



UNITED NATIONS APPEALS TRIBUNAL

TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2013-UNAT-280

**Applicant
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Mary Faherty, Presiding

Judge Sophia Adinyira

Judge Rosalyn Chapman

Case Nos.: 2012-283 & 284

Date: 28 March 2013

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: George Irving

Counsel for Appellant/Respondent: Phyllis Hwang/Amy Wood

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2013-UNAT-280

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals filed by the Secretary-General of the United Nations against Judgment No. UNDT/2011/106 (Judgment on the merits) and Judgment No. UNDT/2011/192 (Judgment on compensation), rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi, on 23 June 2011 and 10 November 2011 respectively, in the case of *Applicant v. Secretary-General of the United Nations*. The Secretary-General appealed the Judgment on the merits on 29 December 2011 and the Judgment on compensation on 9 January 2012. The Applicant filed answers to both appeals on 21 February 2012.¹

Facts and Procedure

2. The Applicant joined the United Nations Mission in Bosnia and Herzegovina (UNMIBH) on 1 February 2000 and was deployed to the United Nations Transitional Administration in East Timor in February 2003. Effective 20 October 2004, he became Chief of the Joint Logistics Operations Centre (JLOC) at the P-4 level with the United Nations Operations in Burundi (ONUB). He remained at ONUB until 17 January 2008, when he was summarily dismissed for serious misconduct.

3. On 21 May 2005, a Logistics Assistant (Complainant) within JLOC made a complaint against the Applicant, alleging harassment. She was soon thereafter transferred to another unit. The Complainant had worked as a locally-recruited Logistics and Supply Clerk for UNMIBH from May 2000 to December 2002, under the Applicant's supervision. Upon the Applicant's recommendation, the Complainant had relocated to Bujumbura, Burundi, to start working for ONUB, again under the Applicant's supervision, on 15 February 2005.

4. In a complaint dated 2 June 2005, the Complainant detailed the sexually loaded "non professional" comments that the Applicant had made to her in person, by telephone and by text messages; the Applicant's sending of a photograph of his penis to her, which she found shocking and outrageous, and an incident in which the Applicant attempted to squeeze her left hand while she was a passenger in his car. The Complainant stated that she was making a complaint against the Applicant "for the respect to myself, my family and my employer United Nations ... because I found myself being victim of harassment and mental abuse by my supervisor [the Applicant's

¹ By Order No. 84 (2012) dated 23 March 2012, the Appeals Tribunal granted the Applicant's motion to keep his identity and that of the Complainant confidential in the present case.

name] until the point that [a]ffected my health, my productivity at work and upset all my being". The Complainant also stated that, as a result of the Applicant's actions, "I had many sleepless nights and eating disorder due to stress, that was building day by day since I joined the ONUB mission".

5. Following receipt of this complaint, the Special Representative of the Secretary-General for ONUB requested that the Office of Internal Oversight Services (OIOS) conduct an investigation into the allegations against the Applicant.

6. According to the UNDT, during the investigation, OIOS interviewed the Applicant, among others, and provided him with "some information on the substance of the complaints and the e-mail correspondence between him and the Complainant. The Applicant provided his responses to the complaints both orally and in writing."² However, OIOS did not provide the Applicant with a copy of the Complainant's 2 June 2005 statement before he was interviewed.

7. OIOS concluded in its report of 26 January 2006 that the Applicant had not subjected the Complainant to sexual harassment, but had engaged in workplace harassment against her. It also concluded that the Applicant had utilized his position for personal reasons to prejudice the Complainant's employment, by speaking to her new supervisor and by expressing an interest in having input into her performance appraisal. OIOS further concluded that, in contacting the Complainant and her husband, the Applicant had failed to follow instructions from his supervisors.

8. The Applicant was charged with sexual and workplace harassment, attempted abuse of authority, interference with an official investigation, and failure to follow instructions. His case was subsequently referred to the Joint Disciplinary Committee (JDC). In its report dated 10 January 2008, the JDC found that the Applicant did not violate the sexual harassment policies, but that his conduct in respect of the Complainant did amount to workplace harassment and he had abused his authority by contacting her new supervisor. The JDC also found that the Applicant did not interfere or attempt to interfere with the OIOS investigation, but that he failed

² Prior to the complaint of 2 June 2005 filed by the Complainant, two other ONUB staff members had brought a complaint of sexual exploitation and abuse against the Applicant based on information that they had obtained from the Complainant. The OIOS has withheld the identities of these two staff members.

to follow duly authorized instructions. The JDC further found that the Administration violated the Applicant's due process rights, having provided him with a copy of the complaint only after the investigation and after the charges had been filed against him. The JDC recommended that the Applicant be separated from service with notice or compensation in lieu thereof.

9. The Secretary-General disagreed. He considered the Applicant's actions in relation to the Complainant to constitute both sexual harassment and workplace harassment. On the basis of sexual harassment and workplace harassment, abuse of authority and failure to follow instructions given by his supervisors, the Secretary-General summarily dismissed the Applicant.

10. On 31 March 2008, the Applicant appealed his summary dismissal to the former Administrative Tribunal. His case was subsequently transferred to the UNDT.

11. In its Judgment on the merits, the UNDT did not find the charges of sexual harassment and workplace harassment established. Neither did the UNDT find evidence of attempted abuse of authority, interference with official investigations or failure to follow properly issued instructions. The UNDT found that the Applicant's due process rights had been breached in that he had not been provided with a copy of the complaint by the time of the investigation, and that the principle of presumed innocence was not observed in the Applicant's case. In the view of the UNDT, what had happened between the Applicant and the Complainant was "a personal and intimate feud between two consenting adult staff members", and the evidence pointed to certain elements of incompetence on the part of the Applicant that deserved "a reprimand at the very worst but certainly not summary dismissal".

12. In its Judgment on compensation, the UNDT ordered rescission of the summary dismissal decision, payment to the Applicant of three and a half years' back pay, reinstatement or payment of two years' net base salary in lieu thereof, payment of four months' net base salary for due process violations, payment of nine months' net base salary for moral damages, payment of the repatriation grant in effect in January 2008, and placement of the Applicant on the roster of internal candidates for suitable P-5 positions.

Submissions

UNDT Judgment on the Merits

Secretary-General's Appeal

13. The Secretary-General submits that the UNDT exceeded its competence and erred in law and in fact, resulting in a manifestly unreasonable decision. The UNDT erred in law by failing to review the case pursuant to the full definition in paragraph 2 of administrative instruction ST/AI/379 "Procedure for dealing with sexual harassment" of 29 October 1992 and in the context of the supervisor-subordinate relationship between the Applicant and the Complainant and the Applicant's power to affect the Complainant's career prospects.

14. The Secretary-General also submits that the UNDT erred in law and fact in concluding that the Applicant had neither abused his authority nor failed to follow properly issued instructions. The Secretary-General is of the view that it was reasonable for him to conclude that the Applicant was aware that apprising the Complainant's new supervisor of her "history" would have a negative impact on the Complainant, and that it is highly probable that he abused his position as the Complainant's former supervisor in retaliation for her lodging a complaint against him. With respect to the failure to follow instructions, the Secretary-General maintains that staff members such as the Applicant are expected to comply with instructions, verbal or written, from senior officials with specific responsibilities including safety, security and disciplinary matters, and that the Applicant failed to follow the clear instruction from the Chief of the Conduct and Discipline Unit (CDU) not to contact the Complainant.

15. The Secretary-General further submits that the UNDT's conclusions about the breach of the Applicant's due process rights and the violation of the principle of presumed innocence are legally unsustainable. In the view of the Secretary-General, the due process rights applicable at the preliminary investigation stage are considerably less than the due process rights applicable once disciplinary proceedings have commenced. He contends that the Dispute Tribunal and the Administrative Tribunal of the International Labour Organization (ILOAT) have drawn a distinction between the rights applicable at a preliminary investigation and the rights applicable after disciplinary proceedings have been initiated. Furthermore, in the present case, at the time of the interviews, the Applicant was provided with each of the e-mails presented by the Complainant and was thus informed in a clear manner of the allegations against him and given

ample opportunity to respond; he did, in fact, avail himself of the opportunity to do so. The actions of the Administration fully complied with the requirements of the former administrative instruction ST/AI/371 “Revised disciplinary measures and procedures” of 2 August 1991, and ST/AI/379.

16. The Secretary-General lastly submits that the UNDT’s determination that the Applicant’s actions and behaviour warranted a reprimand and not summary dismissal is inconsistent with the *Sanwidi* ruling of the Appeals Tribunal.³

Applicant’s Answer

17. The Applicant submits that the Secretary-General has failed to articulate sufficient grounds for overturning the UNDT Judgment and has merely engaged in trying to reassert the same arguments that were carefully reviewed by the UNDT and found insufficient to sustain the charges.

18. The Applicant also submits that the Secretary-General has gained an unfair advantage in that he had six months to prepare his submission on the merits, due to the fact that two judgments disposed of one case. In the view of the Applicant, the jurisprudence of the Appeals Tribunal does not appear to support the filing of two separate appeals, as the Secretary-General has done in the present case, but merely allows a party to wait for the issuance of the judgment on compensation in order to file one appeal against both judgments. He argues that the Secretary-General’s filing of two appeals constitutes an abuse of process.

19. The Applicant maintains that the Secretary-General has further abused the process by continuing to provide only selective excerpts of the full record despite the UNDT’s criticism of the Secretary-General for having produced incomplete records of investigation.

20. The Applicant draws this Tribunal’s attention to the private nature of the communications and exchanges between him and the Complainant, which were sent from personal Yahoo e-mail accounts outside working hours. Notably, there was no evidence of their personal relationship spilling over to the workplace or their relationship becoming a condition for the Complainant’s continued employment. It is noteworthy that none of their co-workers noticed any effect on the workplace.

³ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

21. The Applicant emphasizes that the UNDT accurately summed up the true nature of the situation in which he found himself. There is no prohibition against fraternizing by colleagues outside of work or exchanging intimate and personal communications outside of work, even between supervisors and supervisees.

22. The Applicant requests that the Appeals Tribunal sustain the UNDT Judgment.

Judgment on compensation

Secretary-General's Appeal

23. The Secretary-General submits that the UNDT erred in law when it failed to provide any rationale for awarding the Applicant a total of more than six and a half years' net base salary, or nearly USD 700,000, or to establish compelling reasons for ordering the payment of more than three years' back pay. The Secretary-General notes that a staff member serving with a peacekeeping mission is generally not awarded contracts in excess of one year. In this connection, the Secretary-General refers to the Appeals Tribunal Judgment No. 2010-UNAT-087 (*Liyanarachchige*), in which the Appeals Tribunal reversed a summary dismissal decision and set compensation in lieu of rescission at one year's net base salary. He also refers to Judgments No. 2011-UNAT-131 (*Cohen*) and No. 2011-UNAT-188 (*Harding*), in which the Appeals Tribunal emphasized that the period of compensation for loss of earnings resulting from dismissal should be limited to two years.

24. The Secretary-General also submits that the UNDT's order to award four months' net base salary for due process violation should be vacated as it is based on a legally erroneous finding. Likewise, its order to pay repatriation grant to the Applicant is legally unsustainable because the Secretary-General considers that the summary dismissal was appropriate.

25. The Secretary-General further submits that the UNDT erred in law and exceeded its competence by ordering nine months' net base salary for moral damages. To the extent that the UNDT might have considered it appropriate to award such an amount to correspond to the eight months that had elapsed between the Applicant's dismissal in January 2008 and the commencement of his job in Iraq in September 2008, the Secretary-General maintains that an award for moral damages is not intended to compensate for economic loss, especially after the UNDT awarded compensation for economic loss in the form of back pay and entitlements.

26. The Secretary-General maintains that the UNDT's order to place the Applicant on the roster for P-5 positions after the Dispute Tribunal found him to have engaged in "gross managerial incompetence"⁴ is tantamount to directing the Secretary-General to take a course of action that is directly contrary to his obligation under the Charter to employ staff of the highest standards of efficiency, competence and integrity.

Applicant's Answer

27. The Applicant submits that none of the arguments of the Secretary-General meet the legal requirement that the UNDT's findings and conclusions be manifestly unreasonable.

28. The Applicant submits that whilst the Secretary-General fashions his arguments around claims of mistake of law or exceeding the Tribunal's competence, he is really attempting to reargue the basis for compensation. In fact, the Secretary-General is arguing that his discretionary authority is absolute and, even if the UNDT Judgment on the merits is sustained, his liability should be strictly limited. This broad argument reveals the Secretary-General's efforts to undermine the UNDT Judgment in every way possible in order to avoid financial liability for the wrongs done to the Applicant.

29. The Applicant submits that the UNDT's award of compensation is consistent with other cases involving wrongful termination that the Appeals Tribunal has reviewed.

30. The Applicant maintains that he had served continuously in peacekeeping missions for eight years and had a legitimate expectation of continued service with the Organization. The Secretary-General has failed to introduce any evidence to show that his contract would not have continued. Furthermore, there was reasonable certainty of his promotion to a higher level had he not been dismissed.

31. The Applicant contends that his case is distinguishable from *Liyanarachchige* in that the *Liyanarachchige* decision was based only on procedural irregularities whereas, in the present case, the underlying decision was also repudiated.

⁴ The UNDT Judgment on the merits refers, in paragraph 187 (v), to the Applicant's "managerial incompetence", and not "gross managerial incompetence", as asserted by the Secretary-General.

32. The Applicant submits that, having heard the evidence, the UNDT was in the best position to judge the effects that the wrongful decision had on him.

Considerations

33. The Secretary-General has filed two separate appeals against Judgment No. UNDT/2011/106 and Judgment No. UNDT/2011/192.

34. By way of preliminary issue, the Appeals Tribunal finds no basis for the Secretary-General having filed two appeals in this case. As this Tribunal has previously determined, it is sufficient for a party appealing a UNDT judgment to address in a single appeal both the merits of the case and the remedy/remedies awarded by the UNDT.⁵

35. The Secretary-General appeals on a number of grounds.

(i) *Did the Dispute Tribunal err on questions of law and fact in concluding that the Applicant did not engage in sexual harassment?*

36. As stated in the dismissal letter,⁶ the Secretary-General determined that the actions of the Applicant vis-à-vis the Complainant constituted sexual harassment within the meaning of the relevant administrative instruction. While the JDC, in its report of 10 January 2008, found that the Administration had established the charge of workplace harassment against the Applicant, it did not find that the Applicant's conduct, either before or after 15 March 2005, came within the definition of sexual harassment then in force. The issue for this Tribunal is whether the UNDT properly determined that the Secretary-General's conclusion, namely that the Applicant sexually harassed the Complainant, was not sustained in law or fact.

37. ST/AI/379 (administrative instruction in force for the purposes of this case) defines sexual harassment as "any unwelcome sexual advance, request for sexual favours or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment".

⁵ *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-076.

⁶ The letter was dated 19 December 2007, which is clearly a mistake. The letter could only have been issued after 10 January 2008, the date of the JDC report.

It is in the context of this definition that the Secretary-General's appeal against the UNDT's conclusion must be assessed.

38. Prior to taking up employment as a Logistics Assistant within ONUB on 15 February 2005, the Complainant had worked under the Applicant's supervision as a locally recruited Logistics and Supply Clerk for UNMIBH from May 2000 to December 2002. While the complaints which form the basis for the Administration's inquiry into the Applicant's conduct in this case (and which led to the charges against him) relate to events which occurred in and around the commencement of the Complainant's recruitment to ONUB and thereafter (i.e. between January and May 2005), it merits noting that between December 2002 and 15 February 2005 there was e-mail correspondence between the Applicant and the Complainant which highlighted that the Applicant and the Complainant had a pre-existing friendship and which suggested also, on the part of the Applicant, that he was wishing for and actively contemplating working with the Complainant again.

39. As the JDC report noted, "the present case involves two staff members, supervisor and subordinate, who, concomitant with their professional relationship from the time of their service at a previous field assignment, had developed what by all accounts was a close, intimate friendship".

40. For an understanding of the circumstances in which, it is contended by the Secretary-General, the actions of the Applicant vis-à-vis the Complainant constituted, inter alia, sexual harassment within the above-quoted definition, it is necessary to set out in some detail the content of e-mails and other communications between the Applicant and the Complainant in the period January to May 2005, and, indeed, it is necessary to make reference to relevant communications which occurred in 2003 and 2004.

41. A portion of an e-mail of 18 March 2003 from the Applicant to the Complainant reads as follows:

Over the years you have resolutely resisted all my advances ... I just had and still [missing word] overriding desire to make love to you and be inside you. I know you didn't want [word indecipherable] and, of course I accept your view.
I just wish we could be together here in East Timor.

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42. By February 2004, the Applicant was actively promoting the Complainant's re-engagement by the Organization, as evidenced by the following internal e-mail sent by him on 2 November 2004:

We spoke yesterday of [the Complainant], who worked for me as a logistics assistant in UNMIBH. She is a very capable staff member, who ran my supply administration office but was downsized when the mission closed. I attach her P11 for your consideration, should a suitable vacancy present itself.

43. An e-mail of 13 December 2004 from the Applicant to the Complainant advised her as follows:

I checked with Personnel and things seem to be moving along in the right direction albeit slowly. You are definitely pencilled in on my sections [sic] organisation chart. Two other people I suggest for posts have already received offers and a third is pending, along with you. I think you just have to be a bit patient ... Let me know as soon as you hear anything. I can't wait to get you out here with me. Just like the old times, except I think it will be even better as we know more about each other now....

This communication was signed "Love ..."

44. On 22 January 2005, in reply to an e-mail from the Complainant discussing her concern with malaria and its likely impact on any future pregnancy she might have, the Applicant wrote:

No I don't think you are crazy, but you are worrying too much about malaria. If you take proper precautions, there is no reason why you should be infected. If you are, then quick treatment is usually 100% effective. You could always get pregnant early if you are worried, maybe I could help with that!

45. This e-mail elicited the following response from the Complainant on 22 January 2005:

Wooow,

Eih, hold on!!!

I was saying IF ONE DAY I WISH TO HAVE ...

And if I will ever be in a position to shar [sic] your room, one of us must sleep on the floor!!! Punto.

:)

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P.S.: I note that we are now joking only, we are really good friends and there is nothing that can change that (just do not mention sex or sleeping ina [sic] same room and everything will be fine). :)

The Applicant wrote, *inter alia*, as follows:

I know I was joking, but we should still take some time to think things through properly. I think you and I have a very special relationship, which not everyone will understand ... We will be working very closely together and you will not be able to escape as easily as before ... I still believe that we will enjoy sex together sometime, possibly in this mission, but only if it suits you. Have a think about it and let me know what you feel. We should certainly talk about these things so that we can avoid any problems or misunderstanding. I hope you still trust me to look after you.

46. On 23 January 2005, the Complainant e-mailed as follows:

I do agree that you and I have a very special relationship, which not everyone will understand. I hope that things will not change between us and that we will be able to talk about absolutely everything without restriction, as we used to. I really enjoyed our conversations about life, relationships, sex and everything else and I do not won't [sic] that change and I do not feel uncomfortable about it in general.

But I do not wont [sic] to give you any false hope because [sic] I do not wont [sic] to have sex with you. I never wanted [sic] that and morre [sic] correct I do not wont [sic] to have sex with anybody at all.

I do not joke now...

Only one person with whom I wanted [sic] to have sex did not wont [sic] to have sex with me, more correct is not willing to have sex with me anymore, so I have a bad luck to my love life and sex in general. But that is my heart, my rules and principle and for time being I am ok like this, without it, and I am not missing it at all, I am fine by myself. I wont [sic] to keep it that way.

I am looking to workwith [sic] U very closely together and I do not feel any problem with that (hope U wont harrest [sic] me.) There is no need to keep a distance from you because I do trust you very much and it would be to extreme [sic] change in our friendship anyway, I do not see a need to live in a different hotel only if you insist on it, what I guess you will not ask, because U will not bother me like in old days on a frustrating way, that bad time of misunderstyandings [sic] is behind us I hope.

The Applicant's response was as follows:

Thanks [...], I understand you completely. I just had to ask. I will not harass you; you know me well enough to tell me directly if I am doing the wrong thing.

47. This Tribunal is satisfied that by the end of January 2005, the Complainant had established the parameters of her friendship with the Applicant and, notwithstanding the wide-ranging nature of their personal friendship, she had set up a clear barrier beyond which the Applicant was not to venture.

48. The Complainant took up her position as Logistics Assistant in ONUB under the Applicant's supervision on 15 February 2005. It is not in dispute that the Applicant was instrumental in securing accommodation for the Complainant in the hotel where he himself resided, and that she travelled to work with him everyday in the vehicle assigned to him by the mission.

49. On 15 March 2005, some four weeks after the Complainant took up her employment in JLOC, the Applicant e-mailed the Complainant a photograph of his genitalia saying: "Be careful – For Your Eyes Only. You have seen it all before! Enjoy ... and destroy." By any definition, the Applicant's action on 15 March 2005 was of a sexual nature.

50. This e-mail elicited the following response from the Complainant:

I simply cannot believe [sic] that you have sent me this photo. I have not seen your intimate part before definitely [sic] and I truly hope you are joking only. What on earth made you to take this kind picture of your exposed body and send it to me...I can forgive you only if you were drunk completely [sic] when done so.

The Applicant responded: "Not drunk ... just having fun ... your turn now." To which the Complainant replied: "Dream on .. u can only dream about it."

51. An analysis of the e-mail and text message exchanges between the Applicant and Complainant between 1 April 2005 and 22 April 2005 reveals a decisive shift in the Applicant's approaches to the Complainant. As of 1 April 2005, the emphasis, from the perspective of the Applicant, was on berating the Complainant for having moved out of the Applicant's hotel accommodation and for the fact that the Complainant had begun developing a separate network of friends. The Applicant's jealousy of this state of affairs and his possessive attitude towards the Complainant is evident in the following excerpt from an e-mail addressed to the Complainant on 11 April 2005:

My biggest mistake? ...

I should be the happiest guy in the world. Why do I feel so miserable? Like something has been ripped out of my stomach ... my life is on a downward spiral. Since I left you in Sarajevo back in 2002, I have thought of little else except how to get a mission job for you, preferably with me, so that we could have fun again. I desperately wanted to rescue you from your stressful and unhappy existence in Pale [Bosnia/Herzegovina] ... How wrong could I be? ... I should have left you in Pale ... The truth is I feel completely used. It seems I was just a means to get you here to Bujumbura and now my usefulness is at an end.

52. The Complainant's reaction to this e-mail, as expressed to a personal friend on 12 April 2005, was as follows:

Please keep this to you and tell me what to do if you can. I never had relation or sex with [the Applicant] and I never will do ... from my side it was always very professional as you know from Sarajevo time and he was telling me that he really appreciates my work...and that is the reason why he got me here from the first place ... but he is such a HIPOCRIT [sic] I was crying all morning because of this email ... he simply wonts [sic] that he is with me 24 hrs ... telling me to whom to say hello and whom to say nothing ... Also I fear every day that he will suck (sic) me from work and that my family will stay without bread ... this is way too much for me.

53. In the course of text messaging with the Applicant on 12 April 2005, the Complainant stated: "Helping me in one had (sic) and harassing in another is like blackmail an [sic] it upset [sic] me so much ... are you aware of what you are doing to me since I came here in Bujumbura?" In the course of the same communication, she requested the Applicant not to "imprison" her "in order [for her] to spend 24 hrs with [the Applicant]" and likened her circumstances to being put in a "bird cage".

54. In a further e-mail to the same personal friend on 12 April 2005, the Complainant advised as follows:

I asked [the Applicant] to go for coffee and talk to me ... and he did so I have trown [sic] everything in his face what I do think about his harassment and non appropriate behaviour as my supervisor and I told him that I will not tolerate it any longer ... if it happens one more time I will go to personnel ... and complain about the everything starting with day 1 of my time here ... He promised two hours ago to me and that he will not hassel [sic] me anymore.

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55. Some ten days later, on 22 April 2005, after discovering that the Complainant had sent text messages to a male friend, the Applicant e-mailed her, advising her, inter alia, as follows:

I am so upset, angry and disappointed in you. I can hardly stop shaking. You have lied to me and misled me completely ... It seems that all the time I was on leave, you were developing this relationship with [...] ... He obviously had sex with you ... To be truthful, if you found some reason for not coming back here ... I would be happy.

On the same date, the Complainant responded, inter alia, as follows:

... all this storry [sic] about [...] and your offensive conclusions towards me and him for god sake ... I was never developing an [sic] relationship with [...] I have never had sex with --- You have given yourself a freedom to go so much into my privacy ... U can not do that. I do not like and I do not appreciate what you are doing to me.
... I still cannot believe that you opened my private messages on the mobile and read them without asking me first.

The Complainant continued:

I was never attracted by you as a man, I was never intimate. I have never had sex with you and I never will/be ... If you brought me to Burindi [sic] and helped me to get this job it does not mean that I have to feel obliged to have sexual contact with you or any other contact that lides [sic] to intimacy ... YOU have no right to face [sic] me to spend time with you after working hours especially if I am not in mood to do so.

The Complainant also stated:

... do not treaten [sic] me with my work, you have no any solid ground for it, and do not tell me not to come to Bujumbura again ... because my work is my bread and bread for all my family too, no mater [sic] how may [sic] members my family have it depend on my salary, Myself and my family do not deserve to change our life because for god sake U love me so much ... or because you cannot control your emotions with me your control and possesivens [sic] towards me.

Later on the same day, the Complainant advised the Applicant that she had “spent approx 2 hours in toilete [sic] in Nairobi airport vomiting ... from stress”.

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56. On 23 April 2005, the Applicant e-mailed as follows:

Obviously our friendship is over. However we will probably have to work together for a while, at least until one of us is reassigned ... I propose a few simple rules that might make it easier for both of us ...

- No socialising out of work hours
- Keep conversations to work-related matters only ...
- Minimise contact in the office.

The Complainant responded, *inter alia*, as follows:

So if U say that our friendship is over ... than [sic] only conclusion from my side is that there was no[t] any friendship from your side all this time .. because [sic] you have been pretending that you are my friend to get me and come closer to me to reach your goals as a men [sic]..

... I will not tolerate O ignorance from your side related to my work .. because [sic] I do not deserve that my work (our team work) suffers because [sic] you have LOVE problem ... I am your assistant no mater [sic] do you like it or not and professionally [sic] I have no any problems to work with you on the same ground. U have no any right to influence my work on negative way do to your personall [sic] matters ... Work and Organisation (ONUB) and our profesional [sic] relationship should be respected i[n] total–full terms!!!

57. On 19 May 2005, the Complainant was the recipient of an e-mail from the Applicant, a portion of which reads as follows:

Over the past few days I believe I have finally begun to see the light about you, after all these years. M is right, you use everyone with whom you come into contact ... I despise you and all you have done to me. I wish I had never set eyes on your face years ago ... I have tried to look after you ever since we met, even doing everything to get you this job here. I was useful for that ... only to be “dumped” the moment I went on leave and you had found enough “friends” that were more useful to you ...

With regard to this e-mail, it is relevant that the Applicant breached the parameters he himself sought to establish in his e-mail of 23 April 2005.

58. The Complainant replied on 20 May 2005, stating *inter alia*:

... you may despise me as much as you want but I am so sure that you are doing so just bec...use [indecipherable] I say NO to you as to a man!. Nothing else. Well I do respect UN very much and love my job and working for the UN you should really stop to give me a hard time and respect the UN in all possible terms ...

59. The Appeals Tribunal is satisfied, having regard to the contents of the e-mail exchanges which took place between the Applicant and the Complainant in January 2005 (and, indeed, having regard to the earlier e-mail exchanges between them, as referred to above), that the Complainant did not share the Applicant's desire to pursue a sexual relationship and, in particular, we are satisfied that the Applicant's conduct on 15 March 2005 was "unwelcome" to the Complainant within the meaning of ST/AI/379, as evidenced by her response to it. We are satisfied that it was unwelcome in the context of the boundaries the Complainant had set out in her January 2005 e-mails (a position known to the Applicant), during a time when she was being actively recruited by the Applicant for a post under his supervision in ONUB. The transmission by the Applicant of a photograph of his genitalia to a female colleague, much less a female colleague under his direct supervision, irrespective of whether the photograph was sent within or outside work hours, can at its best, as found by the JDC, "be characterised as outrageous, and most probably unwanted". In the present case, there was no "probability" surrounding the issue as to whether this action was unwanted or unwelcome, given the boundaries which the Complainant had set in her correspondence of January 2005. Accordingly, we are satisfied (applying the test set out in *Molari*⁷) that the Secretary-General had clear and convincing evidence that the Applicant's conduct on 15 March 2005 was unwelcome to the Complainant.

60. The fundamental basis of the Applicant's and the Complainant's relationship, from 15 February 2005 onwards, was that of supervisor and supervisee. Given the unequal nature of this relationship and the boundaries which the Complainant had attempted to establish, together with the Applicant's breach of those boundaries, the Secretary-General, in assessing the relevant facts, had sufficient grounds to conclude, as a matter of high probability, that the Applicant's very graphic conduct on 15 March 2005 and its unwelcome nature rendered the Complainant's work environment "offensive" within the meaning of ST/AI/379.

⁷ In *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, the Appeals Tribunal stated in paragraph 2: "Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable."

61. There was no further mention of the photograph in the e-mails or other exchanges between the Applicant and the Complainant in the latter half of March 2005, a time when the Applicant was on leave. An analysis of the text message exchanges between the two on 23 and 29 March 2005 suggests the Complainant was awaiting the Applicant's return from leave in a positive frame of mind. Taking into consideration the unequal nature of their respective positions within the Organization's framework and bearing in mind the role played by the Applicant in securing the Complainant's employment in ONUB, the contents of the Complainant's communications with the Applicant in the latter half of March 2005 did not dilute in any substantive way the unwelcome and offensive nature of the Applicant's sexual conduct of 15 March 2005. Nor is it necessary that the Complainant, in order for her to rely on the offensiveness of that conduct, establish that tangible employment consequences arose as a result of it.

62. Having considered the communications between the Applicant and the Complainant between 1 April and 20 May 2005 (only a portion of which is set out herein), this Tribunal is further satisfied that the Secretary-General properly concluded that the Applicant's approaches to the Complainant remained sexual in nature, notwithstanding the absence of overt sexual comments or entreaties on the part of the Applicant. It is apparent from the Complainant's responses to the Applicant's communications, and notwithstanding any concessions she made to the friendship they had, that the sexual context of the Applicant's conduct and the jealousy and possessiveness it gave rise to remained unwelcome to the Complainant. Moreover, we are satisfied that the totality of the circumstances in which the Complainant found herself in the period from February to May 2005 constituted circumstances which could reasonably be considered by the Secretary-General, under any standard, unwelcome to the Complainant as well as an offensive, and on occasions intimidating, work environment for the Complainant. In making this finding, we have had particular regard to the fact that, at all relevant times, the Complainant was the Applicant's subordinate. We have also considered the content of the Complainant's e-mails, and notwithstanding the placatory and sometimes convivial language used in some of them, we do not find, given the unequal nature of their respective positions, that the concessions made by the Complainant were such as to negate the offensive work environment the Applicant's conduct created.

63. We are of the view that, in the course of its analysis as to whether the Applicant had sexually harassed the Complainant, the UNDT failed manifestly to attach sufficient weight to the unequal nature of the respective positions of the Applicant and the Complainant within the Organization. The Dispute Tribunal failed manifestly to attach proper weight to the strength of the Complainant's rejection of the Applicant's desire for an intimate sexual relationship with her. Thus, we regard as manifestly unreasonable the Dispute Tribunal's finding that the Complainant "was a consenting partner in an intimate adult relationship where no holds were barred as far as topics for discussions were concerned", particularly since the Complainant, as evident from her e-mails, had set out in clear terms for the Applicant the parameters of her non-sexual relationship with him.

64. The UNDT (at paragraphs 50 to 52 of its Judgment on the merits) attached significant weight to the Complainant's rejection, on 29 April 2005, of the Applicant's offer to arrange for her to move temporarily to another section within the mission stating: "... A person who claims that a particular workplace becomes intimidating, hostile or offensive in addition to affecting her emotionally and physically would not, in the face of a possible reassignment, choose to remain in such a workplace."

65. In the opinion of this Tribunal, the weight attached by the Dispute Tribunal to the Complainant's wish to remain in her workplace, and the inference drawn by the UNDT there from, was disproportionate in the overall context of the significant imbalance in the parties' respective positions within ONUB and having regard to the deference shown by the Complainant to the Applicant as her supervisor, as evident from the content of her e-mail of 29 April 2005. We accept the Secretary-General's submission that it was reasonable for him to evaluate the communications between the Applicant and the Complainant in light of the Complainant's position of inequality and vulnerability vis-à-vis the Applicant.

66. Under the heading "Workplace harassment" and in particular at paragraphs 70-72 of its Judgment, the Dispute Tribunal cast doubt on the Complainant's assertions in her complaint of 2 June 2005 that she was afraid to open her e-mails at work as there would often be an e-mail from the Applicant wanting to know whom she was with the night before and her assertion that the Applicant would often ask her to stay behind after work to discuss work-related matters but would soon confront her about her activities the previous night. The UNDT tended to disbelieve the Complainant because no such e-mails were produced by her. However the contents of an e-mail received by the Complainant on 20 May 2005 at

5:15 pm from the Applicant belie that conclusion. This e-mail suggests that on that occasion at least, the Applicant questioned the Complainant about a named individual. He did so despite his earlier commitment of 23 April 2005 that conversations between them would be work-related only. Moreover, the content of the entire communication from the Applicant to the Complainant in the months of April and May 2005 suggests that the Complainant's assertions about enquiries made of her by the Applicant while they were at work were, as a matter of probability, truthful. In our view the finding of the UNDT, as set out in paragraph 72 of its Judgment, was manifestly erroneous when viewed against the totality of the circumstances.

67. We also note that at paragraph 74 of the Judgment the UNDT placed emphasis on the fact that the Complainant's discussion with the Applicant on 12 April 2005 took place at her house during a coffee break, stating: "[t]hey were not at work and it is not shown how the incident affected the workplace and their productivity". The UNDT failed manifestly to note the content of the Complainant's e-mail of 12 April 2005, which reflected the state of affairs as of that time from the Complainant's perspective, namely, that she was no longer going to tolerate the Applicant's "harassment" and "non appropriate behavior as [her] supervisor".

68. We have also considered the submissions made on behalf of the Applicant in the course of this appeal. However, we do not accept the Applicant's contention that his relationship with the Complainant constituted private conduct. The overarching factor in this case is that the Applicant was the Complainant's supervisor and, as such, he sought to manage the Complainant's life from the moment she arrived to take up her position in ONUB. Nor do we accept the Applicant's view that the complaints concerned "a purely personal disagreement". Likewise, any reasonable reading of their correspondence between January and May 2005, notwithstanding their shared history, does not support the contention that they had "reached a *modus operandi* that had been accepted by both over long period of time".

69. From as early as 2003 and certainly by January 2005 when he was contemplating the arrival of the Complainant to his work section, the Applicant, by his own words, intermingled his erstwhile private friendship with the Complainant with their imminent work relationship (see, for example, the Applicant's above quoted e-mails of 13 December 2004 and 22 January 2005). The Applicant cannot, in view of the said e-mails, now attempt to draw a demarcation line between his personal and work relationship with the Complainant.

70. Having regard to all of the foregoing, the Appeals Tribunal finds that the Dispute Tribunal erred in law and fact in determining that the Applicant's conduct vis-à-vis the Complainant did not constitute sexual harassment within the meaning of ST/AI/379.

(ii) Did the UNDT err in law and fact in concluding that the Applicant did not engage in workplace harassment?

71. The Secretary-General submits that the Dispute Tribunal erred in concluding that the facts did not establish that the Applicant had engaged in workplace harassment.

72. Former Staff Rule 101.2(d) prohibited "any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work". Thus, to establish a violation of former Staff Rule 101.2(d) the Secretary-General must be satisfied that it was highly probable that:

- (i) the staff member engaged in harassment; and,
- (ii) such harassment either took place at work or was otherwise connected to work.

73. It is noted that in March 2003, information circular ST/IC/2003/17 was enacted "to remind all staff that the Organization's core values require respect for the diversity and the dignity of all staff and that all forms of discrimination and harassment are prohibited".

74. The applicable staff rule in force in 2005 did not define what was meant by "harassment" save that it included the prohibition of physical or verbal abuse. Therefore, what might amount to harassment for the purposes of former Staff Rule 101.2(d) was not exhaustive and would necessarily depend on the facts of any particular case. Certainly, the definition of harassment, at its most basic, would incorporate conduct in the workplace or in connection with work which was unwelcome on the part of the recipient.

75. In its report of 10 January 2008, the JDC concluded that there was considerable evidence in relation to harassment. The JDC, inter alia, concluded that "the e-mail exchanges [between the Applicant and the Complainant] ... while insufficient to show sexual harassment, do indicate harassment which, given the supervisor/supervisee relationship, would rise to the level of workplace harassment".

76. At paragraph 71 of its report, the JDC stated:

There is evidence that, at some point after [the Complainant's] arrival at the mission, [the Applicant] grew more possessive and aggressive in his approach to the friendship. There is ample evidence through their various communications from April 2005 that the complainant felt the [Applicant] was harassing her, and explicitly asked him to stop.

The JDC went on to comment (at paragraph 72 of its report) that the dispute between the Applicant and the Complainant

involved the fundamental boundaries established in any friendship whereby the complainant drew a line of privacy which she requested (and had a right to expect) him to respect, as a friend, and which he ultimately failed to observe. The Panel considers this was harassment under the most basic definition.

Commenting on the Complainant's e-mail to a personal friend on 12 April 2005 (already quoted above), the JDC Panel stated:

[W]hile there is no indication that he himself did anything to put her in apprehension, the fact remains that, at ONUB, he was her supervisor, and therefore had more than a modicum of control over her career, while at the same time in their friendship he carried intense feelings for her and showed erratic and even obsessive behavior, in spite of her equally persistent and intense rejection. Under these circumstances, there is no reason to presume that this would affect their situation during non-working hours only.

77. The content of the e-mail and text message communications between the Applicant and the Complainant in the period from January to May 2005 (already considered in the course of this Judgment) demonstrates that the JDC correctly concluded that the Applicant engaged in workplace harassment. On the sexual harassment issue, this Tribunal has already concluded that the Dispute Tribunal erred in law and fact in failing to attach any or sufficient weight to the Applicant's and the Complainant's supervisor/supervisee relationship and the consequent inequality of arms. Similarly, with regard to the issue of workplace harassment, this failure is again manifest in the Dispute Tribunal's assessment of relevant factual matters.

78. We find that the Dispute Tribunal viewed the relevant actions of the Applicant, and the Complainant's responses thereto, in the period from January to mid-May 2005, through too narrow a lens. The Dispute Tribunal erroneously focused on certain placatory reactions on the Complainant's part, while ignoring the thread of rejection of the Applicant's conduct evident in the Complainant's communications to the Applicant.

79. The e-mail and text message exchanges to which the Complainant (as the Applicant's supervisee) was subjected by the Applicant in the period from January to mid-May 2005, against the backdrop whereby she had set certain boundaries for their personal (and, by implication,) workplace relationship, constituted harassment in connection with work within the meaning of former Staff Rule 101.2(d).

80. We are further satisfied that the Dispute Tribunal erred in law and fact by failing to find a sufficient nexus was established between the complained-of actions on the part of the Applicant and the workplace. As already set out elsewhere in this Judgment, such a nexus was established by the Applicant's status as the Complainant's supervisor. We reiterate that any attempted demarcation between the parties' private friendship and their working relationship cannot be sustained in light of the Applicant's own intermingling of his wish for an intimate sexual relationship with the Complainant with the fact that she was joining ONUB as his subordinate.

81. The Appeals Tribunal is satisfied that the Secretary-General did not act unreasonably in "noting" the findings of the JDC with regard to workplace harassment. As evident from his letter to the Applicant, the Secretary-General chose not to rely on the JDC's finding of workplace harassment, having concluded, with regard to the entire record and the totality of the circumstances, that the Applicant's actions constituted sexual harassment as defined in ST/AI/379. The UNDT therefore erred in law and fact in concluding that the Applicant did not engage in workplace harassment.

(iii) Did the UNDT err in law and fact in concluding that the Applicant did not engage in abuse of authority?

82. Following the initiation of her complaint on 21 May 2005, the Complainant was transferred on 23 May 2005 to another unit. Some days later, on 26 May 2005, she made an official complaint against the Applicant to the CDU of ONUB.

83. On a date between 23 May and 8 July 2005, after he was aware that the Complainant had made a complaint against him, the Applicant approached the Complainant's new supervisor with a view to apprising him of the Complainant's history of filing a sexual harassment complaint. The nature of the Applicant's approach to the new supervisor is encapsulated in the following e-mail sent by the Applicant to an ONUB colleague on 8 July 2005 as follows:

You haven't missed much here. Madam made a grand entrance at the Procurement party on Saturday, ignored me of course .. raised a few eyebrows with others who thought the Queen had arrived! Incidentally, I went to the 3rd floor claims office to take [...] to one side and enlighten him .. should have seen her face when I arrived! Made my day! Am told I may have to write her FOPA as [...] is declining .. what joy!⁸

84. On 19 August 2005, the Applicant pursued the issue of the Complainant's performance evaluation, writing to the Chief of Civilian Personnel as follow:

[The Complainant] has served 6 months in this mission. She is now due either a special report or FOPA. As she worked directly for me for 3 months, it is appropriate that I have an input to this report. Would you please make arrangements for my comments to be taken into account by whomever is tasked with producing the report [?]

85. On 31 August 2005, the Applicant again e-mailed the Chief of Civilian Personnel stating, *inter alia*, "I am concerned that all aspects of [the Complainant's] performance should be properly reflected in her assessment. Otherwise, the problem will just be passed to other sections/missions." The response of the Chief of Personnel was that he did not consider that the circumstances were right at the moment for the Applicant to provide an assessment of the Complainant's performance.

86. Following a meeting on 1 September 2005 with the Chief of Civilian Personnel, the Applicant followed up by an e-mail stating:

I do not wish to provide an assessment of [the Complainant's] performance and I agree that this might be inappropriate. I merely ask that some consideration be given to the [Complainant's] behavior during her time in JLOC; this should not be "glossed over" as this could create difficulties for her future managers ...

⁸ "FOPA" stands for "Field Operations Performance Appraisal", a form used by field missions for evaluating the performance of staff members working there.

87. In its report, the JDC stated as follows:

The Panel assumes that whatever the staff member sought to convey about the complainant, it would be negative. [... If] from his point of view the Organization should have had no need to concern itself with the purely private matter subsumed in her allegations on his conduct, there would in turn be no reason for him to reflect any aspects of her (non-performance related) personal qualities ...

88. The JDC found that the Applicant

wavers from what he contends was a “personal, informal” approach “to enlighten” her new supervisor in one instance, and an approach as her former supervisor to do the same for the benefit of the mission in the context of her performance record. Neither approach was appropriate in this case ... as a manager, it was incumbent on him to know that for the same reasons it was inappropriate to assess her personal qualities in what the Organization otherwise requires to be an objective exercise to establish her performance record. At that time, if the Organization had decided to pursue the matter at all, the appropriate forum to lodge any misgivings he may have held about her conduct would have been in the context of the ensuing investigation.

89. The JDC went on to conclude:

irrespective of whether the [Applicant] felt he was acting personally or officially, his actions took place within the official setting of ONUB and would inevitably carry weight as her former supervisor. Indeed, he would have lacked the authority to evaluate her under any other circumstances. In addition, he undertook these matters at a time when he was aware of her complaint; he had given no indication before that that there were certain factors in her personal behavior that needed to be brought to the mission’s attention. Underlying his responses to the charges there appears to be a sense of betrayal or unjust treatment from the fact she complained about their personal friendship. However, irrespective of whether he acted out of indignance or malice, it is apparent that the complaint itself triggered his motivation, and as such his actions were retaliatory. Moreover, whether he sought to damage her professional reputation or simply offer what he considered to be an accurate portrayal, the resulting damage would have been the same. Therefore, the Panel finds that in taking a suspect and potentially damaging course of action, the [Applicant] abused his position as the complainant’s former supervisor in retaliation for the lodging of the complaint.

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90. At paragraph 95 of its Judgment, and in rejecting the claim that the Applicant had abused his authority, the UNDT stated that the Applicant, as the Complainant's former supervisor, had

no responsibility to exercise regarding the Complainant! There is simply neither power nor authority that a former manager can exercise to endanger or undermine the position of a former supervisee except where the said manager is in a position to make an official evaluation of work done in the past by the supervisee.

91. The Dispute Tribunal went on to state:

To the extent that the Applicant merely approached the Complainant's new supervisor to perhaps give him a prejudiced view of his relationship and problems with her or to even unduly discuss her personal life, he at the very worst had indulged in gossip or backstabbing as the case may be. Much as such an indulgence might be in bad taste, it cannot by any stretch of the imagination be elevated to the misconduct of abuse of authority. It is however possible that a new supervisor who is liable to be influenced by idle gossip would go on to abuse his authority as regards the Complainant based on the fact that she had been bad mouthed by the Applicant. If this had happened, the new supervisor would have exhibited incompetence and would have been the one liable for the abuse of authority.

92. Subsequently, in the course of its Judgment, the Dispute Tribunal stated:

It is the Organization's rule on performance appraisals that managers must formally appraise staff under their charge during the course of a reporting period. At least, *prima facia*, the Applicant was right to request that he make the necessary input as this is a requirement of the Rules on staff appraisals.

93. The Dispute Tribunal went on to describe the actions of the Applicant as an "official request by the Applicant to do what he ought to do under normal circumstances ..."

94. Of primary importance is that the Applicant's attempts in the period of July to September 2005 to engage with the Complainant's new supervisor took place after the Complainant had made serious allegations against him, which called his conduct as a supervisor into question. Thus, the UNDT erred manifestly in describing the circumstances as "normal" and in describing the Applicant's actions as no more than "gossip or backstabbing".

95. Secondly, the Applicant's true retaliatory motivation for speaking with the Complainant's new supervisor is evident in his e-mail of 8 July 2005 and his subsequent e-mails of 31 August and 1 September 2005. The Applicant's purpose was to intervene in the Complainant's new work environment to her detriment. Clearly, therefore, the Dispute Tribunal's conclusion that the Applicant was merely exercising his obligations as a former manager was manifestly unreasonable.

96. The Appeals Tribunal determines that the Applicant could only but have been aware that speaking with the Complainant's new supervisor about the fact that she had made a complaint against him would have had a negative impact on the Complainant, and we are satisfied that the Applicant was motivated to make his approaches to the new supervisor by reason of the Complainant's decision to file a complaint against him. Thus, in all of those circumstances, the Secretary-General reasonably concluded the Applicant's actions constituted misconduct. In ruling otherwise, the Dispute Tribunal erred in law and fact.

(iv) Did the Dispute Tribunal err in law and fact in concluding that the Applicant had not failed to follow properly issued instructions?

97. It is not in dispute that, following the Applicant's e-mail contact with the Complainant in late May and early June 2005, the CDU verbally instructed the Applicant that he should refrain from contacting the Complainant. Notwithstanding this, the Applicant made contact with both the Complainant and her husband in July 2005. However, he ceased such contact when again directed by the CDU not to do so on 11 July 2005.

98. One of the charges brought against the Applicant was that his actions in May/June 2005 violated former Staff Rule 101.2(b) which provided that staff members "shall follow the directions and instructions properly issued by the Secretary-General and their supervisors".

99. The JDC, which found the charge against the Applicant established, stated:

Harassment in any form constitutes serious misconduct. A complaint by another staff member amounting to harassment had been lodged against [the Applicant], and it was incumbent upon him to follow the directions of those officials charged with handling the matters of misconduct as much to avoid complicating his own position as it was to allow the Organization the opportunity to sort the matter out and avoid prejudice to either of the parties involved pending further determination. This would have been

the case even if the Administration ultimately agreed with his position that the complaint was a purely private matter: the staff member's compliance was not conditional on his agreement with the complaint on substance.

100. The Dispute Tribunal rejected the JDC's conclusion, on the basis that the initial advice from the Chief of the CDU to the Applicant "was not an official instruction as contemplated by the provisions of staff rule 101.2(b) and that the CDU had no authority to issue such an official instruction to the Applicant".

101. In the circumstances of this case, where the Applicant himself acknowledged that his supervisor also had verbally advised him to refrain from contacting the Complainant, we are of the view, for the reasons set out in the above quoted passage, that the UNDT erred in its conclusion that former Staff Rule 101.2(b) was not violated.

102. We would add, however, that it is generally better practice and preferable to issue such instructions in writing.

(v) Did the UNDT err in law in concluding that the Applicant's due process rights were breached?

103. Paragraph 9 of ST/AI/379 provides as follows:

Upon receipt of a complaint from the aggrieved staff member pursuant to paragraph 8, or upon receipt of a report of sexual harassment from an appropriate official pursuant to paragraph 7, the Office of Human Resources Management will promptly conduct at Headquarters the initial investigation and fact-finding provided for in administrative instruction ST/AI/371 on revised disciplinary measures and procedures. At all other duty stations, the Assistant Secretary-General for Human Resources Management shall designate an official who will conduct the initial investigation and fact-finding and report directly to him or her.

104. Paragraph 6(a) of the former administrative instruction ST/AI/371 provides: "[i]f the case is to be pursued, the appropriate official in the administration... shall inform the staff member in writing of the allegations."

Paragraph 6(a) of ST/AI/371 relates to the stage at which the Administration has decided to charge the staff member with misconduct.

105. However, paragraph 10 of ST/AI/379 provides:

The alleged offender shall receive a copy of the complaint submitted in accordance with paragraph 8 [of ST/AI/379], or a written version of the report submitted to the Assistant Secretary-General for Human Resources Management under paragraph 7 [of ST/AI/379]. He or she shall be given an opportunity to answer the allegations in writing and to produce evidence to the contrary. At the same time, he or she shall be informed of his or her right to the advice of another staff member or retired staff member to assist in his or her response. If no response is submitted, the matter shall nevertheless proceed.

106. Paragraph 11 of ST/AI/379 states: “[a]fter completion of the initial investigation and fact-finding, the Assistant Secretary-General for Human Resources Management shall, in accordance with paragraph 8 of ST/AI/371, proceed as follows ... “

107. In its analysis of the above statutory procedures (applicable in the case of complaints of sexual harassment) the JDC concluded that paragraph 10 of ST/AI/379 created an additional and separate right, on the part of a staff member against whom a complaint of sexual harassment is leveled, to a copy of the relevant complaint or report *prior* to the end of the investigation and before the Administration would proceed (as per ST/AI/371) with charging him or her with sexual harassment.

108. In our view, the JDC correctly concluded that the above was the required statutory due process *in cases of sexual harassment* (emphasis added).

109. While the Secretary-General submits that the prevailing case law⁹ provides that staff members are only entitled to certain rights once they have been *charged* with misconduct, and that a staff member's rights are safeguarded as long as he or she is given a “fair and reasonable opportunity” to put forward arguments prior to the issuance of the investigation report, it appears that paragraph 10 of ST/AI/379 requires a staff member to be supplied with a copy of the sexual harassment complaint in the course of the preliminary investigation.

⁹ The Secretary-General cites *Zoughy v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/204 and *Zerezghi v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/122.

110. In the present case, the Complainant initiated her complaint against the Applicant on 21 May 2005, filed an official complaint against the Applicant on 26 May 2005, and made a more detailed written complaint on 2 June 2005. As noted in the UNDT Judgment, the Applicant first learnt that there was a complaint against him on 24 May 2005, when his direct supervisor mentioned it, without giving details.

111. The Applicant was initially interviewed by OIOS on 9 September 2005 and a further interview followed on 4 October 2005.

112. On 9 September 2005, the Applicant provided OIOS with a nine-page document entitled “Comments on Complaint of [the Complainant]”. By the time of his 4 October 2005 interview, he had received copies of the e-mails presented by the Complainant in support of her complaint and the Applicant provided a detailed commentary on the Complainant’s e-mails. The contents of the 4 October 2005 interview do not show that the Applicant was disadvantaged in giving his responses, notwithstanding the Applicant’s submissions on appeal, that the material he was shown “had to be read, reviewed and commented upon immediately and in the presence of the interviewers”.

113. The Applicant’s responses were duly recorded in the OIOS report issued on 26 January 2006. The OIOS report claims that the Applicant was provided with a copy of the Complainant’s complaint on 29 September 2005.

114. The Applicant was charged with misconduct on 18 July 2006 and was then provided with the memorandum of the Assistant Secretary-General for Peacekeeping Operations reporting his case to the Office of Human Resources Management (OHRM) and with a copy of the OIOS report. On 27 July 2006, some nine days after being charged with misconduct, the Applicant was furnished with the Complainant’s 2 June 2005 complaint, following a request made by him. The Applicant responded to the charge letter on 8 August and 11 October 2006. On 29 January and 6 and 12 February 2007, he made submissions to the JDC.

115. The Appeals Tribunal concurs with the JDC’s finding that there was a violation of paragraph 10 of ST/AI/379. The Applicant should have received a copy of the 2 June 2005 complaint during the course of the OIOS investigation. However, we do not believe that the Applicant’s due process rights were substantively breached since the Applicant had sufficient

opportunity in the course of the OIOS investigation to respond to the Complainant's allegations of sexual harassment. The Applicant availed himself of this opportunity, as evidenced by his detailed responses of 9 September 2005 and 4 October 2005 to the OIOS investigators, his written comments of 9 September 2005, and his later submissions to the Assistant Secretary-General for OHRM and to the JDC.

116. Accordingly, the Appeals Tribunal finds that the UNDT's legal conclusion that the Applicant's due process rights were breached was erroneous and we do not uphold that legal conclusion.

(vi) Did the UNDT err in law in its conclusion that the Applicant's actions did not merit summary dismissal?

117. In Judgment No. 2010-UNAT-018 (*Mahdi*), the Appeals Tribunal stated that when reviewing disciplinary cases the three factors to be examined are:

- i) whether the facts on which the disciplinary measure was based have been established;
- ii) whether the established facts legally amount to misconduct under the Regulations and Rules; and
- iii) whether the disciplinary measure applied is proportionate to the offense.

118. For the reasons already set out in this Judgment, this Tribunal has found that the Secretary-General properly concluded that the Applicant had sexually harassed the Complainant, had abused his authority as a supervisor and had failed to follow instructions.

119. The issue for this Tribunal is whether the Secretary-General properly exercised his discretion in concluding that the Applicant's actions constituted misconduct, that such actions were inconsistent with the standard of integrity required for international civil servants, and that the severity of the Applicant's misconduct was incompatible with his continued service within the Organization.

120. The Secretary-General has wide discretion in applying sanctions for misconduct but at all relevant times must adhere to the principle of proportionality.¹⁰

¹⁰ Abu Hamda v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2010-UNAT-022.

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121. As set out in ST/AI/379, sexual harassment

is particularly serious when behavior of this kind is engaged in by any official who is in a position to influence the career or employment conditions (including hiring, assignment, contract renewal, performance evaluation or promotion) of the recipient of such attentions.

In deciding on the sanction to be applied, the Secretary-General was entitled to take into consideration the fact that the Applicant was the Complainant's supervisor at the time of the harassment.

122. Moreover, the Secretary-General was entitled to consider as especially egregious the Applicant's conduct following the complaint of sexual harassment having been made against him, namely his attempts to influence the Complainant's new supervisor, and the retaliatory motivation therefor. While the Applicant's failure to follow the instructions given to him by the Chief of the CDU might not, of itself, have been grounds for dismissal, the Secretary-General was also entitled, in his overall assessment of this case, to take this matter into consideration. We are satisfied that the Secretary-General reasonably concluded that the Applicant's misconduct (itself established as a matter of high probability based on clear and convincing evidence) was incompatible with the "standards of conduct expected of an international civil servant" as required by former Staff Rule 110.1.

123. By reason of all of the foregoing, we find that the sanction of summary dismissal was not disproportionate. Accordingly, the Dispute Tribunal erred in law in concluding that the Applicant was improperly dismissed.

Judgment

124. The Secretary-General's appeals are allowed and UNDT Judgment No. UNDT/2011/106 and Judgment No. UNDT/2011/192 are reversed.

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2013-UNAT-280

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Chapman

Entered in the Register on this 8th day of April 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar