
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/034
Judgment No.: UNDT/2021/091
Date: 29 July 2021
Original: English

Before: Judge Francis Belle

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Victor Rodriguez

Counsel for Respondent:

Isavella Vasilogeorgi, AAS/ALD, OHR, UN Secretariat
Jacob van de Velden, AAS/ALD, OHR, UN Secretariat

Introduction

1. At the time of the impugned decision, the

20. An OIOS Note to File dated 28 April 2018 indicated that 10 members of the prayer group, including the Applicant, were interviewed.

21. It is the Applicant's case that not only have the facts surrounding the impugned decision been misconceived, the procedure was irregular and the eventual sanction entirely disproportionate.

22. The Applicant strongly contends that he cannot possibly have been obliged to report on an alleged wrongdoing which the Respondent was already aware of through his legal office, and indeed through the staff member who has been accused himself! Not only did CE report the matter to the Mission as soon as he received the summons, the Mission had itself received the summons and transmitted it to CE. There was, therefore, nothing further for the Applicant to report.

Refusal to cooperate with the investigation

23. On his refusal to cooperate with the investigation, the Applicant submits that OIOS first invited him for an interview *as a subject of an investigation* on 5 November 2018. The Applicant was on annual leave from 9 to 31 October 2018, and on certified sick leave between 16 October 2018 and 10 January 2019. The Applicant responded to the email from OIOS on 6 November 2018 and told them that he was unwell and on certified sick leave.

24. The Applicant makes the point that it is curious that the Medical Services Division ("MSD") took the view that there was no impediment to him being interviewed on 7 December 2018, whereas MSD approved his sick leave on 28 November 2018 after it was apprised of the severity of his illness. OIOS made no effort to ascertain the duration of his sick leave through the Mission's Human Resources Section nor from MSD. Following MSD's\$ the Mission's sion's

25. The Respondent argues that the Applicant's reliance on MSD's approval of his sick leave is misplaced.

(e) Sexual exploitation and abuse is prohibited. Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or the age of consent locally, except where a staff member is legally married to a person who is under the age of 18 but over the age of majority or consent in his or her country of citizenship. Mistaken belief in the age of a child is not a defence. The exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. United Nations staff members are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse.

34. These provisions must therefore be applied

the United Nations system, he or she must report such concerns via established reporting mechanisms;

(f) United Nations staff are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse. Managers at all levels have a particular responsibility to support and develop systems that maintain this environment.

40. The question before this Tribunal is whether the Applicant failed in his obligations as a staff member by not reporting his “concerns or suspicions regarding sexual exploitation” by a “fellow worker.”

41. Although not referred to by the Respondent, the Tribunal is also guided by ST/AI/2017/1 on Unsatisfactory conduct, investigations and the disciplinary process, which places on staff members the obligation to report “information about suspected unsatisfactory conduct.”

42. Section 4.1 of ST/AI/2017/1 reads:

4.1 Pursuant to staff rule 1.2 (c), staff members have the duty to report any breach of the Organization’s regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.

43. To have this applied strictly, the Applicant in this case would have been required to report an allegation of rape which he heard from another person who attended court and which in turn was based on what that individual was told based on a complaint by the victim’s mother/the Complainant.

44. The section goes on to state exactly what the reporting staff member “shall” report.

4.5 Information received from either a staff member or a non-staff member alleging unsatisfactory conduct should contain sufficient details for it to be assessed under the present instruction, such as:

- a. A detailed description of the unsatisfactory conduct;
- b. The names of the implicated staff member(s);
- c. Where and when the unsatisfactory conduct occurred;

- d. The names of potential witnesses to the unsatisfactory conduct; and
- e. All available supporting documentation.

45. In order for the Applicant to assist the investigation in a manner which would be in full compliance with the relevant section (4.5) he would have to report: (a) a detailed description of the unsatisfactory conduct; (b) the names of the staff member(s) involved; (c) where and when the unsatisfactory conduct occurred; and (d) the names of potential witnesses to the unsatisfactory conduct and provide supporting documents.

46. It is apposite at this juncture to note that the rule which was applied relies on a totally subjective view of the applicable facts. The staff member was charged with not reporting his knowledge of the alleged sexual abuse of VO2. But the applicable rule states that where a staff member develops concerns or suspicions regarding sexual misconduct by a fellow worker he or she must report such concerns via established reporting mechanisms.

47. It should not be presumed in applying this rule that the Applicant had a concern or suspicion about the alleged sexual abuse which sections 3.2 (e) and (f) of ST/SGB/2003/13 suggests he should report. Indeed, based on the evidence produced the only information the Applicant would have b00008871 u9

50. The fact is that the Applicant would not have known the substance of CE's or any other person's report. There is no evidence that he had any knowledge of the relevant details on 14 July 2017. And what he came to know on 15 July 2017, was no more "precise" than that CE had been charged. Indeed, the facts show that the Applicant could not have supplied four out of the five kinds of information required under section 4.5 to enable the report to be of some substance.

51. The Tribunal finds that section 4.1 of ST/AI/2017/1 does not apply to an individual who merely hears second-hand about a case of misconduct since much of what such a person has to report would be hearsay and possibly misleading and devoid of the kind of detail the rule is seeking to elicit from the staff member.

52. In the circumstances, it cannot be said that there is clear and convincing evidence that the Applicant failed to comply with section 3.2(e) of ST/SGB/2003/13 by failing to report to the Respondent what the latter was already aware of.

Plan to pay money to CM and VO2

53. Having found that it is unclear what the Applicant knew about the details of the substance of the Charges against CE, indeed, his attendance at a meeting cannot be directly linked to his knowledge of CE's alleged breach of the Staff Rules or Staff Regulations or special measures for protection from sexual exploitation and sexual abuse. There is therefore no clear and convincing evidence of this charge.

Duty to cooperate

54. The final charge against the Applicant was that he failed to cooperate with the investigation, because he did not agree to be interviewed on the charge against him but insisted that he was on sick leave. It is appropriate to consider the relevant rule.

Duty to cooperate

6.2 Pursuant to staff regulation 1.2 (r) and staff rule 1.2 (c), staff members are required to fully cooperate with all duly authorized investigations and to provide any records, documents, information

and communications technology equipment or other information under the control of the Organization or under the staff member's control, as requested. Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct.

55. The Applicant argued that he had cooperated with the investigation into

