



1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/054, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 18 April 2012 in the case of *Applicant v. Secretary-General of the United Nations*. The Secretary-General appealed on 18 June 2012, and the Applicant¹ answered on 17 August 2012.

Full Bench Proceeding

2. The Appeals Tribunal has determined that

employed by KK/GS Security, had made a written complaint to his supervisor about the Applicant sexually touching him.

5. As a result of these complaints, UNICEF requested that Ms. Jennifer Nduku Kiiti, a sexual exploitation and abuse consultant (SEA Consultant), conduct a preliminary investigation: to interview the Complainants and write down the details of their complaints; to interview others with knowledge of the alleged incidents; and to obtain documents.

6. On 12 July 2006, Mr. Simon Strachan, Director of UNICEF South Sudan, sent an e-mail to the Applicant attaching the complaints taken by the SEA Consultant from the Complainants and their supervisors and managers, as well as documents obtained during the preliminary investigation. On 13 July 2006, the Applicant sent a reply in which he denied all the accusations as false and raised defenses.

7. On 9 August 2006, Ms. Christine Nylander, a UNICEF Human Resources Manager, was appointed as the Investigator to conduct a formal investigation into the Complainants' allegations. Between 8 and 16 September 2006, the Investigator interviewed four Complainants (C1, C2, C3 and C5) in person; however, she was unable to interview C4 in person since he was no longer in South Sudan or Kenya. The Investigator also interviewed the Applicant (twice), several supervisors and managers associated with AFEX and KK/GS Security, and others. The Investigator then

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2013-UNAT-302

18. The UNDT erred in concluding that the investigation report was fundamentally flawed by giving undue weight to deficiencies in the investigation report that were not reasonable, material or relevant, resulting in the UNDT concluding that the investigation report could not be relied on to establish the facts supporting the Applicant's summary dismissal.

19. The UNDT erred in concluding that the evidence from the Complainants was unreliable and did not show sexual misconduct by the Applicant when it gave undue weight to inconsistencies in the Complainants' testimonies that were neither material nor relevant.

20. The record contained clear and convincing evidence to support a reasonable conclusion that the Applicant had sexually harassed the Complainants. Even if the evidence showed that only one of the Complainants' accounts had been substantiated by clear and convincing evidence, summary dismissal of the Applicant was warranted.

21. The UNDT erred as a matter of law in concluding the Applicant's actions were not misconduct warranting summary dismissal. Specifically, the UNDT failed to address the charges against the Applicant for violating Staff Rule 101.2(d) and paragraph 20 of the 2001 Standards of Conduct, which were alleged to constitute serious misconduct, and to demonstrate his failure to uphold the standards

Applicant's Answer

24. The UNDT applied the correct standard of “clear and convincing evidence”. In applying this standard, the UNDT determined the Complainants’ testimonies were not credible, and rhetorically asked questions to highlight areas of inconsistencies in their statements since the Complainants were not produced at the hearing.

25. The UNDT, as the tribunal of first instance, is the best place to assess the evidence of the Investigator, who testified at the hearing, and the Appeals Tribunal should give some deference to the factual findings of the UNDT when oral evidence is heard. The UNDT did not exceed its jurisdiction and competence in determining the credibility of the witnesses who were not present at the hearing, including the Complainants.

26. The UNDT correctly concluded that the Organization had failed to establish facts

Considerations

29. Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during

THE UNITED N

buy water[,] and because he was carrying a bag, the man asked [him] to carr[y] the water down to his tent.

As they walked down, [C2] (who thought [the Applicant] was a doctor) asked him [the Applicant] if he knew of a remedy for rashes. ... [T]he man told him he would look at them and give ... advi[c]e. In the tent ... he proceeded to show the man the rashes on his arms[,] after which the man asked him if he had rashes anywhere else. [He] removed his shirt to show him the rashes on his back and again the man asked him if he had rashes elsewhere. He said on his thigh and the man asked if he could see. He unzipped his trousers and showed him the rashes on [h]is leg but was extremely uncomfortable to be looked at and touched in the groin area by another man.

He then dressed up [and] asked the man if he had medication[,] to which the man replied he did not, but advised [him] to seek medication from a doctor.

C2 further told the SEA Consultant that he felt humiliated, stating that if the Applicant “was not able to help him or if he did not have medication, he should not have asked him to undress”.

d. C1, a 23 year-old barman at the AFEX camp, stated:

[A]round end of April (he could not confirm the exact date), late in the afternoon (between 4-5 pm) the man described above [“big/old man living Khartoum tent”] had come to the Afex bar and greeted him. He mentioned to the man that he [had] a toothache and wondered if he had any advice on medications to take. ... (He did not [know] the man’s name, but knew he lived in “Khartoum” tent.)] The man told [him] that he had medication in his tent and could assist him. [He] then followed ... [the Applicant] to the tent. ... The man gave him medicine[,] but thereafter proceeded to caress him on the neck[,] arms and down the chest. Feeling extremely uncomfortable and thinking that such a touch had “nothing to do with his teeth problem[,]” [he] ran out of the tent and back to the bar.

The following day and thereafter, the man greeted him normally but did not say anything about the incident. On the weekend of May 26th after a story had gone around about another humanitarian worker being deported for having sexual activity with a young man, [he] reported the incident to Millie Khavere, Camps Manager[,] Afex.

e. C5, a 22 year-old security guard employed by KK/GS Security, stated:

[T]he event occurred in late April around 11 pm when he was guarding at Bravo Gate or the gate between OCHA Office and Afex residential compounds. ... [The Applicant] came and shook his hand, kept holding his hand and proceeded to press his arm

muscles. At this point [the Applicant] said he wanted to know if he was strong. [The Applicant] also lowered his hands and press[ed] his thighs and asked if he plays

32. The UNDT determined that the CRFs and the signed interview statements taken by the Investigator had “no probative value”. In discounting this evidence, the UNDT reasoned:

... 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* ... 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. ~~It is not the duty of the UNDT to investigate the facts of the case or to determine the truth of the allegations made against the Applicant.~~

THE UNITED NATIONS A

CF/AI/2005-017 established both informal and formal procedures for investigating and resolving harassment complaints, with both procedures focusing on gathering information and the formal procedure also focusing on fact-finding. The record shows that the Agency closely followed the procedures set forth in CF/AI/2005-017 in investigating the complaints of harassment against the Applicant. The Applicant was apprised of the evidence against him (including the Complainants' and other witnesses' identities) an

UNDT found that these statements raised “a number of pertinent questions” about the credibility of C1 and C2 and found these Complainants were not credible.

44. The UNDT did not explicitly determine that C3 and C5 (and their supervisor S1) were not credible, but nevertheless concluded:

... [T]here 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.¹⁶

This is rank speculation. When reviewing the evidence before it, the UNDT improperly placed itself in the Applicant’s shoes and did not evaluate the evidence objectively. This Tribunal determines that the UNDT erred in law and fact resulting in a manifestly unreasonable decision when it determined that the Complainants were not credible and the investigation report should not have relied on their statements and those of their supervisors. The evidence in the record does not support the UNDT’s legal conclusions and factual findings.

45. The Applicant also challenged the “credibility of the investigation”, claiming the Investigator was not competent and lacked objectivity and fairness. The Dispute Tribunal agreed with the Applicant and determined the investigation report was “an unfair, unbalanced and prejudicial report” and that “[t]he Investigator exhibited bias and lacked objectivity”, stating, in part:

...
(j) ... It was disconcerting to observe during the hearing of this matter how the Investigator continued to make excuses to

46. This Tribunal determines that the UNDT erred in law and fact resulting in a manifestly unreasonable decision when it determined that the Investigator was biased and lacked objectivity and that the investigation report was “unfair, unbalanced and prejudicial”. The record does not support the UNDT’s legal conclusions and factual findings. To the contrary, both in the investigation report and at the oral hearing, the Investigator tried to explain why she found the Complainants and their supervisors to be credible and why the investigation report could not definitively establish the dates and times of some of the incidents. Believing the Complainants and disbelieving the Applicant does not show bias or prejudice against the Applicant. It is the duty and responsibility of the Investigator to gather information and then to determine what happened (the facts) based on that information. That is what the Investigator did.¹⁸

47. In determining the credibility of the Complainants, the UNDT mistakenly focused on minor inconsistencies in their statements, rather than focusing on the clear and convincing evidence established by the record. Such minor inconsistencies were adequately explained in the investigation report, but the UNDT incorrectly viewed the Investigator’s explanations as showing bias and lack of objectivity. Moreover, in erroneously finding that the Complainants were not credible, the UNDT failed to take into account the quite unique and detailed accounts of their conversations with the Applicant, as well as the Complainants’ youth and culture. For all these reasons, the UNDT made an error of law and fact resulting in a manifestly unreasonable decision when it determined the charges against the Applicant had not been established by clear and convincing evidence. They were.

The Established Facts Show a Violation of the Staff Regulations and Rules

48. The Applicant was summarily dismissed for “engaging in sexual harassment” of C1, C2, C3 and C5, in violation of Staff Rule 101.2(d), paragraph 20 of the Standards of Conduct and CF/AI/2005-017. The Agency determined that the Applicant’s conduct constituted “serious misconduct and demonstrate[d] a serious failure to uphold the standards of integrity expected ... under United Nations Staff Regulation 1.2(b)”.

¹⁸ Although the Applicant claimed that everyone involved in the investigation was prejudiced against him, he has not shown that improper motive, bias or prejudice vitiated any stage of UNICEF’s decision to summarily dismiss him or that the decision was tainted by these or other, similar factors. (See *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-081.)

49. The UNDT considered only whether the charges against the Applicant, if established, would violate paragraph 8 of CF/AI/2005-017, which defines sexual harassd[(ym)(alu3m31:AL)]TJ0 Tc 0 Tw

53.

