

Facts

3.

Case No. UNDT/GVA/2016/009

Judgment No. UNDT/2017/051

9.

a disciplinary measure and that, hence, the Applicant could proceed directly to file an application before the Tribunal.

19. On 14 August 2015, the Local Staff Association, Regional Representation, DRC, sent a letter, accompanied by signatures of 130 staff members of different branch offices of UNHCR in DRC, stressing the “exemplary behaviour” and “moral and personal integrity” of the Applicant.

20. The present application was filed with the Nairobi Registry of the Tribunal on 6 October 2015, that is, within 90 days as of the date the Applicant received the notification of the contested decision. The Respondent replied on 6 November 2015. The Applicant filed additional submissions on 9 December 2015.

21. After consultation with the parties, who raised no objection, the case was transferred to the Geneva Registry of the Tribunal, by Order No. 164 (NBI/2016) of 23 March 2016.

22. Pursuant to Order No. 232 (GVA/2016) of 5 December 2016, the Respondent filed additional information and materials on 12 December 2016.

23. A case management discussion took place on 16 December 2016. A substantive hearing was held on 28 February and 17 March 2017, at which four witnesses were heard, out of the seven initially suggested by the parties.

Parties' submissions

24. The Applicant's principal contentions are:

- a. The contested decision was made without full consideration of all relevant facts and was thus based on erroneous conclusions. Despite the absence of other direct witnesses and/or concrete evidence corroborating the allegations, the Administration did not examine the exculpatory witnesses suggested by the Applicant. Specifically, it failed to consider the Applicant's character, personality and professional history, and his previous conduct at work with female colleagues or supervisees, although it is highly

unlikely that a man harasses three different women in just a few days while he has never showed such kind of conduct before in 25 years of career;

b. IGO and the Administration omitted to consider evidence submitted by the Applicant. They gave no weight to the explanations that he would not have promised any post to the Complainant because he lacked the authority to select her, and that he would not have proposed to spend the following weekend in Oslo because he had a return flight ticket and it would have been complicated to change it. Further, it is not believable that the Applicant would have hugged, put his arms around and tried to kiss the Complainant as she raised her voice while the door was open without anyone noticing. Equally hard to believe is that his alleged gestures toward two other colleagues would have gone unnoticed;

c. The procedure was partial and biased, given that:

i. Besides the Complainant and the Applicant, only five participants to the WEM, all women, were interviewed. It is unclear why only these six people were chosen for interview and not, for instance, other participants to the WEM such as th6()""FsH,z0,)FMH,zc)"0m6F p"F H

Case No. UNDT/GVA/2016/009

Judgment No. UNDT/2017/051

Case No. UNDT/GVA/2016/009

Judgment No. UNDT/2017/051

e.

the irregularities committed during the investigation process and the Organization's lack of care.

25. The Respondent's principal contentions are:

a. The record in this case contains sufficient basis to conclude that the facts constituting the basis for the disciplinary measure were established through clear and convincing evidence. IGO should have investigated both inculpatory and exculpatory evidence. The record of the Complainant's interview is direct evidence of the allegations. Its credibility is supported by its coherence and the trauma and stress she expressed, as well as by her having contemporaneously reported the unwelcome sexual advances. Indeed, she reported them to two facilitators on the next day and to three fellow participants within the following three days, who all subsequently provided a consistent account of the Complainant's reporting of the incident and who each was convinced of the truth of her account. Although the investigator asked many of them whether they "believed" the Complainant's account, when read in context, it is clear that such question referred to her emotional state, as the following question is precisely about their perception of her emotional state. The credibility of her account was further supported by the reports from other WEM participants regarding the Applicant's acts,

d. The investigator has wide discretion to determine the evidence that is relevant to obtain. There was no indication that anyone beyond those actually interviewed had any relevant information. It was not unreasonable for him to not pursue the leads that the Applicant now points out as being *a una* in the investigation, as they were not foreseeably relevant or added to the information already gathered. Likewise, visiting the scene once the WEM had ended and its participants were no longer there, and conducting the interviews in person, to fully see the witnesses' demeanour months after the events had limited added value;

e. The Applicant's assertions that, he claims, counter the findings of fact regarding the incident are without merit:

i. Assuming that the Applicant was indeed not in a position to assist in obtaining a P-2 or P-3 post in Kinshasa, it does not exclude that he could have told so to the Complainant in an attempt to convince her to welcome his sexual advances;

ii. Even if the Applicant had a return flight ticket on 28 June 2014, it was possible to change it, especially since it was not a flight to Kinshasa but a relatively short trip to Geneva;

iii. The fact that the door of the room was open does not rule out the possibility that the Applicant made advances to the Complainant;

iv. Whereas the Applicant asserts that on the evening in which he purportedly made explicit allusions to spending the night with a colleague he was having drinks with other participants in the room of one of them, it is known that he was also at a different gathering at the room of another colleague's room. Hence, his presence in this social event does not disprove that he could have made the reported advances, and rather suggests that on that evening he actually walked by the corridor where this incident reportedly happened;

Tribunal have upheld separation from service, and even dismissal, as being proportionate in sexual harassment cases;

h.

Case No. UNDT/GVA/2016/009

Judgment No. UNDT/2017/051

allegations during his interview. He had all the information he was required

Case No. UNDT/GVA/2016/009

Judgment No. UNDT/2017/051

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Case No. UNDT/GVA/2016/009

Judgment No. UNDT/2017/051

During the investigation

34. Regarding the investigation, the Applicant claims that it was deficient, since

have known, that is, that the Applicant was present in a social event at this person's room during the evening where he reportedly proposed to spend the night with a female colleague, were accepted as true, thus did not need to be demonstrated. It cannot be excluded, however, that the details he could have provided might have had an added value or pointed to more witnesses.

39. The investigator also made the choice not to seek information on the Applicant's "character". It subsequently appeared that his colleagues from DRC office were prepared to attest of his general appropriate conduct. It is a given that this was not direct evidence on the 20 June 2014 incident. Nevertheless, insofar as it could be relevant, its indirect nature is not necessarily a reason to exclude it. Circumstantial evidence is permissible (see reference to indirect evidence in *Aq* 2010-UNAT-040, para. 33. See also the use of indirect evidence made in *Mo ar* 2011-UNAT-164), and often crucial, provided that it is not attached excessive weight. It is noteworthy, in this respect, that other circumstantial evidence was admitted in the investigation, such as the reports of inappropriate conduct incidents with two other participants to the WEM. In fact, significant reliance was placed on those reports, which were taken as supporting that the Applicant had a certain pattern of behaviour.

40. Similarly, the Applicant takes issue with the statements of the WEM participants and facilitators in whom the Complainant confided about the incident in the Applicant's room, which he views as no more than hearsay. Firstly, the Tribunal wishes to emphasise that these statements are not mere hearsay. They are direct evidence as regards the fact that the Complainant promptly reported the alleged incident to several people, in great detail and with remarkable consistency. In any event, hearsay is admissible in the Organization's internal justice system. However, it only has limited value (*ya bu a* 2013-UNAT-364, para. 37, *Bor o* UNDT/2011/067, para. 89. See also ILOAT Judgment No. 2771 (2009)). Therefore, again, the difficulty resides in not ascribing to it excessive probative value.

Case No. UNDT/GVA/2016/009

Judgment No. UNDT/2017/051

statements from the Complainant and the Applicant and that, they tend, indeed, to reinforce the Complainant's version. Likewise, the fact that the Complainant had nothing to win in inventing the accusations is a valid consideration (*C o* UNDT/2011/181).

49. In fact, the Director, DHRM, added in her oral evidence that the Complainant could even have feared that bringing a sexual harassment complaint would hindered her career precisely at a critical point, as it is well known among UNHCR staff that the WEM is generally the precursor step for their assignment to field missions. The Tribunal also considers that this circumstance may indeed explain that the Complainant hesitated for a few weeks before lodging a formal complaint under ST/SGB/2008/5. By contrast, the Applicant's submission that the Complainant and two other women, who did not know him prior to the WEM and who did not work in the same office or department, would collude to make up malicious accusations against him, while not completely impossible, objectively appears highly unlikely. It is thus open to the Administration to take into

51. The Applicant complains that his statements countering the allegations, such

Case No. UNDT/GVA/2016/009

Judgment No. UNDT/2017/051

“[i]n light of the seriousness of the allegations ... “clear and convincmz6666FTH,z

Case No. UNDT/GVA/2016/009

Judgment No. UNDT/2017/051

65. In short, the evidence effectively before the decision-maker presented two contradictory statements by direct witnesses, that of the Complainant being more credible for the reasons developed in paragraphs 48 and 49 above, and some indirect evidence. Most of this indirect evidence, and especially the most relevant

Case No. UNDT/GVA/2016/009

Judgment No. UNDT/2017/051

c. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision and carrying out the aforementioned specific performance, the Applicant shall be paid, as an alternative, a sum equivalent to six months of emoluments as specified in para. 69 above;

d. Unless the Administration opts for the specific performance, the compensation set at sub-paragraph (c) above, shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable.

(n)

Judge Rowan Downing

Dated this 29th day of June 2017

Entered in the Register on this 29th day of June 2017

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René M. Vargas M., Registrar, Geneva