



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/011/
UNAT/1587
Judgment No.: UNDT/2012/054
Date: 18 April 2012
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Anita Saran, OSLA

Counsel for the Respondent:
Jorge Ballesteros, Policy and Administrative Section, UNICEF

Introduction

1. The Applicant entered into service with the United Nations Children's Fund UNICEF, on 1 February 2006 as Chief of the UNICEF Southern Sudan Water and Environmental Sanitation Section. He moved into tented accommodation at the AFEX/OCHA camp on 17 February 2006 and was based there until he left Juba on 20 June 2006.

2. The Applicant contests a decision to summarily dismiss him from UNICEF, which took effect on 2 January 2007, based on allegations of sexual harassment made by two waiters and two security men working at the Africa Expeditions, United Nations Office for the Coordination of Humanitarian Affairs ("AFEX/OCHA") tented camp in Juba where he was living.

Facts

3. On 20 and 23 June 2006, oral allegations of sexual assault were made against the Applicant by four employees of the AFEX/OCHA premises in Juba, Sudan. None of the four were employees or agents of the United Nations.

4. A preliminary investigation was carried out by a Consultant hired by UNICEF to deal with cases of sexual exploitation and abuse ("SEA") on 20 June 2006. The SEA Consultant was in charge of interviewing and recording in writing the initial complaints made by the Complainants.

5. On 12 July 2006, the Director of UNICEF South Sudan sent an email to the Applicant attaching the statements from the Complainants in which they had made allegations of sexual assault against him. Other statements collected from other parties interviewed during the preliminary investigation were also sent to the Applicant. He responded to these allegations on 13 July 2006.

6. On 9 August 2006, a Human Resources Manager with UNICEF ("the Investigator"), was appointed to conduct an investigation into allegations of sexual harassment based on the statements taken from the Complainants and others. According to her, she was provided with guidelines, parameters and terms of reference to carry out the investigations. She knew the

Applicant previously by virtue of being the then desk human resources officer handling his recruitment for South Sudan including his appointment to the P5 post.

7.

12. On 7 February 2007, the Applicant requested that a Joint Disciplinary Committee (JDC) be constituted to review the decision to summarily dismiss him from UNICEF.

13. On 10 April 2007, in accordance with UN staff rule 110.4(c) and Chapter 15 on Disciplinary Measures and Procedures of the UNICEF Human Resources Policy & Procedure Manual, an *ad hoc* JDC was constituted in Nairobi to review the Executive Director's decision to summarily dismiss the Applicant for serious misconduct.

14. The Report of the *ad hoc* JDC, dated 29 June 2007, concluded that a substantial case had been made and that there were no other material issues that required or warranted further investigation and/or clarification. On the basis of its review, the unanimous opinion of the *ad hoc* JDC was that the events alleged occurred and therefore the panel concurred with the decision of the Executive Director's Office to summarily dismiss the Applicant.

15. On 2 July 2007, the DED accepted the recommendation of the *ad hoc* JDC and maintained the decision to summarily dismiss the Applicant. The Applicant was informed, that in accordance with staff rule 110.4(d), he could appeal the decision directly to the former UN Administrative Tribunal.

16. On 19 March 2008, the Applicant submitted the present Application to the former UN Administrative Tribunal. The Respondent filed his Reply on 22 September 2008. As a result of the transitional measures related to the introduction of the new system of administration of justice, the case was transferred from the former UN Administrative Tribunal to the United Nations Dispute Tribunal ("the Tribunal").

17. The Tribunal held a hearing via teleconference from Nairobi from 7-9 February 2011. During the hearing, the Tribunal, received testimonies from the Applicant for himself and from the Investigator who was a witness for the Respondent. Counsel for the Respondent and the Applicant filed their closing submissions on 24 and 28 February 2011 respectively.

34. The allegations were true and substantiated.

35. There is no conspiracy agai

- f. Relevance and admissibility of the Complaint Review Forms and the investigator's interview notes as to the facts in issue;
- g. Standard of proof in disciplinary cases; and
- h. The charge against the Applicant and the legal framework.

Role of the Tribunal in disciplinary cases

49. Part of the Respondent's case is that when, in a matter of a disciplinary sanction, the Tribunal has in evidence a report by a JDC panel, the role of the Tribunal is restricted to reviewing the facts as stated by the panel and to determining whether or not the said facts give rise to misconduct. The Tribunal would then evaluate the seriousness of such misconduct and may only proceed on the facts as found by the said JDC or other primary fact finding body. Where the Tribunal departs from this procedure, it ought to give justification for doing so.

50. In former UN Administrative Tribunal Judgment No. 941, *Kiwanuka* (1999), it was held that the imposition of disciplinary sanctions is an exercise of quasi-judicial power and that the Administration's interest in maintaining high standards of conduct and thus protecting itself must, therefore, be reconciled with the interest of staff members in being assured that they are not penalized unfairly or arbitrarily.

51. The question of any party attempting to draw the parameters or limitations for judicial adjudication by the Dispute Tribunal is as unnecessary as it is futile. Its true mandate is governed by legislation and this has been restated in earlier judgments. This Tribunal is competent to entertain applications as provided for by the Statute creating it. As a judicial body, the Tribunal is entitled to examine the entire case before it. In other words, it may consider not only the administrative decision of the Secretary-General imposing disciplinary measures but also examine the material placed before the Secretary-General on which he bases his decision in addition to other facts relevant to the said material. Such other facts may include the charge, the

investigation report, memoranda and other texts and materials which contribute to the conclusions of the investigators and the decision maker¹.

52. In its jurisprudence, the Dispute Tribunal has

- a. That there was no effort made to re-enact the alleged misconduct with the Complainants even though they were interviewed;
- b. The Investigator did not assess the distances between one location and another within the AFEX/OCHA residential camp and the Applicant's offices as this was material and relevant to the allegations made and the explanations of the Applicant; and
- c. That the Investigator did not visit and inspect the Applicant's *Khartoum* tent where it was alleged he had sexually assaulted two of the Complainants on different occasions in order to determine its size and location as a possible venue for the alleged misconduct.

57. An investigator must be trained and competent to conduct investigations. Other standards expected of investigators are objectivity, impartiality and fairness. An investigator must be committed to ascertaining the facts of the case through relevant inquiry involving the questioning of witnesses, forensic evidence where necessary and identification and collection of relevant documentary evidence. The investigator's findings should be based on substantiated facts and related analysis, not suppositions and assumptions. Factual accuracy is very important.

58. In her testimony, the Investigator told the Tribunal that she abided by the procedural steps and standards required during investigations and that she was fair, unbiased and objective. She stated that she obtained physical demonstrations from each Complainant interviewed as to how they were allegedly inappropriately touched by the Applicant, but under cross examination, she admitted that she did not enter

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relevant. She added that what was relevant to her at the time of investigation were the “issues that happened in a specific location”, that is, *Khartoum* tent and Bravo gate.

Credibility of the Complainants and witnesses interviewed by the Investigator

62. Unfortunately, none of the five persons: two waiters at AFEX/OCHA premises and three security guards at the Bravo gate connecting the offices and residential area who allegedly made the complaints that gave rise to the Applicant’s summary dismissal in this case, gave their testimony before the Tribunal. This was because the Respondent could not produce any of them.

63. In deciding on the credibility of the Complainants, the Tribunal is in the circumstances constrained to rely on an evaluation of the interview notes made by the Investigator when she spoke to them, the CRFs filled by the initial fact-finder who first recorded their complaints in writing and the submissions made on behalf of the parties.

The accounts of the waiters and their supervisor

64. Complainant 1 (“C1”) is one of the two waiters who complained of what amounts to sexual assault by the Applicant. On 20 June 2006, he spoke to the SEA Consultant who filled a CRF on his behalf. According to information on the CRF, C1 stated that while at work at the AFEX/OCHA bar on an unspecified day in late April 2006 between 4.00 p.m. and 5.00 p.m., the Applicant greeted him and he mentioned to the Applicant that he had a toothache and asked for advice on medication.

65. Further, that the Applicant offered to give him some medication which he had in his tent and C1 followed him to the *Khartoum* tent where he gave him some medication and then caressed him on the neck, arms and chest. Feeling uncomfortable, he ran out of the tent and returned to the bar. Thereafter, the Applicant would greet him as if nothing had happened and it was not until 26 May 2006 when a story had gone round about a humanitarian worker who was deported from Sudan for homosexual activity with a young male, that he reported his incident

66. On 14 September 2006 when C1 was interviewed by the Investigator, he told her that the incident took place at night. The date and month of the incident was not stated. He said that the Applicant had approached him on the night in question, asked how he was and, on finding that he was unwell asked him to come to his tent for medicine. His colleague, Complainant 2 (“C2”), offered to go on his behalf but the Applicant insisted that C1 come by himself.

67. As soon as they got to the tent, the Applicant began to touch his arm, neck and chest as if massaging him. Feeling uncomfortable, he left the tent to return to his work. He told C2 about the incident and was told by C2 that he had had a similar experience with the Applicant. Between the two waiters, they kept these experiences secret until the incident involving the security guards when their supervisor asked him if he knew anything and he told her of the incident with the Applicant.

68. A second waiter who also complained about sexual abuse by the Applicant was C2. In the CRF, he stated that the incident with the Applicant took place at the beginning of May 2006. According to his account, the Applicant bought water from the AFEX bar and asked C2 to carry the water to his tent. As they walked down, C2 asked the Applicant if he knew a remedy for the rashes on his body. The Applicant said he would look at them and give advice.

69. At the tent, he showed the Applicant some rashes on his arm but was asked if he had

71. An email from the note-taker sent to the Investigator on 25 September 2006 revealed that

b. In his interview with the Investigator, C1 said that when the Applicant offered to give him medication, his colleague C2 had offered to go with the Applicant to his tent to collect it but the Applicant refused and insisted that C1 would have to come by himself. It suggests that C2 was present when discussion about medication for C1's toothache took place with the Applicant. This account of C2 offering to collect the medicine and the Applicant's refusal was not given in C1's CRF or by C2 at any time.

c. In the CRF, C1 said he reported his experience to the AFEX/OCHA Camp Manager during the weekend of 26 May 2006 when the story about a humanitarian worker who had been deported for homosexual activity was making the rounds. He then told the Investigator that he made the report after the security guards complained about the Applicant. The security guards complaint was on 20 June 2006, the same day that C1's CRF was filled. Which version is to be believed? Is it that C1 first reported that he was sexually assaulted by the Applicant on the day he had his CRF filled or that he did when he heard about the deported humanitarian worker in May 2006?

d. Similarly, in C2's CRF dated 20 June 2006, it is recorded that he had reported his assault by the Applicant to the AFEX Camp Manager earlier. To the Investigator, C2 claimed he never officially reported as he did not take it seriously until the incident of the security guards happened.

e. Both C1 and C2 told the Investigator that they only reported their separate sexual assaults by the Applicant to the AFEX Camp manager after the security guards incident when she asked them if they knew anything. Was the AFEX Camp Manager looking for stories from her supervisees to strengthen the case against the Applicant?

f. Why did C2 not take the incident of his sexual assault by the Applicant seriously until the AFEX Camp Manager asked? Did it mean he did not find it offensive at the time it happened? Was he only reporting it then because he was told it was serious?

g. Both C1 and C2 said they confided in

should collect medicine on his behalf and had then confided in his co-worker C2, why did the said C2 ask the Applicant for help with his rashes in May 2006 and agree to have intimate parts of his body examined by him in the same tent?

h. Why did C2 state in his CRF that the Applicant was not able to help him and yet had asked him to undress in spite of the fact that he had collected USD 10 from the Applicant for treatment?

i. Why did C2 forget to mention that he received USD 10 from the Applicant both at the time of filling the CRF and when interviewed by the Investigator? Were both this forgetfulness and the claim that the Applicant did not help him treat his rashes only convenient lies to cast the

not mention receiving any report of sexual abuse until 20 June 2006 after the security guards incident. Why would he omit such a material piece of evidence during investigations?

m. Both C1 and C2 stated in their CRF and to the Investigator that apart from confiding in one another, they kept their experiences secret until the bigger problem with the security guards happened and the AFEX Camp Manager, asked them what they knew regarding the story that was making the rounds. It was only then that they revealed their abuse by the Applicant. Why would the AFEX Camp Manager, to whom the waiters had never complained, ask her supervisees if they knew anything? Was she trying to elicit reports from them in order to build up the case against the Applicant? Was it possible that C1 and C2 made false allegations about the Applicant in order to impress or even help their supervisor? Did the circumstances not render these allegations suspect?

75. The material questions that arise from accounts given by C1, C2 and the AFEX Camp Manager were not resolved by the Investigator. They are serious and sufficiently relevant to successfully strip these absent Complainants of the credibility needed to establish that the Applicant indeed sexually assaulted two of them. The Tribunal finds that the allegations of sexual assault by the Applicant against C1 and C2 were not established by the Investigator.

The accounts of sexual assault by three security guards and their supervisor

76. Three security guards attached to GS Services of the KK Group of Companies in Juba, South Sudan made complaints which were recorded in the CRF on 23 June 2006. The three were C3, Complainants 4 (“C4”) and 5 (“C5”). Apart from the AFEX Camp Manager, S1 who was a supervisor of the three complainant security guards, also filled the CRF relating the accounts of the alleged sexual abuse of the security guards.

77. C4’s story was that on the night of 8 May 2006, the Applicant came to the Bravo gate where he was on duty to talk to him. The Applicant asked him if he was married and if he knew how to have sexual intercourse to which he replied in the affirmative. The Applicant then moved closer and asked him many questions related to sex. Although he was confused as to what the

Applicant intended, he shook hands with him but the Applicant held on to his hand for a long time.

78. While still holding his hand, the Applicant touched his arm muscles and asked if he played football. He then touched other parts of his body including his upper arm, chest and the groin area. The Applicant then invited him to his tent but he declined.

79. C4 went to report the incident to his supervisor. He was asked to write a report which he did and which was put in the report file at the main gate. C4 and his colleagues waited for the Applicant to come again so as to arrest him but he did not return. On how he felt after the incident, C4 said he was angry because of the way another man talked to him about sex. C4 was not interviewed by the Investigator as he had relocated at the time of the investigations.

80. C5 in the CRF stated that he was on duty at about 11.00 p.m. in April 2006 at the Bravo gate when the Applicant came to him and shook hands. He kept holding his hand and pressed his arm muscles saying he wanted to know if C5 was strong. The Applicant also lowered his hands, pressed his thighs and asked if he played football. He then extended his hand and touched C5's private parts. When C5 asked him what he was doing, he said he wanted to know how strong he was.

81. The Applicant then asked C5 what he would do if he saw a beautiful girl and if he would not have an erection. When C5 replied that he would be unmoved at the sight of a beautiful girl, the Applicant invited him to come for a discussion in his tent but C5 refused. The Applicant then pulled him and touched his private parts again. C5 warned him to stop doing so or he would take action against him.

- d. In his CRF, C5 stated that he did not report his encounter with the Applicant until

j. If indeed S1 rotated his security staff on account of the Applicant's alleged sexual abuse of them, why did he fail to state so at the earliest opportunity, that is, the fact-finding or CRF stage? Why also did he not have any roster to show the posting and rotation since he claimed that the reports he got and his consequent rotation of security officers all happened in June 2006? Apart from his say-so, he did not have any records showing that the officers were replaced one after the other due to a problem as serious as sexual abuse. Was the story of frequent reassignment of security staff made up to strengthen the case against the Applicant?

k. If S1 had to change one security staff for another due to the alleged sexual assault, was it not reasonable that he would warn the staff who replaced another about a possible abuser who would inappropriately touch the officer's private parts after an unduly long handshake? If he did not, was it because his story about the changing of the security officers due to sexual abuse was untrue?

90. As in the examination of the stories told by the absentee waiters, the CRF and investigative accounts of the security guards and their supervisor show serious and material inconsistencies. They also show clearly in certain instances such, as in S1's story to the Investigator, that certain accounts which could be fictitious were treated as established facts and unduly formed part of the investigative findings against the Applicant for which he was summarily dismissed.

91. The foregoing analysis reveals that there were several discussions held between the waiters and the security guards amongst each other suggesting that there was a strong likelihood of collusion amongst them. Contrary to the Respondent's submission that "none of the victims had anything to gain by making their reports and further, they risked their jobs by reporting," there is no evidence in the CRFs, in the interview notes and in the investigation reports of such concerns on the part of the Complainants.

The integrity of the investigative process

92. The importance of the integrity of an investigation process cannot be overemphasised. Where an investigation lacks integrity, it goes without saying that it would be rendered unreliable and useless for the purposes for which it was intended. The importance of maintaining internationally accepted best practice standards in the conduct of internal investigation must be underscored. These standards include the competence of the investigator who must also maintain objectivity, impartiality and fairness throughout.

c. The Investigator was inexperienced in conducting an investigation of this specific nature and as such, she failed to take account of very significant features of this case in her report.

95. For his part, the Respondent replied to the foregoing submissions as follows:

a. No doubt the investigation could have been improved. No investigation is perfect. Not even those made by experienced professional criminal investigators. This is an administrative case where an employer has to decide if it has enough evidence to terminate the contractual relationship with one of its staff members, someone who has been accused of abusing the position given by the Organization.

b. Seen in retrospect, one can always identify things that could have been done better. The investigator, a seasoned HR professional, has candidly acknowledged that if she had known what she knows now, she could have included additional comments or explanations and she did not. Nonetheless, it is unfair and inaccurate to say that the investigation was biased, subjective, tendentious or fatally flawed.

c. The gaps the Applicant identified during the hearing either as investigator 'faults' or as 'major inconsistencies' in the investigations report are mere details, which do not affect the final findings.

96. In the view of the Tribunal, some of the obvious flaws or shortcomings in the investigation are:

a. A failure by the Investigator to visit and inspect the alleged scene of the incidents reported by the two waiters, that is, *Khartoum* tent occupied by the Applicant at the material time in order to ascertain its size, layout and to observe the lighting conditions inside and outside the tent. Her efforts to describe the size of the inside of *Khartoum* tent by comparing it to another tent in which she resided during the investigations was incompetent especially as she had not provided any authoritative evidence that all or some of the fifty tents at the AFEX camp were identical in every respect.

services or of those working at very junior jobs. These sentiments had evidently coloured what ought to have been a dispassionate investigation exercise.

k. The bias on the part of the Investigator is clearly seen in her question to the Applicant in the second interview of 15 September 2006 regarding AFEX rules about AFEX staff visiting the tents. Why did she not ask the Complainant waiters why they entered the Applicant's tent, contrary to the rules?

l. Similarly, the Investigator did not ask the Complainant waiters what their interactions with the Applicant were like before and after the alleged incidents which they did not report. She did not ask the security guards either although she posed the question to the Applicant.

m. In her report, the Investigator made a recommendation concerning how UNICEF should respond to the Complainants. This should be the business of UNICEF's administration and was clearly beyond the terms of reference of the investigation. Her engagement with this issue which had no place in her assignment compromised her role as an impartial and committed gatherer and assessor of facts.

n. The credibility of the entire investigation exercise which began with the summarizing of the allegations in the CRFs on behalf of the Complainants and some witnesses was seriously and adversely affected by the involvement of the SEA Consultant who had, only a few days before filling the forms, had a disagreement over accommodation matters with the Applicant.

The investigation report

97. The Applicant's counsel submitted that the investigation report was biased, unreliable and unfair for many reasons including that:

a. It failed to mention the many material inconsistencies and deficiencies in the accounts of each Complainant. These were sufficient to call the credibility and reliability of such accounts into question. For instance, C3 was recorded as having told the

a. At page 6, paragraph 4, lines 8 and 9 of the investigation report, it was reported that: “[Applicant] confirmed that he gave [C2] US\$10 for medical treatment.” The true position as established in the investigation is that the Complainant C2 never revealed that he got USD 10 from the Applicant. The Applicant did not confirm that fact, rather, he asserted it at every opportunity until the Complainant was asked and admitted it. In other words, it was C2 who confirmed the Applicant’s claim that he gave C2 USD 10 to treat

had interest and perhaps sexual interest in young men evidently went beyond the Investigator's terms of reference as she had clearly stated in the first page of the report that the aim of the investigation was "to ascertain the facts regarding the allegations."

b. Similarly, the evidence gathered from one KR was irrelevant as it merely served to characterise the Applicant as a loner who had a habit of walking around the AFEX camp at odd hours with his quick run bag or sat with the guards at the gate into the early hours of the morning. Was this profiling of the Applicant as a person with the character of a sexual predator one of the facts relevant to the allegations? Certainly not!

103. In an effort to establish that the Applicant was not targeted over sexual orientation, the investigation made baseless findings about the absence of a homophobic environment in South Sudan. At page 11, paragraph (c), the report stated:

However, it should also be clarified that although homosexuality was unacceptable there was not a homophobic environment in South Sudan. There was also no evidence that the allegations were made by the Security Guards and Waiters because of their perceived /possible sexual orientation of [Applicant].

This finding by the Investigator is at variance with an incident report dated 28 June 2006 made by the Operations Manager of the security company with regard to the allegations against the Applicant which was made available to her during investigations. In the second paragraph of the said incident report, reference is made to "a suspect alleged to have made homosexual advances" and in the penultimate paragraph it is further stated: "...it will be important to have him relocated to a different camp to avoid a nasty ending since the guards have an idea that he is gay."

104. In the Investigation report as well as

It is necessary to state in this regard that an investigator gathers oral and documentary evidence from witnesses. She does not become a witness of fact herself except for facts relating to how she conducted her investigations.

How times and dates were treated in the investigation report

105. Paragraph 37 of CF/AI/2005-017 is one of the provisions concerning the conduct of formal investigations. It states as follows:

The purpose of an investigation is to establish facts, which will, for the most part, be obtained by interviewing the victim, the alleged offender and other witnesses as deemed relevant by the investigating body. **The facts should establish the time, sequence and nature of the occurrences.** (Emphasis added.)

106. The accounts given by some of the Complainants and other witnesses in their CRF and in their interviews with the Investigator as to the times and dates of the alleged sexual assaults remarkably differed. Perhaps as a way of dealing with this important issue which was never resolved in the investigation, the Investigator while making conclusions in the investigations report, stated that there was clear and convincing evidence that “during 2006” C1 and C2 were “inappropriately touched” by the Applicant. The year 2006 is made up of twelve months. It was wholly wrong for the Investigator to arrive at such a ridiculous and timeless conclusion.

107. Also on the matter of times and dates, the Investigator consistently defended what the Complainants told her as the truth because, according to her, they were lowly educated individuals and time was a loose concept with them and some did not know their birth date and came across as very trusting. They were embarrassed to talk about the issue as they seemed humiliated.

108. Evidently, the conclusion that establishing the times and dates of the alleged incidents was immaterial was made because there was no convincing evidence from the two waiters as to times and dates of the allegations they had made. This is not acceptable because as submitted by learned counsel for the Applicant, at the very least, providing the date of an alleged misconduct affords the Applicant a better opportunity to rebut the allegation and present possible alibi. Not doing so means that he was unduly hampered in denying an allegation that is not substantiated in

any other way. Since justice is for both the party making the allegation and the party accused, objectivity dictates that no party to an allegation is allowed a lower threshold in establishing his case.

Relevance and admissibility of the Complaint Review Forms and the investigator's interview notes as to the facts in issue

109. It is important to briefly examine the relevance of the Complaint Review Forms or CRF and the interview notes of the Investigator to the consideration of this case instituted by the Applicant to challenge his summary dismissal.

110. The CRF as used by UNICEF is a document made by an initial fact-finder in which the account of a complainant or other witness to an alleged wrong-doing is recorded. The investigator's interview notes are summaries of the facts gathered by an investigator in interviewing a complainant or witness to an allegation. These documents are sometimes signed by the recorder and the witness. On some occasions, they are not.

111. Whether they are signed or not, the obvious shortcoming of merely relying on these is that if their maker or the person who provided the information recorded in them does not appear in the ensuing judicial proceeding, the truth of the contents of these documents cannot be tested by cross-examination in an open hearing and therefore have no probative value. This is compounded by the fact that the Applicant had not had any opportunity to challenge the Complainants or witnesses on whatever allegations they had made or stories they had told against him. If such evidence are admitted and not otherwise corroborated, their usefulness is limited to showing that they were gathered, not to prove an alleged fact.

112. The Respondent submitted that the absence of testimony by the alleged victims did not negatively impact on his case and that the Applicant had every opportunity to contest the evidence provided by the alleged victims. This cannot be further from the truth. Where an allegation is quasi-criminal in nature, is justice not denied the person against whom an allegation is made if he is not afforded an opportunity to challenge the one making the allegation? One of

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The Charge against the Applicant and the legal framework

118. On 15 November 2006, the Applicant was charged as follows:

You engaged in sexual harassment by your unwelcome sexual advances, gestures of sexual nature against two waiters, AFEX Camp, Juba, South Sudan and two security guards, KK/GS, Juba, South Sudan, that caused them offence and humiliation which created an intimidating, hostile, and offensive work environment in violation of UNICEF's administrative instruction, *Working in respect in the UNICEF workplace, UNICEF's Policy on preventing harassment, sexual harassment and abuse of authority*. (CF/AI/2005-017), dated 16 December 2005.

119. While the charge is obviously brought pursuant to CF/AI/2005-017, "UNICEF Policy on Preventing Harassment, Sexual Harassment and Abuse of Authority", the said charge unfortunately, does not state or set out what article or section or paragraph of the said Administrative Instruction it is founded upon. However, paragraph 8 of the document defines "sexual harassment" thus:

Any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be 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. It can include a one-time incident or a continuous series of incidents. Sexual harassment may be deliberate, unsolicited and coercive. Both male and female colleagues can be either victims or offenders. Sexual harassment may also occur outside the workplace and/or outside working hours.

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- e. Both male and female colleagues can be victims.
- f. It may occur outside the workpl

c. Were the Complainants “male or female colleagues” as envisaged by the definition in CF/AI/2005-017 and was the UNICEF work environment rendered offensive, hostile or intimidating for them? Neither the two waiters nor the security guards belonged, by any stretch of definition, in the UNICEF work environment and were therefore not work colleagues. Contrary to the Respondent’s assertion that the Complainants are covered by paragraphs 12 and 16 of the UNICEF policy on the prevention of sexual harassment, they, in fact, do not fall under the class of non-staff personnel as they do not work with UNICEF under any arrangement at all. Since they were legally unknown to UNICEF and never inhabited the UNICEF work environment, it cannot be said that it was rendered offensive, hostile or intimidating for any of them.

124. It was the job of the Investigator not only to collect such evidence that would go to establish facts, the facts established must in turn establish the elements of the misconduct alleged or in other words be relevant to the said misconduct.

125. The charge letter which was sent to the Applicant referred also to art. 101 of the UN Charter and staff regulation 1.2(b) requiring staff members to uphold the highest standards of integrity. It also referred to staff rule 101.2(d) which prohibits discrimination, harassment, sexual or gender harassment as well as physical or verbal abuse in the workplace or in connection with work.

126. Staff regulation 1.2(b) commands staff members to uphold the highest standards of integrity. It further defines integrity as including but not limited to probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status. This staff regulation is often wrongly cited as creating misconduct by itself. It is worth stating here that the said staff regulation is merely an omnibus provision which becomes efficacious or meaningful when a staff member is found to have committed misconduct, gross misconduct or has been proved to be liable following legal proceedings.

127. If the foregoing staff rules and regulations including the CF/AI/2005-017 provisions constitute the legal framework or applicable legal norms relied upon to charge and dismiss the

Applicant in the instant case, then the impugned administrative decisions were entirely without proper legal basis.

The drafter of the charge letter

128. The Tribunal held in *Applicant* UNDT/2011/106 that when the officers whose responsibility it is to draft charges against staff members who have been investigated for misconduct perform their functions, they must bear in mind that such duties are to be discharged with a high sense of responsibility, fairness and accountability. It is not in their liberty to run amok with useless charges in the hope that something sticks to bring the charged staff member down. In the present case, the drafter of the charge letter constituted himself into an assessor and judge of the evidence. This is seen in the following excerpts from the charge letter:

If they [Complainants] were acting in retaliation against you for not giving them money, they would have been vigorous in their cooperation with the Investigator and would have collaborated together on their responses which may have resulted in more serious sexual allegations....The Investigator questioned why these men would choose you from all the other international professionals to file a complaint against unless there was credibility in their accusations and their identification of you as the harasser.

129. That the drafter of the charge went on to discuss possible sanctions against the Applicant in the charge letter, whereas his role was to transmit the charges to the Applicant, this in fact suggests that a conclusion had already been reached as to the Applicant's fate. He stated in the charge letter:

The Executive Director reserves the right to take any disciplinary measure she deems appropriate as regards these charges and summary dismissal is one possible outcome of the disciplinary proceedings.

130. The foregoing wordings strike against the universal principle of presumption of innocence thereby breaching the Applicant's due process rights. It also suggests that the investigation and the subsequent charging of the Applicant were mere formalities carried out with the aim of ultimately summarily dismissing the Applicant. It is also not correct that the UNICEF Executive Director has the authority to "take any disciplinary measure she deems

Findings

135. The summary of the Tribunal's findings are as follows:

a. This Tribunal is competent to entertain applications as provided for by the Statute creating it. As a judicial body, the Tribunal is entitled to examine the entire case before it. In other words, it may consider not only the administrative decision of the Secretary-General imposing disciplinary measures but also examine the material placed before the Secretary-General on which he bases his decision in addition to other facts relevant to the said material.

b. The investigator's failure to ascertain the state of lighting and visibility in the AFEX/OCHA premises and the inside and surroundings of *Khartoum* tent and Bravo gate raised by the Applicant is a material omission as there is no evidence to help the Tribunal determine whether there was sufficient visibility as to make it likely or unlikely that the alleged sexual abuses took place especially as it was claimed by almost all the Complainants that the abuses took place at night.

c. The material questions that arise from accounts given by C1, C2 and the AFEX Camp Manager were not resolved by the Investigator. They are serious and sufficiently relevant to successfully strip these absent complainants of the credibility needed to establish that the Applicant indeed sexually assaulted two of them. The Tribunal finds that sexual assault by the Applicant against the waiters was not established by the Investigator.

d. An examination of the accounts of the Applicant's encounters with the three security guards as given by the said guards and their supervisor also throws up some critical questions which cast serious doubts on the untested evidence relied upon by the Respondent.

e. The CRF and investigative accounts of the security guards and their supervisor show serious and material inconsistencies. They also show clearly in certain instances, such as in S1's story to the Investigator, that certain accounts which could be fictitious

were treated as established facts and unduly formed part of the investigative findings against the Applicant for which he was summarily dismissed.

f. The investigation against the Applicant lacked integrity and credibility. The investigator was incompetent, exhibited bias and lacked objectivity and fairness. The Investigator's note-taker was not only allowed to conduct part of the investigation by solely administering questions to two witnesses, she was also allowed the liberty of expressing her views on how some evidence she had elicited from C2 should not change impressions earlier formed.

g. The investigation report was biased, unreliable and unfair. The characterisation of certain facts was done in a manner intended to draw only inculpatory conclusions with regard to the Applicant. The report did not accurately and correctly state certain facts and thereby characterised them as being voluntary when they were not. The investigation in part dwelt on irrelevancies, became diversionary and made hasty generalizations.

h. The effort by the Investigator to profile the Applicant as a person who had interest and perhaps sexual interest in young men evidently went beyond the Investigator's terms of reference.

i. In an effort to establish that the Applicant was not targeted over sexual orientation, the investigation made baseless findings about the absence of a homophobic environment in South Sudan. In the Investigation report as well as in her testimony before the Tribunal, the Investigator turned witness for the non-homophobic environment of South Sudan.

j. Where an allegation is quasi-criminal in nature, justice is denied the person against whom an allegation is made if he is not afforded an opportunity to challenge the one making the allegation.

k. The practice of not calling evidence but placing reliance entirely upon recordings in initial fact-finding exercises and interview notes of appointed investigators without

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d. Irrespective of whether the Respondent elects to reinstate the Applicant or to pay him the above amount as an alternative, the Applicant also deserves compensation under article 10.5 (b) of the UNDT statute for the moral damage the wrongful decision has caused him. In view of the stigma arising from the imposition of the most severe disciplinary measure and the resulting difficulties in finding further employment, the Tribunal sets the appropriate amount at six months of the Applicant's net base salary.

e. Awards the Applicant six months' net base salary for the violation of his due process rights as a result of a most incompetent investigation.

f. Orders that all material relating to the Applicant's dismissal be removed from his official status file, with the exception of this judgment and any subsequent action taken by the Administration to implement it.

(Signed)

Judge Nkemdilim Izuako

Dated this 18th

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