UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Case Nos. 2011-215, 2011-250 and 2011-253

Applicant

(Appellant/Respondent)

v.

Secretary-General of the United Nations

(Respondent/Appellant)

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Sophia Adinyira Judge Luis María Simón
Judgment No.:	2012-UNAT-209
Date:	16 March 2012
Registrar:	Weicheng Lin

Counsel for Appellant/Respondent:	Edward Patrick Flaherty
Counsel for Respondent/Appellant:	Stéphanie Cartier/Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by the Secretary-General on 2 May 2011 against Judgment No. UNDT/2011/054, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in the case of *Applicant v. Secretary-General of the United Nations* on 16 March 2011 (Judgment on the merits). The Appeals Tribunal is also seized of two appeals, filed by the Secretary-General and the Appellant on 12 September 2011 and 5 October 2011, respectively, against Judgment No. UNDT/2011/131, rendered by the UNDT on 20 July 2011 (Judgment on compensation).

2. This Court has held in *Bertucci*[1] that even if the refusal to give the staff member access to the investigation file at the preliminary investigation stage was unlawful, this unlawful refusal had not been shown to have caused any actual prejudice to the staff member. This Tribunal reaffirms its disapproval for the award of compensation in the absence of actual prejudice. There are no legal grounds that can justify such a decision when no actual prejudice has been found.

3. In examining the three elements set out in *Sanwidi*,[2] we differ from the UNDT's finding. The Administration followed the rules of due process in conducting its investigation, the facts were well established and amount to misconduct, and the dismissal was proportionate to the misconduct.

4. The UNDT Judgment on the merits is reversed.

5. Once the Judgment on the merits has been vacated and no liability on the part of the Administration has been established, the Judgment on compensation cannot stand. Accordingly, the appeals against the Judgment on compensation have become moot.

Facts and Procedure

6. The Appellant joined the United Nations High Commissioner for Refugees (UNHCR) in 1995 as an Associate Personnel Officer. In 2008, he was appointed to a P-4 position of

[1] *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-114.
[2] *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

Senior Personnel Administration Officer in the UNHCR Budapest Services Centre, where he worked in the Personnel Administration and Payroll Section (PAPS) of the Department of Human Resources Management (DHRM). The Appellant was responsible for the Headquarters, Europe and Americas Unit (HEA Unit) and for managing two sub-units. His immediate supervisor was the Chief of PAPS.

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

8. In late April or May 2008, Ms. M, Ms. S, and Ms. T, independently of each other, approached the Assistant Human Resources Officer (HRO) in Budapest to complain about the Appellant's behaviour. As a result of what she was told, the Assistant HRO spoke to the Chief of PAPS and left it for him to deal with the matter. In mid-May, Ms. S. told the Chief of PAPS about Ms. M.'s concerns and Ms. M. herself approached him with reports of inappropriate behaviour towards her by the Appellant. The Chief of PAPS discussed the matter with the Deputy Director, DHRM who went to Budapest and met with several staff members on 5 June 2008. Following this meeting, the Deputy Director immediately referred the complaints of sexual harassment against the Appellant to the Inspector General's Office (IGO) of UNHCR.

9. That same day, the Chief of PAPS and the Deputy Director met with the Appellant. They discussed the concerns the staff members had raised about their contractual status and the management of the unit. However, the sexual harassment complaints were not mentioned. It was agreed that, in order to allow work place tensions to ease, he would telecommute from home until he took his home leave in July. The Appellant was then expected to return to work after his leave, but he was again requested to work from home. He withdrew his agreement to telecommute when it became apparent in August 2008 that it was likely to continue for a number of months. He then went on sick leave and did not return to work before he was summarily dismissed.

10. In June 2008, Ms. M. and Ms. S. filed written allegations of sexual harassment against the Appellant with the IGO. It was alleged that the Appellant had started sexually

harassing Ms. M. and Ms. S. shortly after they had joined the office in January/February 2008. The IGO commenced an immediate investigation.

11. On 5 August 2008, the IGO advised DHRM that it had received two formal written complaints of sexual harassment from subordinates of the Appellant. On the same day, the Appellant was advised that he was the subject of an investigation into allegations of misconduct and was asked to attend an interview with the investigator.

12. On 8 August 2008, the Appellant was interviewed by the IGO. At the end of the interview, the Appellant was given a suspension letter which had been written on 5 August 2008. The suspension, initially for a period of one month, was on full pay pending completion of the investigation into the allegations against him. It was subsequently extended until his dismissal.

13. On 13 August 2008, the Appellant received a copy of the draft preliminary investigation report (PIR). He was asked to submit his response to the draft PIR and return his signed interview record by 20 August 2008. The Appellant did not do so and, on 22 August 2008, the IGO transmitted the final PIR to the Director, DHRM.

14. In its report, the IGO concluded that there was not enough evidence to pursue the management issues as a disciplinary matter. The IGO had however gathered sufficient evidence to conclude that the allegations of sexual harassment were well founded.

15. On 3 September 2008, DHRM sent a letter to the Appellant enclosing the PIR. The letter informed him of his right to respond in writing to answer the allegations, to produce countervailing evidence, and to be assisted by counsel.

16. On 7 October 2008, the Appellant's counsel sent a letter to DHRM, in which he criticized the process, in particular the fact that the Appellant had had no notice of the allegations before the interview, as well as other matters. He asked that the Director of DHRM recuse himself from the case; that a list of eight named witnesses be interviewed; and that he be provided with a number of documents including the actual transcripts of the testimony of witnesses who had been interviewed and of all complaints made about his client.

17. DHRM granted the Appellant an extension on medical grounds until 31 October 2008 to enable him to provide a substantive reply to the PIR.

18. On 31 October 2008, the Appellant's counsel sent medical certificates as evidence that the Appellant was unable to address the PIR until at least 15 November 2008, but "under protest" also attached the Appellant's preliminary reply to the PIR. In December 2008, counsel wrote to DHRM noting that he had not received any response to previous correspondence and reiterating his previous comments and requests. Counsel received no response to his communications.

19. In a memorandum to the High Commissioner, dated 8 January 2009, DHRM noted that the preliminary investigation had examined 16 incidents of alleged sexual harassment by the Appellant. With respect to eight incidents, it concluded that the facts had been established. It found that between February and April 2008, the Appellant had sexually harassed three local staff members of UNHCR Budapest, and that he had used his position of authority to do so. DHRM therefore recommended that the High Commissioner summarily dismiss the Appellant for misconduct. On 13 January 2009, the High Commissioner advised the Appellant that he had decided to summarily dismiss him for having sexually harassed three local staff members of UNHCR in Budapest.

20. On 13 March 2009, the Appellant filed an application before the Joint Disciplinary Committee (JDC) challenging his summary dismissal. The case was not considered by the JDC before its abolition on 30 June 2009 and was transferred to the UNDT Nairobi.

21. The UNDT issued Judgment No. UNDT/2011/054 on 16 March 2011. It found that the dismissal of the Appellant was unlawful. It noted that there were a number of procedural deficiencies during the investigation into the allegations against the Appellant:

> a) The decision to interview him before any formal charges had been made precluded him [from] having the opportunity to take counsel before having to answer the serious allegations against him.
>
> b) The failure to give him any notice of the allegations before he was required to attend an interview.
>
> c) The failure to provide him before [the] interview and before he was ultimately dismissed with all relevant information to enable him fully to assess the case against him.

> d) The failure properly to consider his request for witnesses specified by him to be interviewed.[3]

22. The UNDT further found that the High Commissioner did not give the Appellant a reasonable opportunity to present his case. The evidence considered by the High Commissioner was limited to that given by witnesses the High Commissioner considered relevant. The UNDT concluded that it could not be satisfied that the facts relied on by the High Commissioner clearly indicated that misconduct had occurred and that the seriousness of the misconduct warranted summary dismissal.

23. The UNDT concluded that the dismissal of the Appellant was unlawful because it breached the Organization's rules and procedures for disciplinary investigations as well as the general requirements of due process. The UNDT ordered that the summary dismissal of the Appellant be rescinded; that the names of the Appellant and the complainants not to be published; and that the issues of compensation be adjourned for agreement between the parties or, failing that, for a hearing and final decision by the UNDT.

24. On 20 July 2011, the UNDT issued its Judgment on compensation. The UNDT ordered, under Article 10(5)(a) of the UNDT Statute, that the Secretary-General may pay compensation in the amount of two years' and two months' net base salary in lieu of the rescission of the contested administrative decision. The UNDT further ordered that the Secretary-General pay the Appellant moral damages, under Article 10(5) of the UNDT Statute equivalent to three months' net base salary as of the date of his dismissal. It further ordered the Secretary-General to pay interest on the total amount at the US Prime Rate from the date of the Appellant's dismissal on 17 January 2009 to the date of the Judgment on compensation.

Submissions

Secretary-General's Appeal against Judgment on the merits

25. The Secretary-General submits that the UNDT erred in law and in fact and exceeded its competence in concluding that the facts underlying the Appellant's dismissal had not been established.

[3] Judgment No. UNDT/2011/054, para. 109.

26. The Secretary-General submits that the UNDT erred in law and fact in finding that the preliminary investigation had not been conducted in accordance with the Appellant's due process rights.

27. The Secretary-General submits that the UNDT erred in law in concluding that the established facts did not amount to misconduct.

28. The Secretary-General submits that the UNDT erred in concluding that the facts underlying the proportionality of dismissal had not been established.

29. The Secretary-General requests the Appeals Tribunal to vacate UNDT Judgment on the merits in its entirety.

Appellant's Answer

30. The Appellant responds that the UNDT correctly concluded that the decision to summarily dismiss him was "plagued with procedural flaws resulting in a violation and gross denial of due process, and a miscarriage of justice".

31. The Appellant submits that the UNDT correctly concluded that the investigation leading to the Organization's finding of sexual harassment was one-sided and therefore flawed and that no such determination could be reached without considering additional evidence and explanations offered by the Appellant.

32. The Appellant submits that the Secretary-General has not established any errors warranting a reversal of the UNDT Judgment finding that the Appellant's summary dismissal was illegal.

33. The Appellant requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

Considerations

34. As a preliminary matter, the Appeals Tribunal rejects the Appellant's request for an oral hearing as it would not assist the Appeals Tribunal in the expeditious and fair disposal of his case.

35. During the UNDT hearing the applicant objected to the names of the complainants being kept confidential while he himself had his own name redacted from the proceedings. The Appeals Tribunal finds that in the circumstances of this case it is reasonable to maintain the requested confidentiality.

36. The questions to be answered in this appeal are the following:

- Did the UNDT err in law and fact in finding that the preliminary investigation had not been conducted in accordance with the Appellant's due process rights? Did the UNDT err in finding that the due process rights which are established under former Staff Rule 110.4 and ST/AI/371 apply at the preliminary investigation stage?

- Did the UNDT err in law and fact and exceed its competence in concluding that the facts underlying the Appellant's dismissal had not been established?

- Did the UNDT err in law in concluding that the established facts did not amount to misconduct?

- Did the UNDT err in concluding that the facts underlying the proportionality of dismissal had not been established?

The Appeals Tribunal will address these questions in turn.

37. The UNDT concluded that the dismissal of the Appellant was unlawful because it breached the Organization's rules and procedures for disciplinary investigations as well as the general requirements of due process. A review of the applicable law and facts however reveals that the Administration fully respected the Appellant's due process rights throughout the proceedings.

38. Former Staff Rule 110.4 establishes:

> (a) No disciplinary proceedings may be instituted against a staff member unless he or she has been notified of the allegations against him or her, as well as of the right to seek the assistance in his or her defence of another staff member or retired staff member, and has been given a reasonable opportunity to respond to those allegations.
>
> (c) In cases of summary dismissal imposed without prior submission of the case to a Joint Disciplinary Committee in accordance with subparagraphs (b) (i) and (ii), the staff member or former staff member concerned may, within two months of having received

> written notification of the measure, request that the measure be reviewed by such a Committee. A request shall not have the effect of suspending the measure. After the advice of the Committee has been received, the Secretary-General shall decide as soon as possible what action to take in respect thereof. An appeal in respect of such a decision may not be submitted to the Joint Appeals Board.

39. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides inter alia:

> Paragraph 2.1: ...every staff member has a right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse.
>
> Paragraph 2.2: ...[t]he Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct.
>
> Paragraph 5.3: Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.
>
> Paragraph 5.17: The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence .... This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

40. A manager may become aware that a staff member may have engaged in possible misconduct. In this regard, every staff member has a right, and indeed the duty, to report misconduct that comes to his or her notice. Staff members agree that they are subject to Regulations and Rules and are expected to know and respect their obligations stemming from their status without the Administration being bound to remind them.

41. ST/AI/371 in its amended version was not in force until 11 May 2010. Nonetheless, both the former and the amended version establish the obligation to undertake an investigation in cases of "[a]ssault upon, harassment of, or threats to other staff members".[4]

42. The Administration diligently undertook the investigation and the Appellant had ample opportunity to make his case.

[4] ST/AI/371, Section II.2. (d).

43. ST/AI/371 and former Staff Rule 110.4 apply once the disciplinary proceedings have been initiated. They obviously cannot apply during the preliminary investigation because they would hinder it.

44. On 8 August 2008, the Appellant was interviewed by the IGO. At the end of the interview, the Appellant was given a suspension letter which had been written on 5 August 2008. It informed him that reports of possible misconduct required his suspension during a preliminary investigation. The suspension, initially for a period of one month, was on full pay pending completion of the investigation. It was subsequently extended until his dismissal.

45. On 13 August 2008, the Appellant received a copy of the draft PIR. He was asked to submit his response to the draft PIR and return his signed interview record by 20 August 2008. The Appellant did not do so and, on 22 August 2008, the IGO transmitted the final PIR to the Director, DHRM "for further action".

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

47. On 31 October 2008, counsel sent medical certificates as evidence that the Appellant was unable to address the PIR until at least 15 November 2008, but "under protest" also attached the Appellant's preliminary reply to the PIR.

48. This Court has held that in *Bertucci*[5] that even if the refusal to give the staff member access to the investigation file at the preliminary investigation stage was unlawful, this unlawful refusal had not been shown to have caused any actual prejudice to the staff member. This Tribunal reaffirmed its disapproval for the awarding of compensation in the absence of actual prejudice. There are no legal grounds that can justify such a decision when no actual prejudice was found.

49. In light of the above, the Appeals Tribunal holds that the UNDT erred in finding that the Administration violated the Appellant's due process rights.

[5] *Bertucci v. Secretary-General of the United Nations,* Judgment No. 2011-UNAT-114.

50. In accordance with the Appeals Tribunal's jurisprudence, in reviewing disciplinary cases this Court has to examine the following:

> 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 offence.[6]

51. In its memorandum to the High Commissioner dated 8 January 2009, DHRM noted that the preliminary investigation had examined 16 incidents of alleged sexual harassment by the Appellant. With respect to eight incidents, it concluded that the facts had been established. It found that between February and April 2008, the Appellant repeatedly sexually harassed three local staff members of UNHCR Budapest, and that he had used his position of authority to sexually harass the three female colleagues. The IGO in particular found that the Appellant had

> (1) touched Ms. [M.]'s breast with the flat hand against her will whilst dancing salsa with her in a salsa club [...];
>
> (2) made sexual innuendos and advances towards Ms. [M.] in the office by asking her whether she considers him a handsome man and telling her that something would have happened if someone else had not been with them at the salsa club [...];
>
> (3) discussed massages with Ms. [M.] in sexually explicit detail at the office, invited her to his apartment for massages and told her that he was very good in bed and that she should try [...];
>
> (4) made a physical sexual advance towards Ms. [M.] in his office by brushing the inside of her thigh with his hands against her will [...];
>
> (5) discussed massages with Ms. [S.] in sexually explicit detail at the office and asked her to join him for massages in the future [...];
>
> (6) massaged Ms. [S.]'s shoulders during a conversation with her in his office without her having given her consent [...];

[6] *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 43, quoting *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018, para. 27.

> (7) continued to make sexual advances towards Ms. [S.] after she had indicated to him that she felt uncomfortable by telling her that he would wait for her until she was ready for him "like good red wine" [...];
>
> (8) discussed massages with Ms. [T.] in the office and asked her private questions about her relationship and sex [...].

52. The memorandum emphasized that the dismissal of the Appellant was not based on the remaining eight incidents. DHRM recommended that the High Commissioner summarily dismiss the Appellant for misconduct. On 13 January 2009, the High Commissioner advised the Appellant that he had decided to summarily dismiss him for having sexually harassed three local staff members of UNHCR in Budapest.

53. The UNDT when reviewing the evidence before it, appears to justify the Appellant's behaviour. This is not the role of the court. For example, paragraph 132 of the UNDT Judgment says: "Having heard his evidence in court, there is room for considering that the discussion about massages and other topics which he does not deny, could haven been interpreted in more than one way." The Appellant also "agreed that it was possible that he had touched one or more of the complainants".[7] He also made remarks on the physical appearance of staff members.[8] He explained that he often sent SMS messages to one of the complainants because he was following up on her offer to assist him to fit curtains. She never told him she did not want to come which made him frustrated and annoyed when he found himself waiting around for her.[9]

54. The Appellant was a senior staff member and supervisor within the United Nations. The test is not if his actions and behaviour can be explained but the perception of his behaviour by a reasonable person within a multicultural environment.

55. The facts have not only been established, but admitted by the Appellant and they clearly amount to misconduct. All staff members should observe and perform their functions consistent with the highest standards of integrity through fostering a culture of ethics, transparency and accountability (see ST/SGB/2005/22). The behaviour described in

[7] *Applicant v. Secretary*-General of the United Nations, Judgment No. UNDT/2011/054, para. 133.
[8] Ibid, para. 134.
[9] Ibid, para. 135.

paragraph 51 is sexual harassment by a staff member using his position of authority with local employees.

56. Given the gravity of the offences, the sanction imposed is proportionate.

57. For these reasons, we vacate the UNDT Judgment.

58. Once the Judgment on the merits has been vacated and no liability on the part of the Administration has been established, the Judgment on compensation cannot stand. The appeals against the Judgment on compensation have therefore become moot.

Judgment

59. The Appeals Tribunal grants the Secretary-General's appeal against the Judgment on the merits and vacates it. The appeals against the Judgment on compensation are therefore moot.

Original and Authoritative Version: English

Dated this 16th day of March 2012 in New York, United States.

(*Signed*)	(*Signed*)	(*Signed*)
Judge Weinberg de Roca, Presiding	Judge Adinyira	Judge Simón

Entered in the Register on this 7th day of May 2012 in New York, United States.

(*Signed*)

Weicheng Lin, Registrar