



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

CATEAUX

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Miles Hastie, OSLA

Counsel for Respondent:

Melissa Bullen, ALS/OHRM, UN Secretariat

Jerome Blanchard, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a former staff member of the then United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)¹. He is

accounts, including the Applicant's account. The second email was sent on 1 November 2008 at 11.57 am from the Applicant's wife's email account, to six

10. The fifth email was sent by the Applicant on 4 December 2008 at 11.18 am from his wife's email account, addressed to Ms. M's private Yahoo email. In the email the Applicant made reference to the photographs of Ms. M, which he had attached to his earlier emails. He also claimed that men in MONUC had requested further nude photographs of Ms. M for their sexual gratification. It stated "[y]our photo will follow you in any mission you go to. I will follow you to your grave. Even your soul won't rest in peace. Slut." The email concluded with the statement that Ms. M had "not merely played with fire" but had "played with a nuclear bomb and must suffer".

11. The Applicant also sent several text messages to Ms. M from his private mobile telephone number as well as his official MONUC number between 19 October and 3 November 2008. Ms. M transcribed the text messages and they

13. Following the Applicant's communications, Ms. M filed a complaint with their mutual employer, the United Nations, accusing the Applicant of sexual exploitation, harassment, and the abuse and distribution of pornographic materials, even going so far as to claim, untruthfully though, that her relationship with the Applicant had not been consensual.

14. On 3 December 2008, the Office of Internal Oversight Services (OIOS) rejected consideration of the matter, considering it to be a category II allegation, in the absence of further facts which would elevate it to a category I allegation. It was therefore referred back to MONUC.

15. An *ad hoc* Investigation Panel was duly appointed to investigate and it issued a report of its conclusions on 5 March 2009. The Investigation Panel concluded that "[the Applicant] deliberately intended to humiliate Ms. M. The Panel felt that [the Applicant], in full knowledge of the UN staff rules prohibiting pornographic materials, harassment and threatening behaviour, defiantly believed that he was above the rules. Therefore the Panel felt that he had violated the UN core values and that disciplinary measures should be applied to him."

16. On the basis of the evidence and findings contained in the Investigation Report and supporting documentation, by memorandum from the then Officer-in-Charge, Human Resources Policy Service, Office of Human Resources Management (OHRM), dated 8 June 2009, the Applicant was charged with:

- a. Having prepared and sent offensive and/or threatening emails and text messages to Ms. M between 19 October and 3 November 2008;
- b. Using his official MONUC number to send personal and/or offensive text messages to Ms. M between 19 October and 3 November 2008;
- c. Having sent the offensive and threatening emails, with pictures of Ms. M naked, to several persons, including MONUC staff, family, friends and colleagues of Ms. M; and
- d. Having sent an email of a partly naked woman to other MONUC staff members' Lotus Notes email accounts using his Lotus Notes email account.

17. The Applicant was informed that, if established, his behaviour would constitute a violation of former staff regulation 1.2(f), former staff rules 301.3(d) and 301.3(e), ST/SGB/2004/15 and ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

18. By memorandum dated 27 June 2009, the Applicant provided comments on the allegations against him. He admitted that he used "harsh words" toward Ms. M and "exchang[ed] violent text messages" with her, but claimed that he never threatened or humiliated her. The Applicant admitted that he sent consecutive emails concerning Ms. M as follows "You are only interested about money; you are cheating on me with another man and are using it to steal money from me. You are acting like a whore and you should be ashamed of yourself". The Applicant admitted that he sent an image of a naked woman to "some of [his] friends" but stated that it was a "joke with no sexual implication."

19. By a letter dated 5 May 2010, the Assistant Secretary-General, Office of Human Resources Management (OHRM), informed the Applicant that all the charges against him had been substantiated and that the USG/DM, on behalf of the Secretary-General, had decided to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity. The Applicant was subsequently separated from service in May 2010.

Procedural history

20. In view of the disciplinary nature of the case a hearing was held pursuant to Article 16 of the Dispute Tribunal's Rules of Procedure (UNDT Rules). The Applicant and Ms. M gave evidence after they were administered the declaration in compliance with art. 17.3 of the Rules of Procedure and were cross examined.

Applicant's submissions

21. The Applicant submits that his conduct did not amount to a case of harassment in connection with the workplace and therefore there was no violation of staff rules 301.3(d) and 301.3(e).

22. The Applicant does not deny that he sent all the emails and text messages to Ms. M but argues that given the nature of the private relationship he had with her and his own emotional state of mind at the material time the ultimate sanction of dismissal from service was disproportionate to his misconduct.

23. The Applicant also submits that the USG/DM had no authority to impose the disciplinary measure on him on the ground that the power to impose disciplinary sanctions granted to the Secretary-General had not been properly delegated to the USG/DM who purported to exercise the power in his case.

24. In regard to the email to which a picture of a partly naked woman was attached the Applicant claims that this did not violate ST/SGB/2004/15.

Respondent's submissions

25. It was reasonable for the Respondent to conclude that, by virtue of his threatening and intimidating emails to Ms. M, and to several persons, including United Nations staff and family, friends and colleagues of Ms. M, the Applicant engaged in harassment of Ms. M, in that his conduct was improper and unwelcome and might reasonably have been expected or be perceived to cause offence or humiliation to another person.

26. The Respondent properly concluded that while the Applicant's actions may have arisen out of an intimate and private relationship, his misconduct was "in connection with work" insofar as his emails and text messages were sent to Ms. M, a United Nations staff member; emails were sent to United Nations staff members at their official United Nations email addresses and to friends and relatives of Ms. M and to her United Nations "work colleagues at their private email addresses; and the emails sought to humiliate Ms. M and to compromise her reputation in a professional context".

27. The Applicant deliberately sent his communications to United Nations staff members in various field offices and to Ms. M's colleagues at their private

email addresses. The purpose of this conduct was to humiliate her, and compromise her reputation and, thus, to interfere with her ability to discharge her official duties.

28. Further, the Applicant's communications that were sent to Ms. M and to non-United Nations staff members, namely her friends and family, were properly considered as an indivisible part of the Applicant's larger campaign of humiliation, abuse and intimidation of Ms. M.

29. In relation to the Applicant's claim that his communications were "personal and private" in nature the Respondent submitted that ST/SGB/2002/13 (Status, basic rights and duties of United Nations staff members) provides that "[t]here can be situations [...] in which the behaviour of an international civil servant can reflect on the Organization. International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organization."

30. In regard to the email to which was attached a picture of a girl on a bridge the Respondent submitted that Section 4 of ST/SGB/2004/15 permits limited personal use of information and communication technology (ICT) resources provided such use is, inter alia, consistent with the highest standard of conduct for international civil servants and would not reasonably be expected to compromise the interests or the reputation of the Organization. Section 4.1(a) provides that among the uses which would clearly not meet this standard is the "use of ICT resources for purposes of obtaining or distributing pornography, engaging in gambling, or downloading audio or video files to, which a staff member is not legally entitled to have access." Section 5 prohibits knowingly using ICT

the emails and the improper use of United Nations ICT resources fully justified the decision.

Issues

32. The Tribunal considers that the following are the issues that should be addressed.

- a. Whether the acts complained of amount to misconduct;
- b. Whether the sanction was proportionate to the acts complained of;
- c. Whether there had been a proper delegation of authority to the USG/OHRM to impose the sanction.

Whether the acts complained of amount to misconduct

33. The United Nations Appeals Tribunal (UNAT) held in *Molari* 2010-UNAT-164 that “...when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable”.

Did the Applicant’s actions in sending the emails and nude photographs of Ms. M constitute harassment within the meaning of ST/SGB/2008/5?

34. ST/SGB/2008/5 was promulgated for the purpose of “ensuring that all staff members of the Secretariat are treated with dignity and respect and are aware of their role and responsibilities in maintaining a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority [...]”. Under this Bulletin, discrimination, harassment, including sexual harassment, and abuse of authority are classified as “prohibited conduct”.

35. Pursuant to section 1.2 of ST/SGB/2008/5, harassment is defined as:

[...] 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, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents.

36. Pursuant to section 3.1, “all staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations”.

37. Having reviewed the contents and nature of the emails this Tribunal takes the view that the conduct of the Applicant in creating these emails and sending them to Ms. M, as well as distributing to other recipients, some of whom were working in the same unit as Ms. M was certainly conduct not befitting a staff member of the Organization. Matters were made worse when the Applicant attached a picture of Ms. M in the nude, a picture that he falsely alleged he had deleted from his camera.

38. The sending of the crude and offensive emails and the pictures amount to harassment by the use of words and gestures and were calculated to demean, humiliate and embarrass Ms. M in her work place in that they tended to depict her as a sort of heartless monster, a woman bent on exploiting men for monetary gains, a woman who would just offer herself to men for money. Ms. M in her testimony given on 22 March 2012 described her reaction as follows:

When I received the emails they demoralised me. I was very emotional and surprised. I even considered suicide. . . I did not think such a thing could happen.

39. She described the effect on her work environment: “[It] meant that I could no longer work or be with [my] colleagues or look them in the eye.... I locked myself in the office for the whole day, crying.... It affected me very badly. Everyone was looking at me in an embarrassed (sic) way. I stayed in the office. I did not want to speak to anyone”.

40. Ms. M described how she felt about the emails being sent to her friends and family: “I was shocked. I really lost my mind. This was overwhelming. I was completely demoralised. The only solution was to commit suicide. I did not see people. Everyone called to ask me what kind of problem you could have with someone like this. I was not myself. I did not know what to do”.

41. On the naked photograph that was sent to her, her colleagues in the Organization, family and friends she stated that she became very emotional. She did not even know that the photograph existed and she was surprised to see it. She explained: “I felt very embarrassed ... It was difficult go to work every day ... [E]veryone was looking at me. I stayed indoors the whole time. I did not speak to anyone”.

42. There is no dispute that the Applicant sent the offensive emails to Ms. M and to other recipients. On the one hand, the Applicant declares that the emails were “damaging and borderline violent” and that they were “personal and private”. On the other hand, he acknowledges that his acts were “unethical” and that he engaged in conduct unbecoming of an international servant, mindful of the adverse consequences for the reputation of Ms. M”.

43. As a matter of law the Applicant has made a statement akin to a confession in criminal law. Though a court of law is faced with an admission of guilt by a party who is charged, the court still has to look at the overall circumstances in which the confession was made and whether the facts admitted to amount to a criminal act. The same approach must, in the view of this Tribunal, be taken in disciplinary matters in view of the presumption of innocence in disciplinary proceedings as observed by the United Nations Appeals Tribunal (“the Appeals Tribunal”) in the case of *Liyanarachchige* 2010-UNAT-087 that: “The Appeals Tribunal recalls that in a system of administration of justice governed by law, the presumption of innocence should be respected”.

44. The evidence shows that the Applicant readily made the confessions in regard to his conduct without any prompting or oppressive conduct by the investigators. Though the Tribunal would urge the investigators to tread with

caution when faced with such a situation. But even if no caution or warning was

48. Even if it is assumed that all the communications related to the private life of the Applicant he still cannot be absolved of blame. ST/SGB/2002/13 (Status, basic rights and duties of United Nations staff members) provides that "[t]here can be situations, in which the behaviour of an international civil servant can reflect on the Organization. International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organization." By acting as he did the Applicant exhibited sordid conduct that would certainly tarnish the image of the Organization.

49. The Tribunal finds that the Applicant's actions in sending the caustic emails and nude photographs of Ms. M to United Nations staff members at their official United Nations email addresses and to their private email addresses constitute harassment within the meaning of ST/SGB/2008/5 in that the emails sought to belittle, humiliate and embarrass Ms. M and to compromise her reputation in a professional context. Accordingly, his actions in this respect amounted to misconduct.

however be applied in a total vacuum. A measure of common sense, logic and human experience will necessarily come into as the standard is used to evaluate concrete facts.

57. The Tribunal reiterates what it stated in the case of *Massah* UNDT/2011/218:

It has never been easy to define what pornography is. “Pornography” is not defined in the Bulletin, or in the Commentary annexed thereto. It is not defined in any of the existing Staff Rules and Regulations or Secretary-General’s Bulletins or Administrativ.

value, it in fact lacked any serious literary, educational or even artistic value. Nevertheless, the Tribunal finds that the picture did not depict sexual conduct in a patently offensive way.

59. The Tribunal finds also that while the picture is tactless and improper and should not have been sent to anyone using the Organization's ICT resources, it

Two staff members received and distributed a relatively small number of e-mails containing pornography using their official Lotus Notes e-mail accounts.

Disposition: censure.

Thirty-two staff members received and distributed a relatively small number of e-mails containing pornography using their official Lotus Notes e-mail accounts.

Disposition: censure.

Eight staff members received e-mails, distributed and stored a relatively large number of e-mails containing pornography using their official Lotus Notes e-mail accounts.

Disposition: censure, loss of two steps within grade and two years deferral of consideration for promotion.

63.

was aimed at demeaning a staff member. At the time of the incident the Applicant was a security officer with MONUC. He held managerial and supervisory responsibilities. He admitted that his position was a serious one of responsibility and authority. In the light of the position he held and the responsibilities he was entrusted with the misconduct is even more serious.

66. The Applicant's misconduct was egregious and it had a devastating effect on another United Nations staff member and her work environment. The Applicant failed to respect the high level of trust placed in him. It was the duty of the Respondent to take the appropriate action and the Secretary-General cannot be faulted for concluding that the Applicant was no longer fit to be a member of the Organisation. It is the duty of the Secretary General to maintain and limit damage that may be done to the Organisation's reputation.

Was the USG/DM properly delegated to sanction the Applicant?

67. The Applicant avers that the USG/DM lacked the necessary authority to make the decision.

68.

70. Further, the Secretary-General indicated to the General Assembly on 23 August 2007 that under the new system of administration of justice, the USG/DM would make all decisions as to the imposition of disciplinary measures.⁸

71. Based on the foregoing, the Tribunal finds that the responsibility for making decisions to impose disciplinary measures and to dismiss staff members was delegated to the USG/DM effective 1 July 2009.

72. Accordingly, the Tribunal concludes that the USG/DM was vested with the proper delegation of authority to sanction the Applicant.

Conclusion

73. The Tribunal finds that that the Applicant's actions in sending the emails and nude photographs of Ms. M to United Nations staff members at their official United Nations email addresses and to their private email addresses constituted harassment within the meaning of ST/SGB/2008/5 and as such, his actions amounted to misconduct.

74. The Tribunal finds that the sanction was proportionate to the misconduct.

75. The Tribunal finds that the USG/DM had been vested with the requisite delegation of authority to sanction the Applicant.

⁸ A/62/294.

76. The Tribunal finds that the disciplinary proceedings against the Applicant were conducted according to appropriate due process standards as set out in ST/AI/371.

77. The Tribunal finds that no compensation is owing to the Applicant.

Judgment

78. Accordingly, the Application is dismissed in its entirety.

Signed

Judge Vinod Boolell

Dated this 21st day of February 2013

Entered in the Register on this 21st day of February 2013

Signed

Jean-Pelé Fomété, Registrar, Nairobi