



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/61

Judgment No.: UNDT/2011/054

Date: 16 March 2011

Original: English

Before: Judge Shaw
Registry: New York
Registrar: Jean-Pelé Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Edward Patrick Flaherty

Counsel for Respondent:
Felix Ross, UNHCR

Introduction

1. The Applicant was summarily dismissed from his post with the office of the United Nations High Commissioner for Refugees (UNHCR) in Budapest, Hungary on 19 January 2009, following an investigation into two formal sexual harassment complaints against him.

2. The Applicant appealed against the decision to dismiss him to the former Joint Disciplinary Committee (JDC) but because of the transition to the new internal justice system on 1 July 2009 the case was transferred to the United Nations Dispute Tribunal (UNDT) before the JDC could consider it.

3. The venue for these proceedings falls into the geographical area of the UNDT, sitting in Geneva. As the disciplinary investigation record was prepared by a person who is now employed in the Registry of UNDT Geneva, it was agreed by the Parties that the case would be administered by the Nairobi Registry and heard by a Judge who is not permanently stationed at Geneva.

4. The oral hearing was conducted in public although, following an application by the Respondent which was opposed by the Applicant, the Tribunal ordered that the court be closed during the evidence of the complainants and one other witness. The Applicant also objected to the names of the complainants being kept confidential.

5. In view of the outcome of this case the Tribunal orders that none of the names of the persons involved in this case will be published.

6. The Respondent called the three complainants, two of their colleagues and two staff members who had worked with the Applicant in other duty stations. The Tribunal called of its own motion, the Director of the UNHCR Division of Human Resources Management (DHRM), and the person who conducted the investigation

for the Inspector General's Office (IGO). The Applicant's witnesses included himself and three former colleagues.

The Application

7. The Applicant disputes the lawfulness of his summary dismissal. He denies that he committed misconduct and says that procedural irregularities and the denial of due process made the decision to dismiss him unlawful. He has applied for the following relief:

- i) To quash the decision of the Respondent to summarily dismiss him;
- ii) To order his immediate reinstatement with full retroactive restoration of all benefits from the date of his dismissal;
- iii) To recommend that no further disciplinary action be taken against him;
- iv) To award him CHF 50,000 for costs and expenses;
- v) To award moral damages in an amount equal to at least five years of his last gross salary;
- vi) To award interest on any monetary damages awarded from the date of his dismissal to when the decision of the Tribunal is satisfied;
- vii) Any other relief.

The Facts

8. The Applicant was employed as an Associate Personnel Officer by UNHCR in 1995. Since then he served in the field including in Liberia and in the office of the High Commission for Human Rights in Geneva. In January 2008, he was appointed to a P4 position of Senior Personnel Administration Officer in the

UNHCR Budapest Services Centre which had been recently relocated from Geneva. He worked in the Personnel Administration and Payroll (PAPS) section of DHRM.

9. The Applicant had overall responsibility for the Headquarters, Europe and Americas Unit (HEA Unit) and had management responsibility for two sub-units. His immediate supervisor was the Chief of PAPS.

10. In January 2008 a group of Personnel Administration officers were locally recruited to work in the HEA Unit. The Applicant was their second level supervisor but until their direct supervisor arrived in March they worked under his direct supervision. They were employed on a 364-day fixed term contracts with an initial probationary period of 3 months. Three of these staff members were Ms M, Ms S and Ms T.

11. On 24 April 2008, the Chief of PAPS called a meeting with local and international staff to address their complaints about the way unit meetings were conducted, lack of technical support, and uncertainty about the nature of their contracts as the probationary period had expired. As a result of these complaints there was some subsequent re-arrangement of work and some staff were transferred.

12. In late April or early May 2008, Ms M approached a Human Resources Officer (HRO), to confide that she had been receiving SMS messages from the Applicant and that he was asking her out. She was emotional and crying. The HRO advised her of the procedures she could follow and, because they were serious allegations, advised her to tell the truth.

13. At about the same time but independently of Ms M Ms S spoke to the Assistant HR Officer in Budapest. She told him that she had been invited by the Applicant to come to his apartment to measure and choose curtains. She was embarrassed about being asked to do this after only one month of employment; she did not feel comfortable and did not want to go. She asked for advice. He advised her not to go. She did not feel comfortable but was also concerned about the security of

her job if she refused. The Assistant HR Officer printed out a document on sexual harassment for her.

14. Shortly after that Ms S spoke to the HRO about the Applicant. Ms S did not know of Ms M's complaint at that stage. Ms S said that the Applicant was angry with her for not wanting to go to his apartment, and that he was calling her into his office to speak about personal matters not just about work. The HRO advised her that she had to be sure of the truth of her allegations and told her of the channels she could follow if she wanted to pursue the matter. She also suggested that she speak to the Chief of PAPS before taking the matter further. Next, the HRO heard from Ms T that the Applicant had stopped talking to her because she had attended a meeting with the Chief of PAPS. She told her that the Applicant had spoken to her of his power in the Organisation. As a result of what she had heard, the HRO spoke to the Chief of PAPS. She left the matter for him to deal with. In mid May, Ms S told the Chief of PAPS about Ms. M's concerns and, Ms M herself approached him with reports of alleged inappropriate behaviour towards her by the Applicant. The Chief of PAPS raised the matter with the Deputy Director DHRM who went to Budapest and met with a number of staff on 5 June 2008. Following this meeting, the Deputy Director immediately referred the complaints of sexual harassment to the Inspector General's Office of UNHCR.

15. On the same day the Chief of PAPS and the Deputy Director met with the Applicant. They discussed the concerns the staff had raised about their contractual status and the management of the unit. The sexual harassment complaints were not mentioned. The Applicant rejected a suggestion that he go on mission to Afghanistan for a month to allow work place tensions to ease as he had just returned from two years in Liberia. Eventually it was agreed that he would telecommute from home until he took his home leave in July.

16. The Applicant then expected to return to work but after his leave he was again requested to work from home. The Applicant withdrew his agreement to telecommute when it became apparent in August 2008 that it was likely to continue

for a number of months. He went on sick leave at that stage and did not return to work again before he was summarily dismissed.

The Preliminary Investigation

17. The Chief of PAPS and the IGO formally received the initial complaints in two e-mails.

18. The first from Ms S said that the Applicant was insulting her behind closed doors in his office, mostly with words but on one occasion physically. She clearly indicated to him that she did not feel comfortable in the situation and that she did not wish to go to his flat. She said this started in the last two weeks of February 2008. She asked for a formal investigation because, although he had stopped insulting her, she did not feel safe and comfortable and she received very negative treatment from him.

19. The second complaint, from Ms M said sexual harassment started almost immediately after his arrival in January 2008. He called her into his office and insulted her with words, and once touched her physically. She had clearly told him that his talk of sexuality and his attraction to her was making her uncomfortable.

20. Once advised of the allegations, IGO commenced an immediate investigation. An investigator was dispatched to Budapest between 18 and 20 June, and conducted 14 interviews with the complainants and other staff members. The investigator found the complainants to be spontaneous and coherent. She had no reason to suspect their truthfulness. The interviews were comprehensive, during which the complainants made more detailed allegations than in the original e-mails.

21. On 5 August 2008, the IGO advised DHRM that it had received two formal written complaints of sexual harassment from subordinates of the Applicant. On the same day the Applicant was advised that he was the subject of an investigation into allegations of misconduct and asked to attend an interview with the investigator. He was not told before the interview that the allegations concerned

sexual harassment. The investigator told the Tribunal that it was not the usual practice at the time to give particulars of the alleged misconduct and that there was no requirement to do so in the rules and procedure of the UN and the IGO in particular. In the Applicant's case, she believed that he had already been told of the sexual harassment complaints by the Chief of PAPS. This was not the case.

22. The investigator interviewed the Applicant on 8 August 2008 with another official as a witness. The Applicant was unaccompanied. The interview lasted from 10a.m. to 3.25p.m., with a break for lunch.

23. The process that was to follow was described to the Applicant and he was asked if he had any preliminary questions. He replied:

I was rather satisfied that I was contacted for this interview when I got to know that I was under investigation. This is a good opportunity for me to ask you questions, the precise nature of the allegations against me. And also I wanted to know whether this is allegations for misconduct, allegations for mismanagement, allegations for what?

The answer was "... with respect to the exact nature of the allegations, we'll come to that in a couple of minutes are you ready to start the interview?"

24. Shortly after that the Applicant was told for the first time that allegations of sexual harassment had been received against him. The investigator said

these relate to your behaviour towards a number of female staff members in Budapest. In your opinion has there been anything in your behaviour that female staff could perceive as inappropriate?

25. The Applicant responded to the allegations by laughing and then he asked for details such as "what was the gesture?", "what happened?" and "who exactly"? The questions however continued for a time in a very general way. Then the investigator asked questions specifically about each complainant. For example, the Applicant was asked to comment on the number, content and meaning of SMS

messages that had passed between him and Ms S. He replied to the effect that he could not remember the details but he could come back to it later because “piece by piece like that I don’t remember the context.” He said he wanted to go back to his memory, try to remember what had happened during that period and confirm it later. As questions became more specific the Applicant either denied allegations, such as inappropriate touching of individual staff members or tried to explain the context and reasons for discussions with them on subjects such as massages.

26. The interview then moved to questions about his management style and allegations of a disrespectful attitude towards staff. At the end when asked if he wanted to add anything the Applicant made the following points:

- i) There were two parts to the meeting, sexual harassment and management allegations.
- ii) He would feel comfortable if other people he had worked with and knew well were interviewed about his attitudes, what they think of him. He gave the names of such people.
- iii) He was taken by surprise by learning the nature of the allegations.
- iv) He felt somebody wanted something bad against him. He was a little bit shocked.

27. A detailed record of questions and answers was taken by the investigating officer. He did not want to stay and read his interview record at that stage. He said he was tired and preferred to read it at home over the weekend. This request was declined and the investigator asked him to return to the IGO on Monday to read and sign the interview record. He did not do so. He told the Tribunal this was because he had thought the meeting was to be about his management style and there were a lot of inaccuracies in the report.

28. The Applicant told the Tribunal that the reason he laughed during the interview was that he found the statements of the witnesses that were being told to him to be “too much”. He also said that he was very nervous during the interview and almost fainted. It was the first time he had heard about the sexual harassment and had not contacted a lawyer before the meeting as he thought it was going to be about his management style.

29. The investigator found his laughter unusual, and said he did not categorically deny anything. Both of these facts were influential in her assessment of the Applicant’s credibility.

30. At the end of the interview, the Applicant was given a suspension letter which had been written on 5 August 2008. It informed him that reports of possible misconduct required him to be suspended during a preliminary investigation. It said this was an administrative measure that did not prejudice any rights he might have as a staff member. It required him to return all UNHCR property, surrender his ground pass, refrain from entering any UN premises without permission and then only under escort, and to avoid contacting colleagues and UNHCR partners. The suspension was on full pay pending completion of the investigation – initially for a period of one month. This period was subsequently extended until his dismissal.

31. The investigator told the Tribunal that the reason the people suggested by the Applicant to speak on his behalf were not interviewed was because IGO did not conduct character interviews about people’s personalities. The only witnesses who they interviewed were people who could either prove or disprove the allegation or if they were witness to what the staff member was accused of.

32. The investigator interviewed one further staff member and on 13 August 2008 provided the Applicant with a copy of the draft preliminary investigation report (PIR). The report found that the evidence gathered in the investigation was sufficient to conclude that the allegations of sexual harassment were well founded but that there was not sufficient evidence to pursue the management issues as a disciplinary matter.

33. The Applicant was asked to submit his response to the draft PIR and return his signed interview record by 20 August 2008. He did not do that and the final PIR was forwarded to the DHRM on 22 August 2008.

The Disciplinary Procedure

34. On 3 September 2008, DHRM sent a letter to the Applicant enclosing the PIR which contained a summary of the investigation and allegations of sexual harassment. But it did not attach all the annexures which had been sent to the DHRM including the original complaints and the transcripts of the interviews of the complainants. It informed him of his right to respond in writing to answer the allegations and to produce countervailing evidence and to be assisted by counsel.

35. The Applicant's counsel sent two letters to DHRM in October and one in December 2008.

36. On 7 October 2008, Counsel made what he referred to as preliminary observations on the "so-called preliminary investigation report". He was critical of the process, in particular the fact that the Applicant had no notice of the allegations before the interview, as well as other matters. He asked for the Director of DHRM to recuse himself from the case; that a list of eight named witnesses be interviewed and for the provision of a number of documents including the actual transcripts of the testimony of witnesses who had been interviewed and of all complaints made about his client. He stressed that the Applicant was willing to subject himself to another properly conducted investigation once he had all the relevant information, and had been cleared by his doctor to participate.

37. The DHRM granted an extension on medical grounds until 31 October 2008 to enable the Applicant provide a substantive reply to the PIR.

38. On 31 October 2008, Counsel sent medical certificates as evidence that the Applicant was unable to address the PIR until at least 15 November 2008 but

under protest also enclosed the Applicant's preliminary reply to the PIR. This was a comprehensive thirty-six (36) page document. It addressed his concerns about the conduct of the investigation such as being interviewed without notice of the allegations or the opportunity to take advice and then answered each of the complaints of sexual harassment. It reiterated his wish for other persons to be interviewed to give a different perspective and listed those people.

39. During the course of 2008, an independent review of UNHCR IGO was undertaken by OLAF (European Union Anti-Fraud Office). In November 2008 OLAF released its recommendations. Neither the investigator nor the DHRM revised the investigation in the light of that review.

40. In December 2008 Counsel for the Applicant wrote to DHRM. He noted he had no response to previous correspondence and reiterated his request for DHRM to be recused and questioned the procedure that led to the Applicant's suspension, amongst other matters. He drew the attention of the DHRM to the OLAF independent review and its criticisms of the UNHCR investigation process.

41. The Respondent did not reply to any of the letters or the issues raised by them. No action was taken by either UNHCR or IGO to interview the witnesses suggested by the Applicant or his counsel. DHRM told the Tribunal that the IGO would have followed up if anything new was raised in the Applicant's response but did not know if IGO had done so in this case. The investigator said that Counsel's letters were not sent to her but that she had received the Applicant's response to the charges and made comment to HRM about them but did not change the preliminary report recommendations. She was not asked to carry out any further investigation.

42. DHRM considered the PIR, the Applicant's responses, and the legal analysis of that, before writing to the High Commissioner with the recommendation that the Applicant be summarily dismissed. The Applicant was advised on 13 January 2009 that the High Commissioner had decided to summarily dismiss him for serious misconduct. A copy of the High Commissioner's decision was attached. This

outlined the allegations, the Applicant's responses at the interview and through his counsel, examined the legal issues including an analysis of misconduct by sexual harassment. It recommended that the Applicant be dismissed because he had behaved inappropriately as a UNHCR staff member by having sexually harassed three local staff members of UNHCR Budapest.

43. DHRM told the Tribunal that, in making his recommendations to the High Commissioner, he relied on the investigator's finding that the complainants were all credible. He said he applied the standard of proof in accordance with the UN standards, that is, on the preponderance of evidence.

Summary of the Complaints

44. The accounts given to the investigator and the Tribunal by the complainants were fuller than the initial complaints conveyed to the Chief of PAPS. In summary their allegations were as follows.

45. One alleged he had touched her breast while dancing at a salsa bar to which the complainants had invited him when he first arrived in an effort to make him feel welcome; that he had discussed massages, including chocolate ones, and invited her to accompany him to one; that he had discussed faithfulness in marriage and invited her to have sex; he touched the inside of her thigh while commenting on her appearance. She said that he spent a lot of time talking to her in his office. She could not avoid the meetings and she did not feel good about them.

46. The other complainant was concerned at the many invitations she received from him to come to his apartment to assist him with selecting curtains. She had offered to help him but became uncomfortable about this. She felt he was getting increasingly familiar with her as he suggested a closer relationship so she made repeated excuses not to go. She alleged that on one occasion in his office he began to massage her shoulders stopping only when she moved away. When she made it clear

she was not interested she said he told her he would wait for her like good red wine. She felt very uncomfortable about this and the effect it had on her professional relationship with him.

47. A third complaint was raised in the course of the interview by the investigator. In her case she complained about the discussions about the subject of chocolate massages and the difficult and overly familiar behaviour of the Applicant.

The Role of the Tribunal in Disciplinary cases

48. In *Sanwidi*¹, the United Nations Appeals Tribunal (UNAT) held that in deciding disciplinary cases the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is concerned with examining how the decision-maker reached the impugned decision, as opposed to an examination of the merits of the decision-makers decision. UNAT stated that the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate.

49. There are therefore three elements to be taken into account when deciding if a decision was reasonable and fair:

- i) Did the Respondent follow a fair and lawful process to investigate and decide the allegations of serious misconduct?
- ii) Did the Respondent have sufficiently established facts to reach the conclusion that misconduct had been committed? And, where appropriate,
- iii) Was the response to the findings proportionate?

50. In considering these matters the Tribunal will examine such evidence as it considers relevant to that enquiry.

¹ 2010-UNAT-084, at p. 13.

Issue 1 - Was the process followed by the decision-makers fair and lawful?

The Applicant's submissions

51. Apart from denial of any misconduct on his behalf, the Applicant's case is that, the process leading to the decision to summarily dismiss him was unfair and unlawful. In particular the Applicant submitted that:

- i) He was not notified of the allegations in writing before being interviewed. Although the charges against him were predominately based on the statements of his colleagues, he was not told of these until he was interviewed. It was submitted that he should have been advised that he was suspected of misconduct in clear and written terms, he should have been provided with the full statements of his alleged accusers and all other evidence in the hands of the IGO in advance in order to make a meaningful answer to the charges;
- ii) He was not given access to all documentary evidence. For example, he did not see the initial complaints nor the transcripts of the complainants' interviews until long after his dismissal;
- iii) He never had the opportunity to directly challenge the honesty, reputation and reliability of the witnesses against him; his denials and proposed exculpatory witnesses were not taken into account which, in his submission, is evidence of the investigator having a "presumption of guilt." The Respondent also failed to allow the Applicant to participate in the investigation and cross-examine the witnesses;

- iv) He was denied access to counsel before he was interviewed;
- v) Counsel cited Judgment No 1242 of the United Nations Administrative Tribunal (a sexual harassment case) in which “the failure to provide an opportunity for the Applicant to be meaningfully involved [resulted] in a fundamental defect which must vitiate the decision of summary dismissal” as well as the UNDT cases of *D’Hooge*², and *Valle Fischer*³ as to due process requirements and implications of the failure to meet these.

52. The Applicant referred to the fact that OLAF had identified that the rules and regulations governing the IGO’s investigations in certain respects did not meet international recognised standards of fairness. This included inadequate notice of the interview and its subject matter. Counsel submitted that the investigation of the Applicant should have been reconsidered in light of its recommendations before a final decision was made in his case.

53. The Applicant’s case is that the irregularities had an inevitable, direct and adverse impact on the decisions made which may not be retroactively cured.

Respondent’s submissions

54. The Respondent submitted that all due processes were respected in accordance with IOM/FOM 54/2005 and ST/AI 371.

55. The Applicant was given all evidence and an opportunity to respond to it when he was given the draft PIR on 30 August 2008.

² UNDT/2010/044

³ UNDT/2010/129

56. He was informed of the investigation in good time and was told that he was to be interviewed about misconduct. It is not policy to advise a suspected staff member of the precise nature of allegations because of concern that it may jeopardise the effectiveness and integrity of the investigation. The integrity of the process includes the rights of all staff members, not just the staff member accused of misconduct.

57. The Respondent relied on the UNDT cases of *Yapa*⁴ and *Zerezghi*⁵ for the proposition that a staff member has no right to be informed of the charges until the disciplinary proceedings are initiated.

58. The Respondent disputed that the OLAF Independent Review Panel report should have been considered as it came out in the late stages of the investigation and was not particular to this case.

59. The Respondent rejected the idea that a witness should be interviewed in the presence of an alleged harasser. In this case the Applicant's rights were protected by being given copies of their statements and the opportunity to rebut them when the formal allegations were made against him. The letters from counsel for the Applicant were not ignored but taken into account.

60. Finally, it was submitted for the Respondent that if there were a violation of due process rights it was not of such magnitude that it would impugn the decision to dismiss. In the present case the Respondent argued that no direct harm was caused to the Applicant as a result of any violations of process.

Relevant Rules and regulations

61. The procedures to be followed in UN disciplinary investigations are set out a) in staff rules 110(4) and ST/AI/371 and b), in the case of UNHCR, in IOM/FOM 54/2005.

⁴ UNDT/2010/169

⁵ UNDT/2010/122

Staff rule 110(4)

62. Staff rule 110.4 states:

(a) no disciplinary proceedings may be instituted against a staff member unless he or she has been formally notified, in writing of the allegations against him or her and of the right to seek the assistance of counsel in his or her defense at his or her own expense and has been given a reasonable opportunity to respond to those allegations.

63. ST/AI/371 dated 2 August 1991 governed the conduct of this investigation. It outlines the basic requirements of due process to be afforded a staff member against whom misconduct is alleged. Part II deals with the initial investigation and fact-finding. Pursuant to the AI, the head of office or responsible officer (officer) has to decide if there is reason to believe that there has been unsatisfactory conduct for which a disciplinary measure may be imposed. If this is the case, then the officer shall undertake a preliminary investigation.

64. If the report of misconduct appears to be well founded, the officer reports to the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM) with all relevant facts and documentary evidence and a recommendation as to whether suspension is warranted. The ASG makes the decision.

65. If the decision is that the matter is to be pursued as a disciplinary proceeding, paragraphs 6(a)-(c) provide for the staff member to be given written notification of the allegations, a copy of the documentary evidence of the alleged misconduct, and his or her rights to advice to prepare his or her responses to the allegations. Paragraph 7 stipulates that the staff member is given a specified time to answer the allegations and present any countervailing evidence.

66. The entire dossier is then submitted to the ASG/OHRM who may make one of three decisions: that the case is closed and charges dropped, the matter should be referred to the then Joint Disciplinary Committee (JDC) or that the seriousness of

the misconduct warrants immediate separation for service and that the staff member should be summarily dismissed.

UNHCR IOM/54/2005, FOM/54/2005

67. These Inter Office and Field Office Memoranda concern the roles, functions and operational methods of the Inspector General's Office in relation to UNHCR including in disciplinary investigations. As the responsible officer under ST/AI/371, the IG has overall responsibility for ensuring that possible misconduct within UNHCR is investigated in a timely and appropriate manner.

68. The decision to institute disciplinary proceedings is made by the Director of DHRM in accordance with ST/AI/371.

69. Paragraph 5.1.3 provides that all investigations undertaken prior to any formal charge of misconduct against a staff member are considered preliminary. The purpose of a preliminary investigation is to determine whether or not the facts support a finding of misconduct that may ultimately be subject to disciplinary action. An investigation is a fact finding exercise not a punitive undertaking.

70. Paragraphs 5.10 to 5.14 cover the procedure for investigations into possible misconduct, responsibility for and principles governing the conduct of investigations, as well as suspensions and investigation findings.

71. The first step in an investigation under the IOM/FOM is an initial examination of possible misconduct. The staff member who reported the possible misconduct is to be advised of any decision to proceed and the name of the responsible officer.

72. Following this, Para 5.10.3 states that

The IGO will as soon as it is feasible without jeopardising the effectiveness or integrity of the investigation process itself, formally communicate to the subject of an investigation that s/he is under investigation.

73. Para 5.12.2 provides that the investigation must respect the individual rights and obligations of all staff and be conducted with strict regard for fairness, impartiality, the presumption of innocence and due process. If a staff member formally asks the IG whether or not they are under investigation they are to be given a definitive response consistent with paragraph 5.10.3.

74. Para 5.12.5 provides that

[I]nvestigative findings should be presented in a draft preliminary investigation report and concerned staff afforded a fair and reasonable opportunity to respond to any information or fact that may tend to implicate them in misconduct

75. The timing and manner in which this is done will be decided by the responsible officer with due regard for the interests of the staff member, the interests of the office and the effectiveness of the investigation process.

76. The Respondent relied on the definition of sexual harassment in the UNHCR Policy on Harassment, as being

[A]ny unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature... that might reasonably be expected or perceived to cause offence or humiliation to another. Sexual harassment may occur when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. Sexual harassment may also occur outside the workplace and/or outside working hours.

Discussion

77. Under the United Nations hierarchy of instruments information circulars come after the UN Charter, Staff Regulations and Staff Rules. Any such circulars should be consistent with the Staff Regulations and Rules and the Secretary General's administrative instructions. They should not be interpreted to limit or extend the

rights, privileges, obligations and responsibilities conferred by the superior instruments.

78. Rule 110(4) requires that the staff member who faces disciplinary proceedings must be given a reasonable opportunity to respond to those allegations. Before this can be done a preliminary investigation is held pursuant to ST/AI/371 and the relevant IOM/FOM.

79. Paragraph 3 of the AI sets a low threshold of proof at the preliminary enquiry stage before moving to the next stage of the disciplinary process: it need only appear to indicate to the responsible officer that a report of misconduct is well founded. The enquiry is very much preliminary in nature.

80. The first question is whether the Applicant should have been interviewed as part of the preliminary investigation at all.

81. The only reference to the subject of the investigation in the IOM/FOM concerns the advice to that person that he or she is under investigation. This was interpreted by the Respondent as entitling the IGO to interview the staff member under investigation at the preliminary stage and therefore without the safeguards he would have been entitled to if the charges had been laid, including full advice of the nature of the allegations, the evidence in support of those, the right to consult counsel and have a person accompany him to the interview.

82. The AI is silent about whether the accused staff member should or may be interviewed at the preliminary investigation stage but, in general, this is inconsistent with the commitment of the UN to fair process and the presumption of innocence.

83. Under ST/AI/371, the right to the incidents of fair process (the right to be informed of the allegations, the right to representation, the right of reply and rebuttal) do not arise until a decision has been made to pursue the disciplinary procedure, a

point made in *Yapa*.⁶ It is incumbent on the Organisation strictly to observe those procedures which guarantee the usual rights of due or fair process and not to rely on an interpretation that deprives its staff members of these.

84. If the Respondent believed that advising the staff member of the allegations at the preliminary stage would have jeopardised the investigation then the interview of the staff member should have been delayed until the integrity of the investigation could be preserved.

85. The Respondent circumvented and was therefore in breach of the requirements of Rule 110(4) by interviewing the Applicant at the preliminary stage and without those incidents of fair process. The interview was included in the investigator's report as an important part of the factual matrix. It is no answer for the Respondent to say that at the preliminary stage the staff member has no right to the protections of Rule 110(4) because the disciplinary procedure had not yet commenced.

86. Fair process dictates that the AI must be interpreted to mean that the Applicant should not have been interviewed about the allegations against him or her until the preliminary investigation had been completed. Only at that stage was the whole case against him formulated and only then could he have been properly advised and given an opportunity to answer the allegations. The interpretation contended for by the Respondent would mean that the AI can be used to usurp the rights of the staff member to due process on the pretext that the investigation is at a preliminary stage.

87. The investigator was not in possession of the allegations as contemplated by SG/AI/371. She had only a number of complaints of sexual harassment and mismanagement against the Applicant which were, at that stage, under preliminary investigation by her. The formal allegations were not, and could not be, formulated until the PIR had been considered by the DHRM. In the end, they differed from the

⁶ *Ibid.*

original complaints in that none of the management issues were deemed suitable for disciplinary proceedings. The Applicant could not have been informed at the interview of the precise allegations which were to lead to his dismissal.

88. In any event, staff rule 110(4) and ST/AI/371 dictate that the allegations are specified in writing. A statement before the interview that the investigation is into possible misconduct is not sufficient.

89. Next is the question of disclosure of relevant matters to the Applicant before he was required to answer the allegations. The evidence is clear that the Respondent failed properly to disclose all relevant matters to the Applicant throughout the process. He had no access to the complainants' original statements or to those made at their interviews before his interview. He was only told verbally of their complaints in the course of his interrogation.

90. Nor did he receive all relevant documentation before the disciplinary proceedings were instituted, as required by Rule 110.4. The original complaints were not provided to him until ordered by the Tribunal prior to the hearing of this case.

91. The Tribunal is concerned that it is the Respondent's policy not to provide the accused staff member with all of the annexes to the PIR. UNHCR interprets paragraph 5.12.5 to mean that it is at the discretion of the organisation whether the draft PIR is shared with the staff member and in what manner. Such discretion must not be exercised in an arbitrary manner and must have consideration for the rights of the affected staff member to fair process.

92. A person facing serious allegations must be given all the facts and documentation relied on by the decision maker unless there are particular reasons of security or confidentiality. In those cases, the staff member should be advised of the nature of the documents withheld and the reasons for that. This did not occur in the Applicant's case. He was deprived of a fair opportunity to assess this evidence.

93. The next issue is whether the Applicant had a reasonable opportunity to answer the allegations and to present any countervailing evidence. The Respondent relied on the fact that the Applicant was given the opportunity to respond in writing once the allegations had been put to him and the disciplinary process was being pursued. Unfortunately the attempt to give him his due rights once he was advised in writing of the allegations was too late. This is because in making the decision to dismiss him great reliance was placed on his responses and demeanour during the verbal interview.

94. The interview conducted by the IGO was preliminary only in name. It was conducted over several hours; it subjected the Applicant to very close examination and was his only opportunity to verbally explain his position on a large number of allegations before he was dismissed. It was clear from the evidence of the investigator that the content and manner of the Applicant's responses at the interview were very influential in her assessment of his account. This meant that once the charges were formally made and the disciplinary procedure commenced, the outcome was virtually determined.

95. The Tribunal had the opportunity to see and hear the Applicant give evidence under oath. By the time of the hearing, he had full possession of all the facts and adverse matters against him. Without formulating any final view on the substantive merits of his defence, it became clear during the hearing that he had explanations for things allegedly said and done by him and others which, on the face of it, were exculpatory and entitled to serious consideration. At the very least, it revealed that some of the witnesses suggested by the Applicant should have been interviewed to assess whether some or all of his explanations could be sustained. The Respondent was specifically requested by counsel for the Applicant for this opportunity but this was rejected.

96. None of the witnesses suggested by the Applicant during the interview were contacted or assessed by the Respondent on the basis that they were not witnesses to the alleged events. To the investigator they appeared to be only character

witnesses. Her report to DHRM made no mention of the fact that the Applicant had suggested that other persons be interviewed and that the suggestion was not pursued at that time.

97. Once the formal allegations had been made, and Counsel became involved, he proposed that named persons be interviewed as part of the investigation. The request to interview these witnesses was again rejected and explained by the DHRM in his opinion to the High Commissioner. He cited the UNHCR Policy on Sexual Harassment and Abuse of Authority which states that

98. Both parties may suggest a list of persons to be interviewed by the Investigating Body. The Investigating Body will interview such persons at its discretion.

99. The DHRM wrote:

It is therefore at the discretion of IGO to decide which witnesses it should interview. The testimonies of character witnesses can be considered as not relevant and central to the allegation. The witnesses did not therefore have to be interviewed.

100. The witnesses suggested by counsel for the Applicant included Ms C who was called as a witness at the hearing by the Applicant. Her evidence was relevant. She had conducted the initial training sessions with the Budapest staff including the complainants. She worked in very close proximity to them and the Applicant from January to May 2008. She had observed the behaviour and interaction of all of them at close quarters and described something of the office dynamic at the time. Given that it has always been the Applicant's position that the complaints of sexual harassment were motivated by the management issues that had arisen between him and his staff, an interview with Ms C would have provided the investigator with a relevant perspective.

101. Another suggested witness was Mr S whose evidence was eventually considered by the Respondent to be sufficiently relevant for him to be called as a

witness at the hearing. A third was the Chief of PAPS, a person whose involvement in the matter as the Applicant's supervisor and the person dealing with all of the complaints including the management issues could hardly have been more relevant.

102. In an investigation of this sort, the IGO cannot be expected to conduct wide ranging interviews of witnesses of peripheral or no relevance, however, an impartial investigator should make thorough enquiries to ensure that witnesses suggested by an accused staff member are indeed relevant and the decision-maker should ensure that this important element of fair process has been complied with. The DHRM was in error in classifying all the suggested witnesses as character witnesses. He therefore did not exercise his discretion properly when the Applicant's request was rejected without what I find to be insufficient consideration.

103. The Applicant was prejudiced from the start in his attempts to produce countervailing evidence. As he had no advance notice of the sexual harassment claims he could not reasonably have been expected to compile a list of appropriate witnesses during the interview. The investigator assumed that those he named were character witnesses. She may have been right but did not make enquiries to ascertain this.

104. Having had the opportunity to properly consider his position and take advice, the Applicant was able to suggest at least three relevant witnesses whose evidence would have gone well beyond character evidence. The refusal to interview these as part of the disciplinary process was incomprehensible and seriously prejudicial to the Applicant as he was deprived of the opportunity to present countervailing evidence as contemplated by ST/AI/ 371.

105. That is not to say that a different conclusion would inevitably have been arrived at but the failure of the Respondent to take these important steps means that it is now impossible to assess that possibility.

106. The Tribunal accepts the Applicant's case that the procedural defects at the preliminary stage could not be retrospectively cured at the later stage of

investigation. Given the extent to which the decision-maker relied on the evidence collected during the impugned preliminary investigation, nothing that was done at the later stages of the process could have remedied the initial procedural errors.

Conclusion on Issue 1

107. To give full effect to the requirements of staff rule 110(4) which embodies the elements of fair process in disciplinary investigations, the preliminary investigation undertaken pursuant to the AI and any related IOM/ FOMs should be treated as strictly preliminary. The disciplinary part of the process, including the interview of the alleged offender should only occur once all the preliminary evidence has been made available to the staff member and the specific allegations against him or her have been finalised. If there is to be an interview it should properly be the last step in the investigation as envisaged by paragraph 6(a-c) of the ST/AI/371.

108. In any event, in order for the Applicant in this case to have had a fair and reasonable opportunity to respond as referred to in all of the relevant instruments including in paragraph 5.12.5 of the IOM/FOM, he should have had the opportunity to see all the relevant information before making such a response regardless of what stage he was interviewed at.

109. There were a number of procedural deficiencies during the investigation of the allegations against the Applicant. These are:

- a) The decision to interview him before any formal charges had been made precluded him having the opportunity to take counsel before having to answer the serious allegations against him.
- b) The failure to give him any notice of the allegations before he was required to attend an interview.

- c) The failure to provide him before interview and before he was ultimately dismissed with all relevant information to enable him fully to assess the case against him.
- d) The failure properly to consider his request for witnesses specified by him to be interviewed.

Issue 2- Did the Respondent have sufficient well established facts to reach the conclusion that misconduct had been committed?

The Applicant's submissions

110. It is the case for the Applicant that there is an alternative to the position that the case depends on finding that either the complainants or the Applicant were lying in their accounts of what occurred. It was submitted that there was a disconnect between the DHRM and the IGO. Although the Applicant gave a detailed rebuttal, the issues raised were apparently not reconsidered by the IGO or DHRM. The Respondent gave no response to the letters before making its decision and the DHRM relied on the recommendation of the IGO which did not consider or evaluate the letters from counsel or the Applicant's 36 page rebuttal.

111. The Applicant was critical of the investigator's reliance on the nervous laughter of the Applicant to assess his credibility. The Applicant contends that the Respondent did not apply the high standard of proof required in investigations where the Applicant is facing the possibility of dismissal. He cited ILOAT judgments to this effect and argued that the test for dismissal cases should be the same for all international civil servants. In his submission that test should be the one that is most advantageous to an accused across the common UN system.

112. It was submitted that the evidence relied on by the Respondent did not demonstrate that the Applicant had committed misconduct:

- i) It did not demonstrate that the alleged conduct interfered with work, was unwelcome at the time or created a hostile environment.
- ii) The reports of the “unwelcome” nature of the conduct was only reported long after it occurred and when the complainants became worried about their job security.

Respondent's submissions

113. The Respondent relied principally on the credibility of the complainants. It was submitted that the appropriate standard of proof to be applied in investigations is whether there is adequate evidence and whether the preponderance of evidence supports the allegations. The former UNAT case of *Araim*⁷ was cited.

114. In the alternative, it is the Respondent's position that even if the standard for serious cases, namely higher in summary dismissal cases but somewhat below the beyond reasonable doubt in criminal cases, there is sufficient evidence in this case to meet that test.

115. It was submitted that the complainants gave credible evidence unlike the Applicant who, it was suggested had denied physical contact and did not recall important matters in contention. The Respondent pointed to evidence of corroborating witnesses and to a pattern of behaviour.

116. In response to the criticism that the complainants delayed making their complaints, and made no notes, the Respondent submitted that they were new to the UN, could not be expected to know all the procedures to follow in the event of such conduct, and did not know how to deal with it. They were aware that the Applicant was a supervisor who was in a position of authority, and in any event the time delay was relatively short for this type of case where people are often fearful of retaliation.

⁷ United Nations Administrative Tribunal Judgment No. 533, *Araim* (1991)

117. The Respondent's case is that on the evidence of the complainants the elements of sexual harassment were met. His behaviour was very unwelcome and embarrassing. UNHCR has mandatory training in sexual harassment and the Applicant ought to have known that his invitations were unwelcome especially when they were refused so often.

Discussion

118. When a person faces serious charges the standard of proof required to prove those must be equally serious. However, in the workplace, such allegations are not criminal charges: a staff member is not liable to criminal conviction and penalty. To that extent, in disciplinary procedures, the concept of proof beyond reasonable doubt is not appropriate. As the responsible officer who assesses the evidence and makes the preliminary decision is not acting as a lawyer or a judicial officer, the whole notion of the application of differing standards of proof may, in practice, be a matter more of expression than of correct application. It is easier for a lay person to say they are applying a certain standard of proof than it is properly to act in accordance with that standard.

119. However, ST/AI/371 sets the standard of proof at each stage. At the preliminary enquiry stage the responsible officer has to assess if the report of misconduct is well founded but need only be satisfied that the evidence appears to indicate that. This is not a high standard of proof. At the point of decision, the AI sets two separate standards. If the facts appear to indicate that misconduct has occurred then, under the previous system of Internal Justice, the matter could be referred to the JDC for a full enquiry. Alternatively, as stated by paragraph 6(c), should the evidence clearly indicate that misconduct has occurred and that the seriousness of the misconduct warrants immediate separation then summary dismissal may be recommended. This is a higher standard than that required of the preliminary investigation.

120. These are the statutory standards imposed by the UN.

121. The question in a case of summary dismissal is whether the ultimate decision-maker acted on the basis of evidence that clearly indicated that serious misconduct had occurred.

122. It is not necessary, in the light of the previous conclusions about breaches of process to canvas fully the allegations made by the complainants about the behaviour of the Applicant towards them. It must be stressed however that in their evidence to the Tribunal the two principle complainants from the Budapest office presented as truthful and sincere in relating the facts of the case as it appeared to them. The investigator had reason to be impressed with their credibility.

123. There is no doubt that in January 2008, their actions in welcoming the Applicant as a newcomer to Budapest, and their offers of assistance, were well meant and innocent of any improper motives on their part. They invited him to join them once for dancing at a salsa bar, gave him private phone numbers so he could send SMS messages if he needed help with shopping in a foreign language and engaged in discussions with him on subjects about after work activities.

124. From their account, the Applicant misinterpreted their behaviour as invitations to more intimate relationships and abused their friendly approach by making persistent demands on their private lives and talking inappropriately at work about personal topics in an offensive manner. They alleged three instances of inappropriate touching. One was while dancing in the salsa bar, the others were in the office when it was alleged that the Applicant touched one of them on the leg and briefly massaged the neck of another.

125. If established as true, the Applicant's actions described by them could certainly be characterised as sexual harassment as defined in the UNHCR Guidelines. They would have been offensive and unwelcome. At the very least, such actions would have been likely to have made them uncomfortable in his presence and had an impact on their relationship to their superior.

126. On the basis of the evidence of the complainants, there were enough facts for the investigator to be satisfied that the evidence appeared to indicate that misconduct had occurred. However fairness dictates that the person accused of the misconduct is given a full and fair opportunity to both answer those allegations and have them properly evaluated. The Applicant did not have that chance at the preliminary investigation stage

127. Once witnesses were examined and cross-examined by all counsel and the Tribunal, some matters which had appeared to be well established became open to question.

128. For example, two witnesses were called by the Respondent to demonstrate a pattern of behaviour by the Applicant. Of these, one who alleged historical inappropriate behaviour by the Applicant at another duty station was revealed to have sent him several e-mails which, by their tone and expression, tended to contradict her characterisation of his behaviour as unwelcome. That evidence was unavailable to the Applicant at his interview and, although presented in the Applicant's rebuttal, there is no evidence that it was seriously considered before the decision to dismiss him.

129. Secondly, the Applicant's explanations for some other matters that had been counted against him gave rise to the possibility of a different interpretation.

130. For example the Applicant's offers of assistance and money when one of the complainants had her belongings stolen from the salsa club were described by the complainants as appearing unusually friendly. From his evidence to the Tribunal there is a real possibility that he was acting solely out of concern for a junior staff member who realised as she was about to leave the club late at night that she had lost not only her winter coat and her wallet, but also her house keys, and that his behaviour was misconstrued in hindsight. That behaviour was not mentioned in any of the original complaints to the Chief of PAPS, but it later became a factor in the assessment of his overall conduct towards the complainants.

131. In another example, he agreed in his evidence that he talked with the staff members about massages but he placed these conversations in the context of general talk on a Monday morning about what they had done during the weekend. It appears that he enthusiastically described what he regarded as therapeutic massages and suggested that they give it a try. He explained that he asked the staff members a lot of questions about Hungarian culture including about their backgrounds and careers. He agreed he talked about marriage with one of the complainants but suggested that she also asked him a lot of questions about his own mixed cultural upbringing. He denied that these conversations had a sexual connotation.

132. Having heard his evidence in court, there is some room for considering that the discussions about massages and other topics which he does not deny, could have been interpreted in more than one way. The Tribunal is not in a position to make a definitive conclusion on this except to say that, as his full and considered explanation was not available to the investigator, it could not have been properly considered in the preliminary investigation.

133. Contrary to the Respondent's submission, he agreed that it was possible that he had touched one or more of the complainants but denies it was ever in a sexual manner.

134. He told the Tribunal that it was his practice to remark on the appearance of staff members to ensure proper standards of dress in the office.

135. He explained that he often sent SMS messages to one because he was following up on her offer to assist him to fit curtains. She never told him she did not want to come which made him frustrated and annoyed when he found himself waiting around for her.

136. These matters are related not to suggest that the Applicant's explanations would inevitably have resulted in a rejection of the complainants' evidence, but to show that given a proper opportunity the Applicant was able to give an explanation for most of the allegations. These should have been tested with the complainants

before a decision was made as to whether they were credible or not. The Tribunal cannot therefore be satisfied that the conclusions reached were based on sufficiently established facts.

137. Many of these explanations were set out in the Applicant's reply to the allegations. While the DHRM's opinion to the High Commissioner outlined the content of the Applicant's response to the allegations, and to that extent considered them, it concentrated on answering his criticisms of the procedural irregularities. There was no detailed analysis of the Applicant's extensive written explanations for each of the substantive allegations made against him. The DHRM told the Tribunal that if the Applicant's rebuttal raised anything new it would have been referred to the IGO. He could not recall if UNHCR's legal advisors had done this. The investigator said that the only thing she saw after the PIR was produced was the Applicant's reply. She did not see the letters from counsel but was asked to comment on criticisms of the process.

138. Findings of credibility must be based on evidence from both sides. DHRM did not have that. He relied on the recommendations made in the PIR. This set out the complainants' evidence but the Applicant's side of the story was presented by the investigator after an interview that was conducted in serious violation of the Applicant's rights to a fair process and was therefore not reliable.

139. Finally, there was another dynamic in this case which required thorough investigation. This is that the allegations of sexual harassment were raised in the context of specific and wide spread dissatisfaction about the Applicant's management style.

140. The first allegations about sexual harassment which were alleged to have occurred from January were brought to attention after the management issues were first disclosed by the complainants in late April. There are at least two possible explanations for this. The first is that each complainant, having realised that she was not alone in her complaints about the Applicant became more confident about

bringing her genuine and serious concerns to the attention of management. The second possibility, and the one contended by the Applicant, is that the complainants who did not like his management style elevated some concerns about the Applicant's manner to that of sexual harassment as a means of engineering his removal.

141. I make no assessment of the validity of either of these possibilities. That was for the investigating officer and the decision-maker to do. However the Applicant's version was not investigated properly. His initial, and understandably rather tentative, explanations about this at the interview were rejected without any investigation. The Chief of PAPS was not interviewed on the dynamics of the office and the complainants were not told the Applicant's version so that they could comment on it. This meant that the investigation was one sided. The Applicant did not have a proper opportunity to formulate and articulate his position at the interview as he was taken by surprise. When he did have the chance to fully set out his position in his response to the PIR, it was not investigated.

The context of the complaints in this case is very important. Each case requires an investigation that is governed by the subject matter. In addition to the allegations of inappropriate touching which had to be assessed on the basis of weighing up the credibility of the witnesses, a significant part of the original complaints made concerned the Applicant's style and manner of raising topics. These topics were regarded as inappropriate by the complainants at least when they reported them in late April but the Applicant saw them in a completely different light. It is a question as to whether the conversations were genuinely offensive, and the Applicant was insensitive to this, or whether the complainants used these otherwise innocent events as a means of bolstering their case of poor management. Evaluating these types of complaints requires a subtle and careful approach and must include a thorough objective evaluation of the account of the accused person. That did not occur in this case.

Conclusion on Issue 2

142. The Respondent failed to give the Applicant a reasonable opportunity to present his case and countervailing evidence and have these treated with due deference. The evidence considered by the Respondent was limited to that given by witnesses the Respondent regarded as relevant. As a consequence the Tribunal cannot be satisfied that the facts relied on by the Respondent clearly indicated that misconduct had occurred and that the seriousness of the misconduct warranted immediate separation. Summary dismissal was not the inevitable consequence of the disciplinary procedure.

Decision

143. The dismissal of the Applicant was unlawful because it breached the UN legislative rules and procedures for disciplinary investigations as well as the general requirements of fair process. As the conclusion that the procedure followed in this case was not in accordance with the staff rule 110(4) or the SG/AI/371 and that the facts relied on by the High Commissioner were not sufficiently well established to justify summary dismissal, it is not necessary to rule on the third issue of proportionality or on the secondary points concerning the suspension of the Applicant.

144. It is important to add that these breaches not only prejudiced the Applicant but also the complainants who were deprived of their right to a full, proper and conclusive investigation of their complaints

145. The parties agreed at the hearing that the questions of the amount of payment the Secretary-General may make in lieu of rescission of the summary dismissal and other compensation due to the Applicant will require further consideration. Matters such as the pecuniary losses of the Applicant and his

mitigation of those losses, including related questions such as the state of his health, will require further evidence.

146. The parties are invited to attempt to resolve these issues between them in the light of this decision. If this is not possible and a hearing is to be held this will occur in May or June 2011.

147. The Tribunal orders:

- i) The rescission of the summary dismissal of the Applicant on grounds that it was unlawful;
- ii) The names of the Applicant and complainants are not to be published.
- iii) All issues of compensation are adjourned for agreement between the Parties or, failing that for a hearing and final decision by the Tribunal.

(Signed)

Judge Shaw

Dated this 16th day of March 2011

Entered in the Register on this 16th day of March 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi