UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2021/025
	Judgment No.:	UNDT/2022/098
	Date:	30 September 2022
	Original:	English

Before: Judge Joelle Adda

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THEMMI UNITED NATIONS

Introduction

1. The Applicant contests the "Administration's finding of misconduct and imposition of a disciplinary sanction

and AA's mother have accused the Applicant of having sexually abused AA, who was a minor at the relevant time.

7. On 17 June 2012, after having previously left his job in New York, the Applicant

forgive

> But I repeatedly and sincerely asked you and [AA's father] for forgiveness—both at that moment and later on.
>
> Would you believe, all these years I have lived with great pain from my idiocy and its consequences for [AA], as well as from the loss of our friendship as a result of this. You can't even imagine how tormented I was, how many times I repented for it before God and, in my mind, before you!!! And now I am not at all the same as I was before.
>
> As for New York, this is not some kind of a triumphal move, but a forced step. It just happened so that [the United Nations agency] suddenly introduced universal rotation, and I, unexpectedly, as they say, was shown the door.
>
> Meanwhile, [the Applicant's daughter] had enrolled into a university and already completed two years. If we are to soon lose an education grant, all her studies will collapse.

I tried to look for vacancies in other places, but nothing came of it.es will collapse

Consideration

The issues of the present case

15. The Appeals Tribunal has consistently held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

16. Accordingly, the basic issues of the present case can be defined as follows:

a. Was

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". See, for instance, para 32 of *Turkey* 2019-UNAT-955, quoting *Miyzed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164, and affirmed in *Ladu* 2019-UNAT-956, para. 15, which was further affirmed in *Nyawa* 2020-UNAT-1024.

18. The Appeals Tribunal has generally held that the Administration enjoys a "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, "when judging the validity of the

unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

21. The jurisprudence outlined in the above was, in essence affirmed in *Applicant* 2022-UNAT-1187. In *Applicant*, the Appeals Tribunal made a range of elaborate findings specifically addressed to the Dispute Tribunal's handling of cases regarding sexual misconduct. Thus, a finding of sexual misconduct against a staff member is "a serious matter", which will "have grave implications for the staff member's reputation, standing and future employment prospects". For this reason, the Dispute Tribunal "may only reach a finding of sexual misconduct on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that the elements of sexual exploitation and abuse have been established in accordance with the standard of clear and convincing evidence". In other words, the Appeals Tribunal held that "the sexual misconduct must be shown by the evidence to have been highly probable".

Whether the facts on which the sanction is based have been established?

22. The Applicant generally submits that the Respondent "decided to impose a stern sanction on the Applicant, a staff member with over two decades of dedicated and illustrious service to the Organization, based on unfounded evidence". The sanction "was based on uncorroborated, flimsy, and contradictory evidence", and "[c]ontrary to the assertions of the Respondent in the sanction letter and in the present proceeding, the Applicant has never sexually abused AA". Rather, the Applicant "is a serious and trustworthy individual incapable of such acts".

23. The Respondent, in essence, contends that the facts were established by the applicable standard of proof and that the contested decision was a proper and lawful exercise of the Administration's authority in disciplinary matters.

24. In the following, for the sake of completion, the Tribunal will consider the Applicant's contentions as they were presented in his closing statement, even if repetitions occur. Where relevant, the submissions of the Applicant's final observations have been added.

Salient factors

25. At the outset, the Applicant points to some "salient factors", which he contends the Tribunal should take into account in its review of the present case.

26. Firstly, the Applicant states that the Tribunal should consider the factor of time and the fact that "the allegations date back to 1993-1995, which makes their veracity highly dubious". The complaint against the Applicant was filed by AA's mother "almost 30 years after the alleged incidents took place", and AA's parents' "rationale for filing a complaint only in August 2019 to protect their daughter or because they did not know that it was possible to complain are not credible reasons for such a delay and are contradictory". If "the alleged incidents did happen and did have an impact on AA's life, the allegations against the Applicant would be sufficient in any culture of the world to push educated people as AA's parents or even AA, currently a 40-year-old woman, to complain earlier, including when the Applicant worked on temporary assignments in New York multiple times from 2004 to 2011".

27. The Applicant further contends that "reality is that prior to the [Office of Internal Oversight Services] investigation, neither AA nor her parents complained to any authority, be it the [United Nations] or a national body. Indeed, "the 1993 episode has never happened and what occurred in 1995 was not the overstated version given by

words". Both "BB and CC testified that they socialized on a regular basis and teamed up to organize joint events".

37. The Applicant contends that "[f]ortunately, [his] wife was present at all events that occurred after 1995 and was able to testify that the relationship between the families was good despite the conversation that the Applicant had with AA's mother about AA, which did have certain impact on their friendship". BB and CC "were also able to testify that the friendship continued post 1995".

38. In the Applicant's final observations, he adds that "[t]he change in the friendship was a result of the impact that the difficult conversation between the Applicant and AA's mother had on it after the misunderstanding over the babysitting episode and by no means supports the conclusion that the facts were established". The testimonies "have shown that the witnesses cannot even specify the exact year the alleged events occurred, let alone their chronology". Contrary to the Respondent's statements, the "photographs presented, especially the one taken at the Applicant's home [in Spring 1999] with AA's mother holding the Applicant's daughter [then aged of one year], testify to the close relationship that continued to exist between the families afterwards". The "comment on an 'unavoidable interaction' is demagogical, as AA's father and the Applicant obviously collaborated on creative activities (e.g., playing

redacted for privacy reasons] to translate it for the benefit of the Tribunal. The text, however, remains her own statement which she confirmed independently at the hearing".

43. To begin with, the Tribunal finds that the Applicant and his family indeed have significant work-related, personal and financial interests vested in the outcome of the present case. Their interests, *inter alia*,

to file a false sexual abuse complaint. Nor has the Applicant even provided any submissions on why AA should feel any bias, or other animosity, against him.

46. The Applicant contends that the "fact that AA's mother allowed AA to babysit the Applicant's son, and AA did so out of her own free will after the alleged New Year's Eve 1993 incident proves that the allegations are untrue and that neither AA nor her mother considered the Applicant a threat". AA's mother "testified that when AA

48. Concerning the credibility of AA and her mother's testimonies, in the Applicant's final observations he adds that "[d]uring the hearing, AA was intentionally asked very specific questions by the Respondent ([for instance]., the size of her nightgown or the lighting in the room) to make the Tribunal believe that AA remembers that night in 1993 to the smallest detail". The Applicant asks the Tribunal to "consider AA's age at that time, the passage of almost three decades since 1993 and the fact that AA was asleep during the alleged incident to assess the credibility of AA's supposed recollections. The Applicant maintains that they are all fabricated".

49. The Applicant further submits in his final observations that "[c]ontrary to AA's mother's assertion, the concept of sexual misconduct existed in [name of country redacted for privacy reasons] as early as in the 1960s, established in [the country penal code in force at the time]". Therefore, AA's mother's "inaction" could not "be justified by the inexistence of such a concept in "the [name of country's] culture she grew up in". In

51. The Tribunal also finds that the Applicant's additional submissions regarding the veracity of the testimonies of AA and her mother are speculative, because none of them are proved by any evidence. Rather, the Tribunal finds that the testimonies of AA and her mother are convincing when, in effect, stating with regard to the alleged 1993 incident that they afterwards decided simply not to consider the matter any further and move on as if nothing had occurred. Their lack of knowledge of the concept of sexual abuse and its possibly severe traumatic implications for the victim can reasonably explain this, as well as their wish not to upset the close friendly relations with the Applicant and his family and their standing in the national community. The fact that AA has a detailed recollection of the events only proves that she still vividly recalls the alleged incident, and the Tribunal does not doubt the veracity thereof.

52. Regarding the alleged babysitting incident, the Tribunal notes that the issue of possible sexual abuse was only brought to the attention of AA's mother after AA confided in DD and EE about her alleged experiences. EE then told AA to tell her mother about them, which AA then did. This is, at least, what DD and EE explained to OIOS, and the Tribunal finds these statements convincing, even when taking into account the passage of time. In this regard, it is noted that a sexual abuse claim is a very serious and significant matter that any person could reasonably be expected to remember many years later. Also, neither DD nor EE had any reason to lie about their recollection of facts to OIOS. As for AA herself, the Tribunal observes that she was a minor at the relevant time and could not be expected to fully understand what was happening, while at the same time, she was also intending to protect her father's close friendship with the Applicant.

53. The Applicant contends that the "chronology of events completely discredits the allegations". The photographic evidence that "the friendship continued into 1999 refutes AA's parent's assertion that the friendship ended in 1997". This evidence "overturns the assumption of any abuse allegedly committed by the Applicant". If AA

"only saw the Applicant once after the babysitting episode as she indicated, why did her parents continue seeing him?" Both AA's parents "continued their friendship with the Applicant after the alleged episodes, and AA's mother even asked the Applicant's assistance in buying a guitar for her husband's birthday". If the allegations were true, it "would be their first priority as parents to protect their daughter". This proves that "the incidents as presented in the complaint have never occurred".

54. The Tribunal, as also stated in the above, is convinced by AA's parents' testimonies that they continued to attend the same parties and events as the Applicant and fa

anTuETQ0.00000912 0 612 792 reW*nBT/F1 12 Tf1 0 0 1 178.586.42.43 Tm0 g0 G[(a)4(-31(b154(tt)

and thus AA's father could not have been deliberating on whether to make this matter public".

57. The Tribunal agrees with the Respondent that AA's father at the hearing appeared to be embarrassed by providing testimony. To the Tribunal, AA's father even seemed very discomfortable and distraught by the situation, which is

as an assertive and self-

65. As stated in the above, the Tribunal was convinced by the testimonies of AA and her parents. In this regard, the discrepancy in the testimonies between AA and her father about his seeking forgiveness for the alleged sexual abuse is unimportant and explained by his circumstances. At the same time, the Applicant and his wife have, as also already held, significant professional, personal and financial interests in the present case, whereas it has not been proved that AA and her mother had or have any other interest in the present case than seeking justice for the alleged sexual abuse.

Specific episodes

66. The Applicant contends that the "charge letter identifies two episodes allegedly amounting to misconduct". The "alleged 1993 episode has never occurred and is not corroborated by clear and convincing evidence". AA's mother testified that "when AA told her about this alleged 1993 episode, she dismissed it and continued the relationship as usual". "How can an event like this be dismissed?"

her shirt". Unfortunately, "this event has never been fully clarified as AA's mother categorically refused to arrange a meeting with all the parties proposed by the Applicant to present his apologies to AA for making her feel uncomfortable".

68. The Applicant submits that "[i]n any case, the emails exchanged between the Applicant and AA's mother in 2018 do not constitute any admission to the accusations raised against him

contradictory witness testimonies. As the present case involves termination, the question for the Tribunal to determine is therefore whether the Respondent has established with clear and convincing evidence that the factual background upon which the disciplinary sanction is well-founded. This means that AA's testimony is highly probable whereas, in consequence, the Applicant's testimony is not reliable.

71. With reference to the Tribunal's findings in the above, the Tribunal is—clearly and convincingly—persuaded by AA's testimony in which she affirms the facts as set out the sanction letter. In this regard, the Tribunal, in particular, takes into account its abovementioned findings that: (a) the Applicant in the July 2018 email effectively admits to have sexually abused AA, at minimum on one occasion; (b) AA's account of facts is corroborated by convincing hearsay evidence, especially the testimony of her mother, but also by the investigation statements of DD and EE regarding the babysitting incident; (c) the Applicant and his wife agreed that the relationship with AA's family cooled off after the babysitting incident; (d) neither AA nor AA's mother have any other perceived interest in the sexual abuse complaint than seeking justice for the sexual abuse; (e) the Applicant, as well as his wife, have significant interests in outcome of the case in terms of restoring his private and professional reputation and in retrieval of their

73. Based on the above, the Tribunal finds that the Respondent has properly established the facts set out in the sanction letter.

Whether the established facts qualify as misconduct and whether the sanction is proportionate to the offence?

74. The Applicant makes no other submissions than since the facts were not established by clear and convincing evidence, his "behaviour did not qualify as misconduct under UN former Staff Regulation 1.4 or any other UN rule, and the sanction was therefore arbitrary and grossly disproportionate".

75. The Tribunal notes that since it found that the facts were indeed established with clear and convincing evidence, based solely on the Applicant's submissions, the straightforward conclusion is therefore that (a) the established facts did qualify as misconduct, and (b) the sanction, namely separation from service with compensation *in lieu* of notice and without termination indemnity, was proportionate to the offense, namely sexual abuse of a minor.

76. In the interest of justice, the Tribunal, nevertheless, finds it necessary to also provide its assessment of whether the Applicant's established behavior, as a matter of law, indeed amounted to sexual abuse. Hence, sexual abuse is an objective standard, even if the Applicant's 9 July 2019 email is read as him admitting that he was only aware that he abused AA. Hence, "sexual abuse" is defined in ST

Conclusion

80. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 30th day of September 2022

Entered in the Register on this 30th day of September 2022
(Signed)
Morten Michelsen, Officer-in-Charge, New York