



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Oh

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)



JUDGE SOPHIA ADINYIRA , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Byeong Kil Oh¹ against Judgment No. UNDT/2013/131 in the case of *Applicant v. Secretary-General of the United Nations*, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 29 October 2013. Mr. Oh appealed on 6 January 2014, and the Secretary-General of the United Nations answered on 10 March 2014.

Facts and Procedure

2. The following facts are uncontested:²

... The Applicant entered into service with [the United Nations Operation in Côte d'Ivoire (UNOCI)] on 22 June 2004 as an Engineer at the P-3 level. He was then appointed Head of the Electrical and Mechanical Unit of the Engineering Section. Subsequently, he was selected for a temporary position at United Nations Headquarters in New York as an Engineer at the P-4 level in the Logistic Support Division, Department of Field Support (LSD/DFS). He served in this position until his separation from service on 3 August 2010.

... Between 21 and 23 February 2007, the *Police criminelle d'Abidjan* in Côte d'Ivoire raided five local businesses suspected of operating illegal brothels. The raids resulted in the apprehension of suspected procurers and a number of women suspected of being prostitutes. Among the women apprehended, four were from a bar called Bar Lido and were identified as VO1, VO2, VO3 and VO4 (Victims) who all claimed to have been trafficked and compelled to work as prostitutes.

... On 5 March 2007, [the Office of Internal Oversight Services (OIOS)] received a Code Cable, issued by the Special Representative of the Secretary-General (SRSG), UNOCI, reporting that three of the Victims claimed that UNOCI staff members were among their customers.

... On 6 March 2007, OIOS initiated an investigation into the report made by the SRSG/UNOCI.

... On 7 and 8 March 2007, OIOS gained access to the Victims who were at the CôtelOM adv

Philippines and were offered employment as waitresses in a bar or restaurant

an absolute right and that “the requirements of due process rights will [have] been met in relation to witness statements ... if the witness[...] statements have been provided to the staff member and the staff member has had an opportunity to comment on, and respond to, the statements”.⁵

6. The UNDT concluded that the facts of the misconduct had been established, that Mr. Oh's due process rights had been respected, and that summary dismissal was proportionate to the offence. Accordingly, the UNDT dismissed Mr. Oh's application.

Submissions

Mr. Oh's Appeal

7.

claims that Ms. Blaskovic's handwritten notes of the interview with him differed materially

14. The UNDT properly found that the conditions for admissibility of anonymous statements set out by the Appeals Tribunal in *Liyanarchhige* were met in the present case: The circumstances of the case demonstrate that it was an exceptional case warranting the use of anonymous witness statements. The statements of the anonymous witnesses VO3 and VO4 were corroborated by the statements that Mr. Oh himself made to OIOS. He was provided with sufficient information about the nature of the allegations against him and was afforded the opportunity to effectively challenge the statements of VO3 and VO4. He did have the opportunity to cross-examine the investigator about the circumstances in which the

particular procedure prescribed in the OIOS Investigation Manual or elsewhere. His identification from a set of six photographs, by each of the two victims, independently and separately from each other, constituted evidence that was reasonably considered by both the Administration and the UNDT to support his misconduct.

18. The Secretary-General therefore requests that the Appeals Tribunal reject the appeal in its entirety.

Considerations

Preliminary issue: Application for Confidentiality

19. We observe that in footnote 1 of his brief Mr. Oh states: “The UNDT kept the Applicant’s name confidential. The Applicant requests the UNAT to maintain his confidentiality.” This Tribunal could have ignored the footnote as this request should have been made by a formal motion. However, to avoid addressing the matter after the publication of this Judgment, we must deal with it in this Judgment.

20. Article 20(2) of the Rules of Procedure of the Appeals Tribunal (Rules) provides that:

23. On the contrary, we think it is the victims of misconduct who need anonymity. As the purpose of anonymity is to protect the privacy of victims of misconduct, and also to ensure their safety as in this case where VO3 and VO4 and others were rescued from a kidnapping and prostitution ring. This is not the situation for Mr. Oh.

24. Mr. Oh's application for confidentiality is denied.

Merits

25. Judicial review of a disciplinary sanction requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence".⁷

26. The UNDT held that there was sufficient proof that Mr. Oh had engaged in sexual exploitation and abuse of women, in light of the totality of the evidence on re7li120 3.4(a115.63(t117

necessary for the protection of the witness. Furthermore, it should be possible to verify the circumstances surrounding anonymous witness statements and to allow the accused staff member to effectively challenge such statements⁸.

33. Although the above conditions were met in the *Liyanarachchige* case, the Appeals Tribunal went on to hold:

It should be recalled, however, that even assuming that the above-mentioned conditions were met, a disciplinary measure may not be founded solely on anonymous statements. In disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defence and the requirements of adversary procedure. In this case, the charges are based solely on statements made to the OIOS investigator by anonymous witnesses⁹

34. In the circumstances of the *Liyanarachchige* case, the Appeals Tribunal held:

It follows from the above that the UNDT erred in law by finding that the Secretary-General had not violated the requirements of adversarial proceedings and the rights of the defence in taking the decision to summarily dismiss Mr. Liyanarachchige solely on the basis of the statements of anonymous witnesses!¹⁰

35. As this Tribunal noted above, the circumstances of this case were the same as in *Liyanarachchige*. It was an exceptional case warranting the use of anonymous witness statements. The purpose of anonymity was to protect the privacy of the victims of misconduct, and also to safeguard their safety as they had been removed from a human trafficking ring. Also from the record, the non-governmental organization that had custody of the women granted limited time for interviews before the witnesses were removed from Côte d'Ivoire.

36. The reasons for withholding the identities of the victims and for not producing them at the trial were contained in the OIOS Investigation Report that was sent to Mr. Oh.

37. Accordingly, the UNDT in Mr. Oh's case properly found that the conditions for the admissibility of anonymous statements set out by the Appeals Tribunal in *Liyanarachchige* were met.

⁸ *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087, para. 19.

⁹ *Id.*, para. 20.

¹⁰ *Id.*, para. 21.

38. It should be noted that this is where the similarity between the two cases ends. Mr. Oh's case is clearly distinguished from *Liyanarachchige* for the following reasons. In *Liyanarachchige*, the staff member denied all allegations against him during the interview with OIOS, so that disciplinary measure was solely based on the anonymous witness statements of VO1 and VO3. In Mr. Oh's case the disciplinary measure was founded not only on anonymous witness statements, but also on statements made by Mr. Oh to OIOS that corroborated the witness statements as well as on photographic identification.

39. Mr. Oh further argues that the UNDT misapplied the Appeals Tribunal's ruling in *Applicant*,¹¹ contending that in that case the identities of the complainants who were alleging sexual harassment were known to the defendant staff member and the witness statements were signed by the complainants.

40. As the Secretary-General asserts, *Applicant* does not require that statements of witnesses must be signed when their cross-examination is not possible. Rather, the due process rights of a staff member are complied with as long as he has a meaningful opportunity to mount a defense and question the veracity of the statements against him, which, in the instant case, Mr. Oh did. For clarity, we reproduce portions of the *Applicant* Judgment:

... As a general principle, the importance of confrontation, and cross-examination, of witnesses is well-established. ...

... Under certain circumstances, however, denial of this right does not necessarily fatally flaw the entire process.

...

... In the instant case, it proved impossible for the Administration to produce the Complainants to testify, and be cross-examined, before the Dispute Tribunal. This situation, while certainly regrettable, was not of the making of the Organization and should not be held while certainly regrettable, was not of the making of the Organization and should not be held against

... The Tribunal is satisfied that the key elements of the Applicant's rights of due process were met: he was fully informed of the charges against him, the identity of his accusers and their testimony; as such, he was able to mount a defense and to call into question the veracity of their statements. This Tribunal is, therefore, satisfied that the interests of justice were served in this case, despite his inability to confront the persons who had given evidence against him during the initial investigation.¹²

41. Accordingly, this ground of the appeal fails.

Did the UNDT err in upholding the Secretary-General's decision based on the record of Mr. Oh's interview that he contested?

42. The UNDT, in assessing the reliability of Mr. Oh's statements to OIOS that he had paid the women he had met at the Bar Lido for sexual services, rejected his allegation that his statement had been fabricated by OIOS.

43. Mr. Oh challenges the record of his statements to OIOS by claiming that the "investigators did not follow procedures that would have improved the reliability and trustworthiness of the investigation". He contends that the investigators failed to record the interview and to prepare the report in "question asked-answer received" format. He alleges that there was a "lack of clarity in what [he] was asked and what he understood" during his interview with OIOS. Furthermore, he was not asked to read and sign the statement.

44. The Secretary-General submits that OIOS followed all the required procedures that were applicable at the time of the investigation. The Secretary-General referred to paragraphs 19, 52 and 53, of the OIOS Manual of Investigation Practices and Policies (OIOS Investigation Manual) in force at that time.

45. Paragraph 19 of the OIOS Investigation Manual provides:

When interviewing staff or others, every effort

protections are sought by the interviewee, such as in cases of reasonable fear of retaliation or other danger, the investigators will shield the identity of the witness in the files.

46. Paragraph 66 provides:

An investigation report that recommends disciplinary or judicial action will set out the facts that have been established by OIOS and demonstrate how those facts led OIOS to reasonably conclude that the staff member had engaged in misconduct. The report will present an account of the views of the staff member against whom evid and .dTf 10.022(omm).43

50. Mr. Oh further denies making any admission to the OIOS investigators that he paid prostitutes for sexual services and contests therecord of the interview. He claims his OIOS statements were fabricated. The burden of proving improper motivation lies with the staff member raising such claims.¹³ Mr. Oh presented no evidence to support this allegation.

51. In comparing the handwritten and typed notes of Mr. Oh's statements to OIOS we do not find any material difference. It is also not evident that OIOS misconstrued innocent statements by Mr. Oh as euphemisms for prostitution and drew erroneous inferences.

52. During the oral hearing, Mr. Oh had the opportunity to cross-examine one of the OIOS investigators who had interviewed him. The UNDT also had an opportunity to assess the credibility of both Mr. Oh and the OIOS inve stigator. It was satisfied that Ms. Blaskovic's denials of his allegations were credible and that the allegation of fabrication was unsubstantiated.

53. This Tribunal has emphasized:

... some degree of deference must be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. The UNDT has the advantage of assessing the demeanour of each witness while he or she is giving evidence and this is critical for assessing the credibility of the witness and the persuasiveness of his or her evidence⁴

54. In light of the foregoing, we uphold the UNDT 's decision to reject Mr. Oh's allegation that his statement as recorded by OIOS had been entirely fabricated. We also hold that the UNDT properly relied on the record of Mr. Oh's statement to the OIOS investigators, which corroborates the statements of VO3 and VO4 that he hadpaid them for sexual services.

55. This ground of the appeal fails.

one photograph of a Korean man. This Tribunal has viewed the array of six photographs and is of the view that Mr. Oh did not stand out as all the photographs were of Asian men. Accordingly, we find that the identification of Mr. Oh from six photographs by each of the two victims, independently and separately from each other, constitutes evidence that was reasonably considered by the Administration and the UNDT as supporting the finding of his misconduct. Accordingly, this ground of the appeal also fails.

Conclusion

57. We affirm the UNDT decision that the facts of misconduct have been established in that Mr. Oh had engaged in sexual exploitation and abuse in the light of the totality of the evidence, based on his statements to OIOS, the statements of the two victims, VO3 and VO4, to OIOS, and the identification by VO3 and VO4 of him in a photographic array.

58. From the foregoing, the appeal fails.

Judgment

59. The appeal is dismissed and the UNDT Judgment is affirmed.

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2014-UNAT-480