



Administrative Tribunal

Distr. Limited
30 September 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1446

Case No. 1521

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas at the request of a former staff member of the World Food Program (WFP), the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 15 February 2007;

Whereas, on 26 January 2007, the Applicant filed an Application requesting the Tribunal, *inter alia*:

“PLEAS

...

12. [T]o order:

(a) that the decision taken by the Executive Director, WFP be rescinded and the Applicant be retroactively reinstated in his former position in WFP;

(b) that the Applicant be paid all salary and benefits retroactively from the date of his separation from service until the date of the Tribunal’s judgment;

(c) [plea withdrawn]

or failing that:

(d) that the Applicant be paid compensation in the amount of 2 years net base salary;

(e) that the Applicant be paid compensation in the amount of 6 months salary for moral and professional injury suffered as a result of his wrongful termination.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent’s Answer until 2 August 2007, and once thereafter until 3 September;

Whereas the Respondent filed his Answer on 31 August 2007;

Whereas the Applicant filed Written Observations on 19 November 2007;

On 1 October 1999, the Applicant joined the WFP as a locally recruited Logistics Clerk at the GS-4 level under a three months fixed-term contract for service in the Sub-Office at Masalli, Azerbaijan. Effective 1 January 2000, the Applicant was granted a one year fixed-term appointment with the WFP Masalli Office, subject to the provisions of the Staff Regulations, Rules, and Personnel Policies applicable to the UNDP, which governed his contract on behalf of the WFP. Paragraph 5 of the letter of appointment stated that, “for the purpose of the Staff Rules, chapters 1 to 9, the WFP Executive Director (or her/his representative) exercises supervisory authority and decisions under these chapters taken under such authority”. The WFP extended the Applicant’s fixed-term appointment several times. On 14 May 2003, the Applicant was promoted to the GS-5 level. In January 2004, a Sub-Office was opened in Imishli, Azerbaijan, and the Applicant took over as the staff manager in the Imishli Sub-Office. He was separated from service on 14 August 2006.

Whereas the statement of facts, contained in the report of the Investigation Panel (IP) dated 25 February 2006 reads, in part, as follows:

“[In January 2006,] [Ms. K.] [(the Complainant)], [an] intern for WFP raised a complaint of sexual harassment in written form against [the Applicant], Logistics Clerk, WFP. In her letter of complaint [Ms. K.] made the following allegations of inappropriate behavior [by] the Respondent towards her:

- 1) Physical contact
- 2) Accompanying the complainant home
- 3) Unsolicited sms messages
- 4) Controlling behavior
- 5) Expression of affection/compliments
- 6) Signs of displeasure
- 7) Asking undesirable questions in an aggressive manner

The WFP Representative asked the [Applicant] to clarify his behavior in the presence of his immediate supervisor and Staff representative. A note for record was prepared on the discussion.

On 16 February, the WFP Representative set up an Investigation Panel consisting of three persons to establish facts and draw conclusions on whether the allegations were substantiated or not. ...

...

2) ***INVESTIGATION PANEL’S FINDINGS***

Based on the existing written documentation and the findings of the preliminary investigation, the Investigation Panel during the interviews tried to establish fact and draw conclusion on whether the allegations were substantiated or not. As a result of interviews with all witnesses, the Investigation Panel assessed the allegations as follows:

1) *Physical contact*

The Complainant alleged that the [Applicant] touched the complainant on the cheek, saying a compliment: 'snegurochka' (snow princess). The allegation couldn't be independently verified as there weren't any witnesses present at the time of the alleged incident. The versions of the incident shared by the Complainant and the [Applicant] were divergent. The Complainant told about how the incident happened in detail, denying that it could have happened accidentally. The [Applicant] denied that the incident took place. However, [Mr. K.] (witness) told the Investigation Panel that the Complainant informed him about this incident and expressed her displeasure about the incident. [Mr. K.] gave evidence that the Complainant shared this information with him more than two weeks before the Complainant officially complained to WFP management about the [Applicant's] behavior.

2) *Accompanying the Complainant home*

The Complainant alleged that the [Applicant] accompanied her home [for] a period of two weeks, although she didn't ask him to do so. As the two weeks progressed she was becoming more and more uncomfortable with his company. The [Applicant] only stopped accompanying the Complainant to her home after work when she informed him that she no longer wanted him to accompany her. [Mr. A.] (witness) observed that it appeared that the [Applicant] was timing his departure to coincide with the departure of the Complainant from the office. The [Applicant] confirmed that he accompanied the Complainant for two weeks and informed the Investigation Panel that the suggestion came from him.

3) *Unsolicited sms messages*

The Complainant alleged that she received unsolicited sms messages from the [Applicant]. One of sms messages ('it was cold, dark and silent without you in the office') was kept by the Complainant and also was shown by her to [Mr. K.] (witness), the day she received it, as she found it disturbing. The [Applicant] confirmed the fact of sending such a message, but explained the content of it as being a statement of facts and not a romantic message. The Investigation Panel concluded that this explanation was hard to believe.

4) *Controlling behavior*

The Complainant alleged that the [Applicant] controlled her behavior and gave three examples of it: a) he didn't allow her to leave the car while they were on a field trip and made her stay in the car alone till he and driver returned and this made her cry. b) The [Applicant] tried to control what clothes she should wear; and, c) [Applicant] tried to urge her to cancel a working field trip.

The [Applicant] confirmed these allegations but presented them as being motivated by his care and concern for the Complainant. In the first case, the [Applicant] explained that he didn't want to let the Complainant out of the car to walk alone in a strange town as it was dark in the evening. In the second case, the [Applicant] explained that he felt the Complainant wore very thin clothes and he advised her to wear warm clothes not to [be] cold. In the third case, the [Applicant] explained his behavior saying that he was under

impression that the Complainant was very upset and didn't want to go on the trip, so he advised her to speak to management in order to cancel this trip.

The Investigation Panel interpreted these tree incidents as constituting a pattern of controlling behavior. The [Applicant's] approaches to the complainant are considered by the Investigation Panel to be intrusive, particularly since some of these incidents occurred after the Complainant had informed the [Applicant] of her wish that she didn't want the [Applicant] to accompany her home after work any more. The Investigation Panel concluded that the behavior of the [Applicant] appeared to be controlling rather than protective.

5) *Expression of affection/compliments*

The Complainant alleged that she often received compliments from the [Applicant] (i.e. 'snegurochka-snow princess'). The [Applicant] confirmed that these compliments were made and these compliments were only made by the [Applicant] when he was alone with the Complainant in the office. The [Applicant] explained this because he didn't want to disturb other colleagues while they were working: The [Applicant] believed that there is nothing [wrong] in making a compliment to a female colleague. The Investigation Panel concluded that the ongoing compliments were inappropriate in these circumstances and that it was strange for a male colleague to make compliments to a female colleague only when alone with the female colleague.

6) *Signs of displeasure*

The Complainant alleged that the [Applicant] became very displeased and upset when she gave him signals that she was not pleased with his company. The [Applicant's] reaction to these signals disturbed and frightened the Complainant, the [Applicant] confirmed that he became aware that the Complainant didn't want him any longer to accompany her home and it was clear for him that she was less friendly than she had been in the past to him. The [Applicant] claimed that he wasn't upset or angry with this change of attitude. However, two other witnesses, [Mr. K.] and [Mr. A.], both confirmed the Complainant's allegation that the [Applicant] was very upset and angry, didn't talk [to] anybody in the room and slammed door for approximately ten days until the Complainant officially submitted her complaint to [the] WFP Management. The Investigation Panel concluded that the Complainant's allegation was verified.

7) *Asking undesirable questions in an aggressive manner*

The Complainant alleged that the [Applicant], after she had told him not to accompany her home anymore after work, started asking undesirable questions in what she perceived to be an aggressive manner. The [Applicant] denied that he asked undesirable questions in an aggressive manner. There were no independent witnesses of the [Applicant] asking these questions as the Complainant informed the Investigation Panel that he only asked these questions when alone in the office with her."

On 13 April 2006, the Applicant was informed regarding the findings of the Investigation Panel's report and was notified that his case would be referred to an Ad-Hoc Disciplinary Committee (DC). On 9 May 2006, Ad-Hoc DC adopted its report, which reads, in part, as follows:

"4) A SYNOPSIS OF THE EVIDENCE AND THE COMMITTEE'S EVALUATION THEREOF

The Investigation Panel in its report concluded that five of the seven allegations (*Accompanying the complainant home, Unsolicited sms Message, Controlling Behavior, Expression of affection/compliments, Signs of displeasure*) were confirmed during the investigation process by either the [Applicant] and/or verification by one or more of the two independent witnesses. Further, the Panel found that two allegations made by the Complainant (*Physical contact and [a]sking undesirable questions in an aggressive manner*) were neither confirmed by the [Applicant] nor verified by one or more of the two independent witnesses since these witnesses were not present at the time of the alleged incidents.

Therefore, taking into account the evidence, the Investigation Panel found that the Complainant's allegations of sexual harassment by the [Applicant] were substantiated.

In reviewing the Investigation Panel report and all documentation provided, the Ad Hoc Committee found no fault in the Panel Report and agreed that the findings of the Panel Report were well stated and based on the available evidence. The Ad Hoc Committee agreed that the Panel and disciplinary process to which it had been involved in had been conducted according to WFP Policies and Procedures.

Further, in reviewing the responses of [the Applicant] ... the Ad Hoc Committee agreed that there were discrepancies within the case he presented, with some of his responses contradicting earlier responses.

5) THE FINDINGS, INDICATING WHICH OF THE ALLEGATIONS, IF ANY APPEAR TO BE SUPPORTED BY THE EVIDENCE

After reviewing all relevant documentation and through listening to the second interview with [the Applicant], the Ad Hoc Disciplinary Committee upheld the findings of the Investigation Panel. Thus, the Ad Hoc Disciplinary Committee found that 5 of the 7 allegations of sexual harassment were true, and that while the remaining two allegations (physical contact and asking undesirable questions in an aggressive manner) could not be directly confirmed, these allegations are consistent with the pattern of harassment illustrated under the first five confirmed allegations. Further, through a review of evidence, and in particular, through the second interview of the [Applicant], the Ad Hoc Committee was struck by the fact that the [Applicant] still clearly exhibited a controlling attitude and behaviour with regards to the Complainant....

6) DISSENTING OR SEPARATE OPINION

The [Applicant] does not accept the findings of the Investigation Panel and has tried to indicate that witnesses involved are not friendly towards him and therefore may have not provided accurate testimony, due to unrelated grievances towards him. It was the conclusion of the Ad Hoc Committee that these allegations are weak and unrelated, and do not influence the findings of the Panel or the Committee, as a review of the evidence —and in particular a review of the four different responses by the [Applicant] — uphold the accusations of sexual harassment. It was noted by the Ad Hoc Committee that the [Applicant's] four different responses often times contradict each other, make random accusations and illustrate clearly certain patterns of behaviour which support the allegations made by the Complainant.

7) RECOMMENDATIONS OF AD HOC COMMITTEE ON SANCTIONS TO BE TAKEN

The Ad Hoc Disciplinary Committee thus finds the [Applicant] to be guilty of sexual harassment. As a ten year employee of WFP and main wage earner for a family of four, the Ad Hoc Disciplinary Committee recommends the following sanction:

Immediate separation from service, with pension fund entitlements and payment for unused leave days being granted by the Agency.”

On 14 August 2006, the Director, ADH, transmitted a copy of the Ad-Hoc DC report to the Applicant, and informed him, in relevant parts, of the decision of the Executive Director, as follows:

“[T]his is to inform you that I hereby accept the recommendation of the Ad Hoc Disciplinary Committee to impose on you the disciplinary measure of separation from service for reasons of misconduct. However, as you are entitled to thirty days’ written notice, it has been authorized that you be paid compensation in lieu of this notice period, calculated on the basis of the salary and allowances which you would have received had the date of termination been at the end of the notice period. You need not therefore report to work from the date of receipt of this memorandum.”

On 26 January 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Respondent did not meet his burden of proving that the allegations against the Applicant constituted personal or sexual harassment as defined in WFP’s *Policy on the Prevention of Harassment* dated 19 February 1999.
2. The Respondent’s decision was based on errors of law and fact.
3. His due process rights were violated when the Respondent did not take into account relevant facts, such as the bias and prejudice against him by two witnesses who were interviewed.
4. The Applicant was denied due process as the allegations were not thoroughly investigated.

Whereas the Respondent’s principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters. This includes determination of what constitutes misconduct warranting separation from service. The decision to separate the Applicant from service for failing to meet the standards of conduct required of an international civil servant was proportionate to the misconduct, and a valid exercise of the discretionary authority of the Secretary-General.
2. The Applicant failed to meet the standards of conduct required of an international civil servant; the established facts amounted to misconduct in the form of personal and sexual harassment.
3. The Applicant was afforded due process, he was given fair treatment, and the decision was not vitiated by prejudicial or extraneous factors, by significant procedural irregularity or by significant mistake of fact.
4. Therefore, the Applicant’s case does not warrant the payment of compensation.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

I. The central issues in this case are: i) whether the Respondent properly exercised his discretion in the decision to separate the Applicant from service; ii) whether the sanction was proportionate to the alleged misconduct; and, iii) whether the Applicant's due process rights were violated.

II. As a general principle, the Tribunal has repeatedly stated its position regarding disciplinary measures. In Judgement No. 897, *Jhuthi* (1998), the Tribunal, referring to previous jurisprudence, stated:

“... [T]he taking of disciplinary measures involves the exercise of a discretion by the Administration but it is also the exercise of a quasi-judicial power. In disciplinary cases, the Tribunal examines (i) whether the facts on which the disciplinary measures were based have been established, (ii) whether they legally amount to serious misconduct or misconduct, (iii) whether there has been any substantive irregularity, (iv) whether there has been any procedural irregularity, (v) whether there was an improper motive or abuse of discretion, (vi) whether the sanction is legal, and (vii) whether the sanction imposed was disproportionate to the offence.”

At the same time, the Tribunal has consistently recognized that the Secretary-General has broad discretion in determining the conduct that is expected of an international civil servant, what constitutes misconduct, and, the appropriate disciplinary sanction to be imposed. As stated in Judgement No. 1103, *Dilleyta* (2003):

“It has been the longstanding jurisprudence of the Tribunal that the Secretary General ... has broad discretion with regard to disciplinary matters. (See Judgements No. 300, *Sheye*, (1982) and No. 987, *Edongo* (2000).) This includes the determination of what constitutes ‘serious misconduct’ under the Staff Regulations and Rules and what is the proper punishment for such conduct. (See Judgements No. 815, *Calin* (1997), No. 890, *Augustine* (1998) and No. 1050, *Ogalle* (2002)).

...

The decision to summarily dismiss the Applicant was a proper exercise of the [Respondent's] authority and did not violate the Applicant's rights. The choice of disciplinary measure to be imposed, pursuant to Staff regulation 10.2, falls within the Secretary-General's discretionary powers (Judgements No. 479, *Caine* (1990); No. 542, *Pennacchi* (1991); and, [No. 941, *Kiwanuka* (1999)].) Staff members have a duty to maintain the highest standards of conduct and the Respondent has the responsibility to enforce those standards.”

III. In the present case, the Tribunal finds that the substantial facts which formed the basis for the contested decision have been clearly established and are not in dispute. Particularly, both the IP and the Ad-Hoc DC agreed on the same findings that were well established and based on the available evidence. Both found that 5 of the 7 allegations of sexual harassment were established, and that while the remaining two allegations could not be directly confirmed, these allegations were consistent with the pattern of harassment illustrated under the first five confirmed allegations.

Based on its review of the record, the Tribunal notes that the findings of the Ad-Hoc DC were further supported by the fact that the Applicant had previously been removed from a post for “aggressive behaviour and lack of respect for staff”.

IV. Concerning the Applicant’s claim that his behavior does not come within the definition of personal and sexual harassment set forth in the WFP Policy, the Tribunal notes that the WFP Policy defined, at paragraph 5 and 6, the term of “personal” and “sexual harassment” as:

“Personal Harassment means any improper behavior by a staff member that is directed at and is offensive to another or others, and which that person knew or should reasonably have known would be so. It comprises objectionable conduct, comment or display made on either a one-time or continuous basis that demeans, belittles, or causes personal humiliation or embarrassment to a staff member of WFP. It includes discrimination based on any grounds, such as race, religion, color, creed, ethnic origin, physical attributes, gender or sexual orientation.

Sexual Harassment means any improper conduct, comment, gesture or contact of a sexual nature, whether on a one-time basis or in a continuous series of incidents, that might reasonably be expected to cause offense or humiliation to another or others; or that another or others might reasonably perceive as placing a condition of a sexual nature on employment or on conditions of employment. Generally, sexual harassment is deliberate, unsolicited, coercive and one-sided and both male and female staff members can be the victim or the perpetrator.”

V. In the present case the Tribunal holds that the findings of the IP and the Ad-Hoc DC that the Applicant’s behavior constituted personal and sexual harassment in accordance with paragraphs 5 and 6 were correct because the Applicant’s conduct, which was improper and of a sexual nature, belittled and caused personal humiliation to the Complainant.

VI. As to the proportionality of the sanction, the Tribunal recalls Judgement No. 1187, *Igwebe* (2004), in which it held:

“Whilst the Tribunal has ‘consistently taken the view that the Secretary-General has broad discretion under this regulation with regard to disciplinary matters, and this includes determinations of what constitutes serious misconduct, as well as the appropriate discipline’ (Judgement No. 436, *Wiedl* (1988)), such discretion can be vitiated if the sanction imposed is found to be disproportionate. In Judgement No. 1090, *Berg* (2002), the Tribunal held that, in imposing disciplinary measures disproportionate to the facts, ‘[t]he Respondent’s actions exceeded the scope of his broad discretionary powers’. The Tribunal has undertaken proportionality reviews in a number of disciplinary cases and has awarded compensation where it found that the disciplinary sanction imposed was disproportionate in the circumstances of the case. (See, for example, *Berg*, *ibid.*, and Judgement No. 1011, *Iddi* (2001).) In the instant case, the Tribunal finds that separation from service was not disproportionate and was, in contrast, entirely appropriate in the circumstances. It is disappointing that such a measure had to be imposed upon a staff member so close to retirement, but the Applicant herself bears the responsibility. The United Nations is entitled to expect a level of decorum and conduct from its staff members which is far above that displayed by the Applicant of defamation, hostility, and both veiled and actual threats.”

VII. The Tribunal finds, in the instant case, that the Applicant’s actions constitute serious misconduct, incompatible with continued service, and with the principle of employing staff of the “highest standards of

efficiency, competence and integrity.” (Article 101, para. 3, of the UN Charter, Judgement No. 377, *Jabri* (1986)).

VIII. Accordingly, the Tribunal considers that the sanction was proportionate given the circumstances of the case.

IX. On the issue of the Applicant’s claim that the entire process was tainted by bias or improper motivation of the witnesses, the Tribunal has consistently held that “[t]he burden of proving prejudice or improper motivation rests with the Applicant”. (See Judgements No. 93, *Cooperman*, (1965); No. 553, *Abrah* (1992); and, No. 554, *Fagan* (1992)).

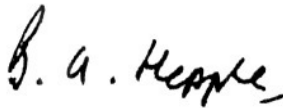
In the present case, the Tribunal finds that the Applicant’s allegations of bias and improper motivation are wholly unsubstantiated.

X. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)



Spyridon **Flogaitis**
President



Bob **Hepple**
Member



Agustín **Gordillo**
Member

Geneva, 31 July 2009



Tamara **Shockley**
Executive Secretary

