UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2017-UNAT-718

Bagot

(Appellant/Respondent on Cross-Appeal)

v.

Commissioner-General

[redacted]

Date: 31 March 2017

Registrar: Weicheng Lin

Counsel for Mr. Bagot: Mathis Kern

Counsel for Commissioner-General: Rachel Evers

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2016/017, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or UNRWA Dispute Tribunal and UNRWA or Agency, respectively) on 19 May 2016, in the case of *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Christopher Bagot filed the appeal on 18 July 2016, and the Commissioner-General filed his answer on 16 September 2016. The Commissioner-General filed a cross-appeal on 18 November 2016, and Mr. Bagot filed his answer to the cross-appeal on 16 January 2017.

Facts and Procedure

2. The following facts are uncontested:[1]

> ... Effective 19 October 2013, the Applicant was employed by the Agency as the Director, Department of Internal Oversight Services ("D/DIOS") on a fixed-term appointment of two years.
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> ... By email dated 7 January 2014 to the Applicant, the Director of Enterprise Resource Planning Department ("D/ERP") requested urgent feedback on a draft paper on "ERP Roles and Access" ("ERP Paper") that

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> 17. The ACIO advised the Com-Gen to consider whether, separate from prohibited conduct, there was evidence of a breach of trust and professional code of ethics by D/DIOS, who is one of UNRWA's key senior managers.

... On 15 October 2014, the Commissioner-General and the DHR met with the Applicant to inform him of the Commissioner-General's decision to terminate the Applicant's appointment for misconduct effective 18 October 2014. The Commissioner-General's decision was set out in the letter of the same date, which was given to the Applicant at the meeting. [In his decision letter, the Commissioner-General noted, *inter alia*, the following:[2]

> Until OIOS had assessed all of the evidence, it would not have been reasonable or responsible for OIOS to identify specifically which types of prohibited conduct were under investigation. The definition of prohibited conduct under [UNRWA General Staff Circular No. 06/2010 on PROHIBITION OF DI

leave, declined his offer to drive her home and suddenly departed from Mr. Bagot's apartment without further explanation when he had left the room.

Following events:

[Mr. Bagot] could reasonably consider that his behaviour was not 'unwelcome'".[7] The

Submissions

Mr. Bagot's Appeal

7. Mr. Bagot submits that the UNRWA DT erred on questions of fact. He refutes the UNRWA DT's finding that he "could have had reasonable doubts" or that it was "obvious" that Ms. L had fabricated the emergency. The UNRWA DT also failed to see that, under the circumstances of the case, Mr. Bagot's behaviour after the meeting was not "unwanted". In particular, the UNRWA DT incorrectly assumed that Mr. Bagot had already received Ms. L's text message asking him not to "trouble himself" when he decided to nevertheless drive to her house, whereas, in reality, he was already outside her building when he received the text message, "which is why he took the reasonable action of replying to her message by asking whether he should stay or go". Ms. L had not told Mr. Bagot that she did not want to speak to him again and he - as "any reasonable and decent person" - called to ensure that Ms. L, who was inebriated, was fine and able to deal with the alleged emergency situation. The record also shows that Ms. L voluntarily answered his phone calls twice. During their 17-minute conversation, Mr. Bagot had no reason to suspect that the call was unwanted because she consciously and deliberately decided to take the phone call and to speak to him for 17 minutes. Nothing in this conversation - even assuming it occurred as described by Ms. H - can be understood as a refusal of future interactions with him. Hence, there was no basis to conclude that the subsequent text messages, in which he stated that he was back home, offered help, expressed his hope that they would continue their conversation and apologised for any misunderstanding, were unwanted. Therefore, none of these actions constituted misconduct.

8. In addition, Mr. Bagot maintains that the content of the 17-minute call did not amount to prohibited conduct. The UNRWA DT erred by relying on Ms. H's statement to determine the content of the conversation without explaining why Mr. Bagot's denial was not given any weight and by corroborating her statement by Ms. L's account which was unreliable due to her inebriated state and the fact that she lied repeatedly, including under oath. Even if the conversation had had the described content, the expressions he allegedly used did not contain any sexual references or implications and they needed to be considered in the context of the preceding "four-hour drinking session" during which they had discussed very personal matters but not engaged in any sort of sexual contact. Furthermore, the UNRWA DT failed to consider some relevant facts such as that Ms. L and Ms. H had been untruthful at several occasions during the investigations and court hearings, that they tried to cover-up these lies during the hearing

before the UNRWA DT and that there must have been "witness tampering" by the Agency because they suddenly modified their account in the hearing.

9. He further contends that the UNRWA DT erred on questions of law. It disregarded the fact that there was no clear and convincing evidence that any of the events on 10 January 2014 was work-related as required by Paragraphs 5 and 6 of GSC No. 06/2010 and thus cannot, as a matter of law, constitute harassment or sexual harassment. Mr. Bagot's actions after the meeting were not unwanted and thus do not qualify as harassment or sexual harassment.

10. Mr. Bagot submits that the UNRWA DT also exceeded its jurisdiction and competence by substituting its own decision to that of the Commissioner-General instead of "remanding" the case to the Agency. The UNRWA DT did so by reviewing "whether the Commissioner-General would have imposed the same disciplinary-measure ... had he only considered as misconduct the same facts as the [UNRWA DT]",[11] namely only the incidents after Ms. L's departure from the apartment.

11. Mr. Bagot further maintains that the UNRWA DT failed to exercise the jurisdiction vested in it and committed errors of procedure, mainly

a) by not considering his request for alternative relief, namely expungement of documents from his personnel file, and issuance of a factually correct certificate of employment, given the UNRWA DT's determination that most allegations were unfounded;

b) by not considering whether to award compensation for the damages he incurred in terms of increased legal fees and difficulties to find a new employment due to the violation of his due process rights and due to the fact that the Commissioner-General charged him with misconduct for actions that the UNRWA DT found not to constitute misconduct.

12. Mr. Bagot therefore requests his reinstatement or, alternatively, "remand" to the Commissioner-General for a new decision on the disciplinary sanction or, alternatively, payment of his full salary and benefits until the ordinary retirement age, or, alternatively, payment of

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misconduct be expunged. In the event that the Appeals Tribunal does not order reinstatement, he requests "that UNRWA issue a factually correct certificate of employment, mentioning the quality of his work and recommending him to future employers". In addition, he requests payment of moral damages in the amount of USD 50,000 and payment of legal fees in the same amount.

The Commissioner-General's Answer

13. In his amended answer, the Commissioner-General submits that the UNRWA DT did not err in fact when it concluded that Mr. Bagot sexually harassed Ms. L after she left his apartment. He recalls the high standard contained in Article 2(1)(*a*) of the Appeals Tribunal Statute which requires incorrect findings of fact to have resulted in a "manifestly unreasonable" decision. The UNRWA DT was entitled to reject Mr. Bagot's version of the events and instead to rely on Ms. L and Ms. H's "consistent accounts", in particular of the 17-minute phone call. With regard to the witnesses' credibility and the alleged "witness tampering", deference should be given to the trial Judge who had the opportunity to assess the witnesses first-hand.

14. He further argues that the UNRWA DT did not err in law when it found that sexual harassment took place outside the workplace and outside working hours. In fact, the Appeals Tribunal's jurisprudence does not establish a restriction in that regard and GSC No. 06/2010 explicitly includes in its definition of sexual harassment conduct occurring in any other setting outside the workplace which impacts on work. The UNRWA DT also did not err in accepting Ms. L's testimony to determ

of judicial efficiency, the UNRWA DT did not have to engage in a hypothetical discourse on

Merits

39. Mr. Bagot was charged with sexual harassment, harassment and abuse of authority in violation of GSC No. 06/2010 and his appointment was terminated.

40. Mr. Bagot appeals the UNRWA DT's Judgment, which upheld the termination decision, on a number of grounds.

i. Did the UNRWA DT err on questions of law and fact in concluding that the Appellant engaged in sexual harassment?

a. The lunch and the apartment

41. After carefully and thoroughly examining the evidence on which the Administration had based the sanction, namely the testimonies of the D/ERP, who was Mr. Bagot's supervisor as well as those of Ms. H and Ms. L and the record before it, the UNRWA DT made the findings and conclusions set out in paragraph 3 of this Judgment.

42. In the case at hand, the applicable Regulations, Rules and other administrative issuances are the following:

43. UNRWA International Staff Regulation 10.2(a) provides:

> The Commissioner-General may impose disciplinary measures on staff members who engage in misconduct.

44. UNRWA International Staff Rule 110.3(b), in effect at the time of the events in question, provided:

> Disciplinary measures under the first paragraph of Staff Regulation 10.2 shall consist of written censure, suspension without pay, demotion or dismissal for misconduct, provided that suspension pending investigation under Rule 110.4 shall not be considered a disciplinary measure.

45. GSC No. 06/2010 provides in Paragraph 6 in relevant part:

> (b) **Harassment** is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy,

48. It is in the context of these definitions and principles that Mr. Bagot's appeal and the Commissioner-General's cross-appeal against the UNRWA DT's conclusions must be assessed.

49. This Tribunal agrees with the findings of the UNRWA DT that the established facts regarding the lunch and the events that took place in the apartment do not amount to misconduct on the part of Mr. Bagot.

50. In his submissions to this Tribunal, the Commissioner-General argues that the UNRWA DT failed to exercise its jurisdiction by not properly considering the question of abuse of power and/or harassment as one of the bases for terminating Mr. Bagot's appointment. In addition, he asserts, among others, that, if the Appeals Tribunal concludes that the UNRWA DT erred in finding that Mr. Bagot's behaviour towards Ms. L after she left his apartment constituted sexual harassment, then his actions qualify as abuse of power and/or harassment as defined in Paragraph 6(d) and 6(b) of GSC No. 06/2010.

51. In all the circumstances of the case, we are not persuaded by the Commissioner-General's arguments. Having regard to the factual findings made by the trial Judge, who is best placed to assess the nature and evidential value of evidence placed before him by the parties to justify his findings,[24] this Tribunal is satisfied that the only reasonable conclusion available to the first instance Judge was that the facts of the alleged misconduct were not established by clear and convincing evidence. This is particularly true in light of the plot and the sequence of the events in the case at hand, assessed in conjunction with the fact that Mr. Bagot and Ms. L had a friendly relationship, that he invited her to his apartment after lunch, she accepted the invitation and they drank several cocktails, and finally engaged in a personal conversation and that there was physical contact by Mr. Bagot with Ms. L, to which Ms. L did not object at the beginning and which he immediately ceased when she asked him to stop.

[23] *Hallal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-207, para. 28, *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087, para. 17.
[24] *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-467, para. 36, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; *Andersson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-379, para. 20.

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> outside her building and asking whether she wanted him to "stay or drive back". The Applicant called Ms. L again at 6:27 p.m., but she did not answer.
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> ... Ms. H testified that when Ms. L arrived at her apartment, she smelled of alcohol, felt nauseous and vomited twice. At 6:29 p.m., the Applicant called Ms. L, and the duration of the conversation was 17 minutes. During the call, Ms. L put the telephone on speaker and part of the conversation was overheard by Ms. H. The Applicant then returned to his apartment. He sent a text message to Ms. L at 7:12 p.m. and another at 9:20 p.m. to which she did not reply. Ms. L returned to her apartment at about 11:30 p.m. that night.
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> ... On 11 January 2014 at 5:47 a.m., the Applicant sent a text message to Ms. L in which he apologised for his "options approach" and thanked her for "listening" and giving him "the chance to help". He also promised to say nothing further on the matter. The same day at 3:26 p.m., the Applicant attempted to call Ms. L but she did not answer.

55. Then, with regard to the following events, as a result of its examination of the factual allegations related to the charges, the UNRWA DT drew the following conclusions:[27]

> ... The events that took place after Ms. L left the Applicant's apartment are quite different. When Ms. L fabricated an excuse to leave the Applicant's apartment at around 5:55 p.m. and told him that she had to go immediately due to an emergency, the Applicant proposed to drive her home. She declined his offer. Ms. L then took the opportunity to suddenly leave the apartment when the Applicant had left the room. At this point, the Applicant could have had a reasonable doubt about the alleged emergency situation. Even assuming that the Applicant believed Ms. L's explanation about the emergency situation, and he wanted to help her, at 6:21 p.m., Ms. L sent him emewrg him tbionsou.0001 Tc.0162 Tw219 tex sevTJT*e.9(o-1.5(d of)]Ts(thh messaer ock)8.6(e)-1.7n)-1.9(r

> other action on his part would be unwelcome. However, at 6:29 p.m. the Applicant called Ms. L, she answered the call and they had a conversation for about 17 minutes. Ms. L, who was at Ms. H's apartment, put the telephone on speaker so that Ms. H could hear the conversation.
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> ... Ms. H testified that she heard part of the conversation between Ms. L and the Applicant. [...] According to Ms. H's testimony, Ms. L told him "no, please don't concern yourself, please go home, don't trouble yourself, I'm ok"; however, he responded:
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> > but [...] we are meant to be together, we are soul mates, we are destined to be together, the universe had this plan, I understand the universe better than you do, you think that this means that the universe thinks that we shouldn't be together but I understand this is the way the universe is giving you a choice and the choice is yours but you have to make the choice tonight.
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> ... In view of the manner in which the meeting at the apartment had ended, the [UNRWA Dispute] Tribunal finds that it was obvious that Ms. L did not want to talk to the Applicant any further. Therefore, the Applicant's actions in calling Ms. L six times between 6:06 p.m. and 6:29 p.m. and sending her three text messages between 6:26 p.m. and 9:20 p.m. certainly constituted unwelcome conduct. Furthermore, the content of the 17-minute conversation, as described by Ms. L and Ms. H in their respective testimony, does constitute sexual harassment. The sexual harassment continued on 11 January 2014 when the Applicant sent a text message to Ms. L at 5:47 a.m. and attempted to call her at 3:26 p.m.

56. Similarly, having regard to this factual situation the UNRWA DT went on to conclude:[28]

> ... In the present case, it has been established in both the statement and the testimony of the D/ERP, who was the Applicant's supervisor, that Ms. L was very disturbed after the incident. According to the D/ERP, Ms. L did not feel safe in Amman, and she was not able to present the ERP [P]aper at the IMG meeting of 16 January 2014.
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> ... A few days after the incident and following discussions with the D/ERP and the DHR, Ms. L returned to her home in the United Kingdom.
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> ... It is highly probable that Ms. L's reaction was due to her very sensitive nature. However, it is evident that she considered that the Applicant's actions had caused her "offence or humiliation" and that her work

direct consequences on Ms. L's work environment, and as such, the requirements imposed by the relevant GSC 06/2010 are met.

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68. In all of those circumstances, we find, for the reasons set out above, that the conditions for harassment and abuse of authority (Paragraph 6(b) and (d) of GSC No. 06/2010) are not satisfied. The established facts do not rise to the level of harassment or abuse of authority, since the totality of the circumstances in which Ms. L

here. In any case, this Tribunal is mindful of Mr. Bagot's claims for harm when assessing the compensation in lieu of reinstatement, as set out below.

72. Article 9(1) of the Statute of the Appeals Tribunal provides as follows:

time of any alleged breach.[31] In our view, the reasonable expectation of the duration of

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Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)	*(Signed)*	*(Signed)*
Judge Raikos, Presiding	Judge Lussick	Judge Murphy