No. 49 (NY/2021), the Applicant filed the response to the Respondent's reply.

Consideration

Standard of review in disciplinary cases

26. The general standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain: (a) whether the facts on which the disciplinary measure was based have been established; (b) whether the established facts legally amount to misconduct; and (c) whether the disciplinary measure applied was proportionate to the offence (see, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024,

Portillo Moya 2015-UNAT-523, *Wishah* 2015-UNAT-537, *Turkey* 2019-UNAT-955, *Ladu* 2019-UNAT-956, *Nyawa* 2020-UNAT-1024). When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, for instance, *Molari* 2011-UNAT-164, and *Ibrahim* 2017-UNAT-776).

Whether the facts on which the disciplinary measure was based have been established

27. In this case, the Investigation Report addressed a wide range of allegations raised against the Applicant. After analyzing collected evidence, IGO concluded that some of the allegations were substantiated and the others were not. Subsequently, in the allegations letter, the Applicant was presented with the allegations that subsequently formed the basis of the disciplinary measures against him (as quoted in para. 13 above).

28. In the sanction letter, the High Commissioner of UNHCR concluded that the facts quoted in para. 15 above had been established on clear and convincing evidence.

29. In the Applicant's response to the Respondent's reply filed on 14 June 2021, the Applicant argues that the Respondent improperly expanded the basis of the disciplinary sanctions in the reply by referring to factual allegations not included in the allegations or the sanction letters and only included in the Investigation Report.

30. This Tribunal recently held in *Applicant* UNDT/2021/066 that "a very basic tenet of due process in a disciplinary case is that each of the relevant facts and allegations of misconduct must be presented to the accused person in such manner that s/he can easily understand them and is thereby afforded a fair and just opportunity to defend herself/himself. If not, the Administration cannot subsequently sanction a staff member against the backdrop of any such fact and/or allegation". By the same token, the Respondent cannot rely on allegations not formally presented to the Applicant during the disciplinary process to justify the sanction during litigation.

31. Accordingly, the Tribunal will only address allegations included in the allegations letter which subsequently formed the basis of the sanction in question. These factual allegations are as follows:

- a. The Applicant's sending three Facebook messages including the following: a link to webpage with the Google image search results for "Greek phallus opener", a weblink an "orgasm sounds library", and a video entitled "Funny Handjob!! Heinz Commercial";
- b. His sharing a hotel room with AA while travelling on official mission in Nairobi;
- c. An altercation with AA during an official mission in Ankara after making comments on the physical appearance of a female colleague in Ankara.

32. The Tribunal notes that the Applicant claims that the above-mentioned facts were taken out of context and distorted.

33. With respect to the three Facebook messages described above, the Applicant accepted that he sent these messages to AA during his interview with IGO and in his response to the allegations letter. However, in his submission dated 14 June 2021, he argues that the Respondent fails to see his sending a link to the "orgasm sounds library" within the context, which is that AA and the Applicant were having discussions about gender. However, this does not change the fact that the Applicant sent the three Facebook messages described above.

34. The Applicant does not dispute that he shared a hotel room with AA in Nairobi. The Applicant submits that this accommodation arrangement was made by AA and that he accepted it since AA insisted that she wanted to share a room to save money. However, regardless of the context, it is undisputed that the Applicant shared a room with AA in Nairobi as charged.

35. Regarding the incident in Ankara, it is undisputed that the Applicant and AA had a verbal altercation after AA accused him of flirting with a female staff member in Ankara, CC. The Applicant denies that he made any inappropriate sexual comments about CC. However, the Organization did not conclude that the Applicant made inappropriate sexual comments about CC. Rather, the Organization concluded that the Applicant commented on the physical appearance of a female colleague in Ankara.

36. The Tribunal notes that AA stated during her interview with IGO that the Applicant made inappropriate comments about CC, without specifying what exactly he said. DD testified during the interview with IGO that the Applicant casually commented to her and her partner that CC was “pretty”. The Applicant’s supervisor, who was not present in Ankara, told the IGO investigators that the Applicant told her that he made a joking comment along the lines of “she is beautiful, don’t leave me alone with her”. Other witnesses stated during the interviews with IGO that they did not recall the Applicant’s making any inappropriate comments about CC.

37. While it is clear that the Applicant had a verbal altercation with AA, the Tribunal finds that it is not established by clear and convincing evidence that the Applicant commented on the physical appearance of a female colleague given the differing testimonies of witnesses.

38. In conclusion, the Tribunal finds that the facts that the Applicant sent three Facebook messages of sexual nature and he shared a hotel room with AA were established.

Whether the established facts legally amount to misconduct

39. In the sanction letter, the High Commissioner stated that “[the Applicant’s] conduct fell short of the standards of conduct required of [him] as a manager and supervisor” and he failed to comply with his obligations under staff regulations 1.2(b) and (f), para. 4.3 of Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (“the Policy”), and paras. 16 and 17 of the Standards of Conduct for the International Civil Service.

40. The High Commissioner found that “[his] engaging in exchanges of a sexual nature with [AA] was inappropriate and in breach of [his] obligations under the Policy” considering “[his] supervisory responsibility, the disparity of power between [him] and [AA] on account of [his] difference in age, seniority and experience with UNHCR, and [his] obligation to act as a role model”. The High Commissioner wrote that “the fact that [AA] appeared to engage in the exchanges of a sexual nature or did not reject them [did] not alter that finding” since as an “older, more senior and more experienced” supervisor, “it was [his] primary responsibility to maintain professional boundaries in accordance with [his] duty to uphold the highest standards of conduct and serve as a role model”.

41. Staff regulation 1.2(b) and (f) provides as follows:

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

...

(f) While staff members’ personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status;

42. Paragraph 4.3 of the Policy provides that managers and supervisors are expected to:

a) act as role models by upholding the highest standards of conduct in order to achieve an environment free from discrimination, harassment, sexual harassment and abuse of authority, in which hurtful and destructive behaviour have no place;

b) facilitate, inspire and help to create a harmonious working environment free of disrespect, intimidation, hostility, offence and any form of discrimination, harassment, sexual harassment and abuse of authority;

c) ensure that incidents of discrimination, harassment, sexual harassment or abuse of authority are promptly addressed in a fair and impartial manner, regardless of the contractual status. Failure on the part of managers and supervisors to fulfil their obligations under this policy may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and may lead to administrative or disciplinary action;

d) disseminate UNHCR's Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority to all personnel under their supervision as well as partners; and be available to provide guidance on prevention and dealing with such forms of behaviour.

43. Paragraphs 16 and 17 of the Standards of Conduct for the International Civil Service:

16. Managers and supervisors are in positions of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect; they should be open to all views and opinions and make sure that the merits of staff are properly recognized. They need to provide support to them; this is particularly important when staff are subject to criticism arising from the performance of their duties. Managers are also responsible for guiding and motivating their staff and promoting their development.

17. Managers and supervisors serve as role models and they have therefore a special obligation to uphold the highest standards of conduct. It is quite improper for them to solicit favours, gifts or loans from their staff; they must act impartially, without favouritism and intimidation. In matters relating to the appointment or career of others, international civil servants should not try to influence colleagues for personal reasons.

44. In essence, staff regulation 1.2 requires staff members to “uphold the highest standards of efficiency, competence and integrity” and “conduct themselves at all times in a manner befitting their status as international civil servants”. Along the same lines, the Policy requires staff members to uphold the highest standards of conduct, and the Standards of Conduct for the International Civil Service requires managers and supervisors to serve as role models and uphold the highest standards of conduct.

45. The Tribunal finds that the Applicant's conduct amounts to misconduct in violation of the above-cited applicable legal framework.

46. The Applicant was a staff member with 11 years of service with the Organization and he was a supervisor to AA, who just joined the Organization on a temporary appointment. Yet, the Applicant sent inappropriate Facebook messages of sexual nature to AA, which is inexcusable conduct.

47. The Applicant argues that exchanges with AA should be seen in the context, but as the High Commissioner noted, even though AA appeared to engage in the exchanges of a sexual nature or did not reject them, he had responsibility to maintain professional boundaries as a supervisor. Therefore, the Tribunal finds that this conduct alone fell short of the standards of conduct required of him as an international civil servant as well as a supervisor.

48. The Applicant's sharing a hotel room was also inappropriate even if it was AA who insisted on sharing a hotel room. Since he was a supervisor with long service with the Organization, he had responsibility to maintain professional boundaries with AA.

49. Therefore, the Tribunal concludes that the Applicant's conduct amounts to misconduct.

Whether the disciplinary measure applied was proportionate to the offence

50. The principle of proportionality in a disciplinary matter is set forth in the staff rule 10.3(b), which provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

51. The Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behavior of the staff member involved, and the Tribunal should not interfere with administrative discretion unless "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” (see, *Portillo Moya* 2015-UNAT-523, paras. 19-21; and also *Sall* 2018-UNAT-889, *Nyawa* 2020-UNAT-1024). The Appeals Tribunal has further stated, “But due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair”. The Appeals Tribunal further explains that this means that the Dispute Tribunal should “objectively assess the basis, purpose and effects of any relevant administrative decision” (*Samandarov* 2018-UNAT-859, para. 24).

52. Before deciding the proportionality of the imposed measures, the Tribunal notes that the Respondent claims that the Applicant’s challenge to the “managerial action” to provide him with training and coaching is not receivable on the grounds that it is not an administrative decision with direct legal consequences on his contract of employment and he failed to request a management evaluation of such decision.

53. This claim is without merit. Staff rule 11.2(b) provides that a staff member wishing to contest “a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process it not required to request a management evaluation”. The challenged managerial action is a non-disciplinary measure imposed following the completion of a disciplinary process and therefore the Applicant can challenge it, along with disciplinary measures, without requesting a management evaluation.

54. In this case, the High Commissioner imposed the disciplinary measures of loss of three steps and deferment, for a period of four years, of eligibility for consideration for promotion and requested that appropriate managerial action be taken to provide him with training and coaching in matters related to professional conduct.

55. The High Commissioner identified as aggravating circumstances that “[the Applicant has] not expressed any remorse for [his] conduct” and his submissions during the disciplinary process “cast doubt on [his] full understanding and sharing of

UNHCR values as well as on [his] ability to hold managerial responsibilities in a diverse environment”. The High Commissioner considered the Applicant’s 11-year long satisfactory service record as well as an unblemished disciplinary record as mitigating circumstances.

56. As already stated above, the Tribunal finds that the nature and gravity of the Applicant’s misconduct were serious. He repeatedly sent inappropriate messages of sexual nature to a recently hired younger supervisee and shared a hotel room with her. Even though the Tribunal did not find that it was established that he made comments on the physical appearance of a colleague, this does not change the nature and gravity of the Applicant’s misconduct.

57. Despite the seriousness of the Applicant’s offenses, as the High Commissioner found, he was unremorseful as exhibited in his response to the allegations letter.

58. About sending inappropriate messages of sexual nature, the Applicant wrote that he “made a mistake, despite these conversations were part of a private i.e. non-work-related discussions with a person whose *idée fixe* is gender and sexuality”.

59. About sharing a hotel room with AA, he repeatedly blamed AA stating that he had to share a room since AA “heavily insisted” thereon. He wrote in the response to the allegations letter that he understood “the need to avoid a perception of conflict of interest and/or improper behavior” but concluded that he would handle such situations better because “certain things could be used to be interpreted and could be perceived as inappropriate and could be manipulated”.

60. About the incident in Ankara, the Applicant declared that “[t]his incident was a brutal verbal insult and harassment against [him], something unacceptable from anyone” and “[n]othing can justify or can be an excuse for [AA] to use such rude language and tone against [him]” and “this is a pure fact which cannot be subject to any debate”. He further concluded that the actions attributed to him were “generated exclusively in [AA’s] imagination, and was a result of [AA’s] lack of temper and aggression control”.

61. The Applicant then wrote that the investigation process taught him “a hard lesson on how things which were part of the normal everyday life and certain decisions which I made in the best faith can be turned against [him]”, that “[he] will act more carefully in situations that can be easily misconstrued in order to prevent any avenue for exploitation” and that “[he wishes] to apologize for not having been aware enough in this regard”.

62. The above statements show that the Applicant was indeed unremorseful about his conduct. The Organization therefore rightfully considered the lack of remorse as aggravating circumstances.

63. The Tribunal also finds that the Organization correctly considered the Applicant’s long satisfactory service record as well as an unblemished disciplinary record as mitigating circumstances.

64. Considering the nature and gravity of the Applicant’s misconduct as well as aggravating and mitigating circumstances, the Tribunal finds that the imposed measures were adequate and there is no basis to interfere with the Administration’s exercise of discretion in this matter.

65. The Applicant claims that the imposed measures are disproportionate since in *Michaud* 2017-UNAT-761, a staff member was only sanctioned with written reprimand for allegedly similar conduct (i.e. making sexually suggestive inappropriate comments to a supervisee).

66. The Tribunal finds that this case is not comparable to *Michaud*. In *Michaud*, the Organization found that a staff member’s conduct “did not rise to the level of misconduct” but “had fallen short of the standards of professionalism expected of a manager and supervisor”. In this case, however, the Organization found that the Applicant’s conduct amounted to misconduct, the finding of which the Tribunal upheld as explained above.

67. Moreover, the Tribunals in *Michaud* only decided whether the imposed written reprimand was reasonable or not. The Tribunals were not tasked to review the reasonableness of the imposition of more severe disciplinary measures. Therefore, the Tribunals' upholding the written reprimand in that case cannot be construed as that the more severe disciplinary measures would be disproportionate to the offense even if the offenses were indeed similar.

68. Therefore, the Tribunal finds that the Administration properly exercised its discretion when imposing the sanctions in question.

Whether the staff member's due process rights have been respected

69. The Applicant does not make any submission that his due process rights were not respected. The Tribunal notes that the Applicant was notified of the formal allegations letter, was given the opportunity to respond to those allegations, and was informed of the right to seek the assistance of counsel in his defense.

70. Therefore, the Tribunal finds that the Applicant's due process rights were respected in this case.

71. In light of the above, the Tribunal upholds the disciplinary measures imposed on the Applicant.

72. As a final note, the Tribunal notes that on 18 June 2021, the Respondent requested to file comments in response to the Applicant's submission of 14 June 2021. In light of the above, the Tribunal finds that the Respondent's comments are unnecessary and thereby rejects his request.

Conclusion

73. In light of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Joelle Adda

Dated this 30th day of June 2021

Entered in the Register on this 30th day of June 2021

(Signed)

for Nerea Suero Fontecha, Registrar, New York