UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2013-UNAT-302

Applicant

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Inés Weinberg de Roca Judge Mary Faherty Judge Sophia Adinyira Judge Richard Lussick Judge Rosalyn Chapman
Case No.:	2012-334
Date:	28 March 2013
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant:	Anita Saran
Counsel for Appellant/Respondent:	Rupa Mitra

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 Applicant[1] answered on 17 August 2012.

Full Bench Proceeding

2. The Appeals Tribunal has determined that the pending appeal "raises a significant question of law" that warrants consideration by the Appeals Tribunal as a whole, pursuant to Article 10(2) of our Statute. The "significant question of law" is whether a staff member facing summary dismissal has the due process right to confront and cross-examine those making allegations against him or her.

Facts and Procedure

3. On 1 February 2006, the Applicant began service with the United Nations Children's Fund (UNICEF) as Chief of the Southern Sudan Water and Environmental Sanitation Section. On 17 February 2006, he moved into a residential tent camp in Juba, South Sudan. The residential tent camp was operated by Africa Expeditions (AFEX) for the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), and the Applicant's tent was known as Khartoum Tent. The Applicant was relocated from the camp for his own safety on 20 June 2006.

4. On the evening of 19 June 2006, C3, a 27-year old male security guard employed by KK/GS Security, was stationed at the Bravo Gate between the AFEX residential tent camp and the OCHA offices. That evening, C3 complained to his supervisor that the Applicant had made unwelcome sexual advances to him the previous night (18 June 2006) and again that night. After C3 complained about the Applicant sexually touching him, three other young South Sudanese men working as waiters at the AFEX camp or as security guards with KK/GS Security made similar complaints against the Applicant. Previously, on 8 May 2006, C4, another security guard

[1] This Tribunal refers to the Applicant anonymously because the UNDT does so in its Judgment; however, we have been unable to find a written order by the UNDT granting the motion for the Applicant's identity to be protected. Moreover, the purpose of anonymity is to protect the privacy of the victims of misconduct, not necessarily the privacy of the staff member accused of misconduct.

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 prepared the final investigation report, which she submitted to Mr. Steven Allen, the Director of Division of Human Resources (DHR), on 31 October 2006.

8. The investigation report concluded that there was clear and convincing evidence that the Applicant "inappropriately touched" C1, C2, C3 and C5, amounting to sexual harassment. The investigation report discussed the Complainants' allegations, the Applicant's responses to the allegations, and other evidence; made findings regarding the Complainants' allegations, the Applicant's responses to them, and other evidence; and ultimately determined that the Complainants were credible. Finally, the investigation report recommended that: (1) the Director of DHR take appropriate disciplinary measures against the Applicant on the grounds he sexually harassed C1, C2, C3 and C5; (2) the Agency ensure the Applicant did not return to South Sudan where his security had been severely compromised; and (3) the Agency provide feedback to the management of AFEX camp and KK/GS Security.

9. On 15 November 2006, the Director, DHR, sent the Applicant a letter charging him with "sexual harassment by inappropriately touching four complainants which offended and humiliated them and created an intimidating, hostile, and offensive work environment". The charge letter advised the Applicant that his "sexual harassment" of the four Complainants was in violation of CF/AI/2005-017, "Working with respect in the UNICEF workplace – UNICEF's policy on preventing harassment, sexual harassment and abuse of authority", of 16 December 2005, and constituted misconduct and that the Agency would "independently determine" whether his conduct also violated Article 101 of the United Nations Charter, Staff Regulation 1.2(b), Staff Rule 101.2(d) and paragraph 20 of the 2001 Standards of Conduct for the International Civil Service (Standards of Conduct). The Applicant responded to the charge letter on 5 December 2006.

10. On 26 December 2006, Mr. Toshiyuki Niwa, the Deputy Executive Director of UNICEF (DED), sent the Applicant a letter advising him that he had committed serious misconduct by "engaging in sexual harassment" of C1, C2, C3 and C5 and that such misconduct warranted his summary dismissal under Staff Regulation 10.2. In particular, the Applicant was advised that he had violated Staff Rule 101.2(d), paragraph 20 of the 2001 Standards of Conduct and CF/AI/2005-017, all of which constituted serious misconduct and demonstrated his failure to uphold the standards of integrity expected under Staff Regulation 1.2(b). The summary dismissal was effective 2 January 2007.

11. On 7 February 2007, the Applicant requested that a Joint Disciplinary Committee (JDC) be constituted to review the decision to summarily dismiss him from service with UNICEF and, on 10 April 2007, an ad hoc JDC was constituted in Nairobi to review the decision. On 29 June 2007, the ad hoc JDC issued its report, in which it concluded:

> In summary, in the opinion of the ad hoc JDC members, a substantial case has been made against [the Applicant]. There are no other material issues that require or warrant further investigation and/or clarification about the case. On the basis of our review, the unanimous opinion of the ad hoc JDC is that the events alleged by the complainants occurred. We therefore concur with the decision made by the Executive Director's Office to summarily dismiss [the Applicant].

12. On 2 July 2007, the DED accepted the recommendations of the ad hoc JDC and confirmed 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 United Nations Administrative Tribunal (former Administrative Tribunal).

13. On 19 March 2008, the Applicant submitted an appeal to the former Administrative Tribunal and, on 22 September 2008, the Secretary-General filed his reply. Subsequently, the matter was transferred to the UNDT.

14. On 7-11 February 2011, the UNDT held a teleconference hearing from Nairobi. The Investigator testified on behalf of the Secretary-General, but the Complainants did not testify "because the [Secretary-General] could not produce any of them". The Applicant testified on his own behalf.

15. On 18 April 2012, the UNDT issued Judgment No. UNDT/2012/054, concluding that the "sanction of summary dismissal was based on unsubstantiated charges". The UNDT then ordered: (a) the rescission of the Applicant's summary dismissal and his continued employment pending the entry of Judgment; (b) the reinstatement of the Applicant with retroactive effect or, in lieu of reinstatement, the payment of two years' net base salary; (c) moral damages for "the wrongful decision" in the amount of six months' net base salary; (d) six months' net base salary for the violation of the Applicant's due process rights "as a result of a most incompetent investigation"; and (e) the removal of "all material relating to the Applicant's dismissal ... from his official status file".

Submissions

Secretary-General's Appeal

16. The UNDT erred on a question of law by applying a standard of "beyond a reasonable doubt" to establish misconduct, rather than the correct standard of "clear and convincing evidence". In this context, the UNDT doubted the credibility of the Complainants, whose statements had minor inconsistencies that raised certain questions for the UNDT.

17. The UNDT exceeded its jurisdiction and competence by speculating about the evidence, rather than making findings based on it. Such speculation amounted to the UNDT acting as an advocate for the Applicant.

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 of integrity expected of United Nations staff members under Staff Regulation 1.2(b). Instead, the UNDT addressed only the charge that the Applicant violated CF/AI/2005-017.

22. The UNDT erred as a matter of law in concluding that the Applicant's actions did not constitute sexual harassment within the meaning of CF/AI/2005-017 because they did not occur in the workplace, the Complainants were not the Applicant's work colleagues, and the activities involved the Applicant's private conduct. Sexual harassment may occur outside the workplace. In any event, the AFEX camp meets the definition of the workplace since it was designated by UNICEF for its staff, including the Applicant, to reside there during their field assignments in South Sudan.

23. The UNDT erred on a question of law in determining that the Applicant's due process rights were violated when he could not cross-examine the Complainants, who did not appear at the hearing before the UNDT. The statements of the Complainants were not anonymous and could properly be relied on by the UNDT.

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 supporting the Applicant's summary dismissal by noting the material and relevant deficiencies in the investigation report and the Complainants' testimonies.

27. The record does not contain clear and convincing evidence that the Applicant sexually harassed the Complainants. Each of the three investigations was flawed: the preliminary investigation was conducted by a consultant who was not independent and who may have been biased against the Applicant; the formal investigation was conducted by an investigator who was inexperienced and lacked objectivity and fairness; and, the ad hoc JDC was neither independent nor objective. In light of these deficiencies, as well as the inconsistencies and contradictions in the Complainants' statements, the UNDT properly determined there was no clear and convincing evidence showing sexual misconduct within the meaning of CF/AI/2005-017.

28. The UNDT correctly determined that the Applicant's due process rights were violated when the Organization did not produce the Complainants at the oral hearing. Due process required that the Applicant be able to cross-examine the Complainants, who were not present.

Considerations

29. Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration.[2] In this context, the UNDT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence".[3] And, of course, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred".[4] "[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable". [5]

The Facts Established By the Evidence Show Sexual Harassment

i. The Complaint Referral Forms and the Signed Interviews

30. On 20 and 23 June 2006, the SEA Consultant interviewed all five Complainants and wrote each of their complaints on a Complaint Referral Form (CRF). She also interviewed the Complainants' supervisors and typed up their interviews. Starting with the last alleged event and working backward, the CRFs set forth the following:

a. C3, a 27 year-old security guard employed by KK/GS Security, stated:

> [O]n 18/6/06 at about 9 pm the man described above ["tall, huge body, grey hair and lived in the tent directly opposite the Bravo Gate [Khartoum tent]"] [the Applicant] came to him at Bravo Gate and greeted him with his hand[,] but he held his hand firmly and kept holding his hand and touching his body from arm to chest and down to his "organ".
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> ... [He] said nothing because [he] was shocked as he had never been don[e] such a thing before. He did however report to his senior supervisor. [H]e did not do

[2] *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.
[3] *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024; *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018.
[4] *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.
[5] *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164.

anything because this was a client for his organization. On the [sic] 19/6/06 at about 10pm, the same man [the Applicant] came back and greeted him and again the man held on to his hand and touched him on his hands, arms, chest and groin. When he pulled away the man offered him sweets but [he] refused.

The man left the main compound then back to the AFEX mess. [He] called [C5] the then Senior guard who send [sic] communication on radio to [S1], Supervisor who later came to Afex. The Operations Manager (Dennis) also came to Afex and they went to look for [the Applicant] but they could not find him so they called the Afex [camp] manager (Millie). After explaining their problem, Millie said she could not sort this out in the night but would see them the next day. ...

b. C4, a 20 year-old security guard employed by KK/GS Security, stated:

[O]n the night of 8/5/06, [the Applicant] came to talk to him in his duty location. ... [The Applicant] asked him if he was married to which [he] replied "yes." [The Applicant] asked him if he knows how to have sex and [he] replied "yes."

[The Applicant] moved closer to him and asked him many questions related to sex. ... [He] was confused about [the Applicant's] intention, but shook his hand as he was leaving, and he held on to his hand for a long time.

... [W]hile holding his hand [the Applicant] touched his arm muscles and asked him if he plays football, to which [he] relied "yes." ... [The Applicant] also proceeded to touch other parts of his body including upper arm, chest and down to the groin area.

... [The Applicant] asked him to join him in his tent to which he said he would visit him when he is off duty as he could not leave his duty location. After this discussion, ... [he] went to Alpha Gate, main gate to report to his supervisor ...

After he reported, the supervisor asked him to write a report which he did and the report was put in the report file at [the] main gate.

After writing his report, ... he and his colleagues decided to try and wait for [the Applicant] to come again so as to arrest him however, [the Applicant] did not return.

... [He] was very angry because of the way another man talked to him about sex.

c. C2, a 26 year-old waiter at the AFEX camp, stated:

[I]n [the] beginning of May, ... the man described above ["huge, fat, tall and a bit old ... white man living in Khartoum tent"] came to the AFEX bar where [he] was working to

> buy water[,] and because he was carrying a bag, the man asked [him] to carr[y] the water down to his tent.
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> 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.
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> 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.
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> 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 football. [He] told him yes he played football when he was in school. ... [The Applicant] extended his touch to his "organ" then [he] said, "what are you doing?" ... [The Applicant] said, "nothing, I am just checking how strong you are."
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> ... [The Applicant] asked him "what do you do when you see a beautiful girl." ... [He] said "nothing because I went to a mixed school where we had many girls." ... [The Applicant] asked him, "are you normal, you do not erect when you see a beautify [sic] girl passing by?" ... [He] said "nothing because if you do not have an appointment with the girl you should not erect."
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> ... [T]he[n] [the Applicant] asked him, "what do you do when you erect and there is no girl? [He] replied, "you can masturbate." ... [The Applicant] said, "you are not serious, why don't you come to my tent to discuss?"
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> [He] replied, "who [sic] can I leave my post?" and [the Applicant] replied, "your colleague will take care of the post." ... [He] said, "no that can not be done."
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> ... [The Applicant] pulled him and touched his organ again and [C5] responded by saying to him, "you should avoid that and be a responsible person or I will take steps against you."
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> ... [The Applicant] continued the sex discussion and asked him, "what would you do if you were taken to a place with only men?" ... [He] said "nothing." ... [The Applicant] told him, "if you want to know what to do, come to my tent and I will explain."

C5 explained to the SEA Consultant that he "was angry" and "only told his supervisor the story after the same thing happened to [C3] recently".

31. The Investigator, in turn, would subsequently interview C1, C2, C3 and C5 in person; however, she could not interview C4 in person since he was no longer in South Sudan or Kenya. When interviewing the Complainants and other witnesses, the Investigator explained the purpose of the interviews, asked them to tell their stories, wrote down their statements, and advised them to read their statements before signing them. The Complainants and other witnesses duly signed their interview statements.

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**.** *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.*
>
> ... ... It stands to reason that in an open justice system such as we have, *it is fatal for the case of the party who does not provide any of his witnesses for judicial scrutiny* but merely seeks to submit that untested oral statements gathered in investigation without more, are sufficient. (Emphasis added.)[6]

33. As a general principle, the importance of confrontation, and cross-examination, of witnesses is well-established. That said, "[d]isciplinary cases are not criminal. Liberty is not at stake."[7] Thus, due process does not *always* require that a staff member defending a disciplinary action for summary dismissal has the rights to confront and cross-examine his accusers.

34. The former Administrative Tribunal "consistently maintained the right of Applicants to see all evidence against them and their right to cross-examine witnesses".[8] Under certain circumstances, however, denial of this right does not necessarily fatally flaw the entire process.

35. The Administrative Tribunal of the International Labour Organization (ILOAT) has emphasised the general principle that:

> An internal appellate body is the primary fact-finding body in the internal appeals process. It is the body that sees and hears the witnesses and must assess the reliability of the evidence adduced. A full appreciation of the evidence can only occur in circumstances where individuals whose interests may have been adversely affected have an opportunity not only to be present to hear the evidence but also to test the evidence through cross-examination.[9]

[6] Paras. 111-112.
[7] *Molari*, para. 30.
[8] Former Administrative Tribunal Judgement No. 654, *Hourani* (1994), para. VI.
[9] ILOAT Judgment No. 3108 (2012), para. 9.

36. There are, however, cases in which it is impossible, or inadvisable, for such confrontation to occur. In the above-cited *Hourani*, for example, the former Administrative Tribunal weighed the right of the accused staff member against justified "precautionary measures to protect witnesses" "likely to be suborned or subjected to threats and physical harm" and concluded that cross-examination was not an absolute right, "in certain exceptional circumstances, and so long as it is established to the Tribunal's satisfaction that the Applicant was afforded fair and legitimate opportunities to defend his or her position".[10]

37. The ILOAT has also considered the context of the case as relevant in determining essential rights of due process. In its Judgment No. 2771 (2009), the ILOAT held:

> ... The complainant points to cases in which the Tribunal observed that the complainant had not been present when statements were taken and not given the opportunity to cross-examine witnesses (for example, Judgments 999 and 2475), to object to evidence (for example, Judgment 2468) or to have a verbatim record of the evidence (for example, Judgment 1384). These are matters that, in the cases concerned, would have ensured that the requirements of due process were satisfied. However, they are not the only means by which due process can be ensured. In the present case, the complainant was informed of the precise allegations made against him by his subordinate, and provided with the summaries of the witnesses' testimonies relied upon by the Investigation Panel, even if not verbatim records. He was able to and did point out to the Assistant Director-General and, later, the Director of the Human Resources Management Division, inconsistencies in the evidence, its apparent weaknesses and other matters that bore upon its relevance and probative value, before the finding of unsatisfactory conduct was made on 6 February 2006. In this way, the complainant was able to confront and test the evidence against him, even though he was not present when statements were made and not able to cross-examine the witnesses who made them. Moreover, the complainant had and exercised a right of appeal to the Appeals Committee. There is no suggestion that he was in any way circumscribed in the way his appeal was conducted. Accordingly, the process, viewed in its entirety from the making of the subordinate's harassment complaint until the Committee reported to the Director-General, was one that satisfied the requirements of due process.[11]

[10] *Hourani*, para VI.
[11] Para. 118.

38. In the instant case, it proved impossible for the Administration to produce the Complainants to testify, and be cross-examined, before the Dispute Tribunal. This situation, while certainly regrettable, was not of the making of the Organization and should not be held against it. The United Nations operates globally and in situations which can prove highly transient or volatile. The Appeals Tribunal accepts that the Organization was unable to produce witnesses in the South Sudan almost five years after the complained-of incidents.

39. The Tribunal is satisfied that the key elements of the Applicant's rights of due process were met: he was fully informed of the charges against him, the identity of his accusers and their testimony; as such, he was able to mount a defense and to call into question the veracity of their statements. This Tribunal is, therefore, satisfied that the interests of justice were served in this case, despite his inability to confront the persons who had given evidence against him during the initial investigation.[12]

40. This decision is not inconsistent with *Liyanarachchige*, in which this Tribunal concluded that "a disciplinary measure may not be founded *solely* on *anonymous* statements".[13] In the Applicant's case, the statements of the Complainants were neither anonymous nor the only evidence against the Applicant. The Complainants and other witnesses were named in the CRFs and in the signed interview statements they gave the Investigator, as well as in the investigation report and the ad hoc JDC report. Since the Applicant knew the identities of the Complainants and other witnesses, he was able to and did prepare a defense to each of the alleged incidents described by them. This Tribunal determines that, in giving no probative value to the Complainants' CRFs and their signed interviews, the UNDT made a significant error of law.

ii. The Final Investigation Report

41. The Staff Rules and administrative issuances of each organization establish the procedures to be followed when allegations of harassment by a staff member are investigated.[14] In 2006, UNICEF's procedures for conducting investigations into allegations of harassment by a staff member were set out in administrative instruction CF/AI/2005-017. Briefly,

[12] See former Administrative Tribunal Judgement No. 494, *Rezene* (1990) and ILOAT Judgment No. 2601 (2007).
[13] *Liyanarachchige*, para. 20 (emphasis added).
[14] *Messinger*.

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) and was given an opportunity to respond to the evidence and to present his defenses.

42. The final investigation report concluded the Complainants were credible, stating:

> [They] provided statements explaining in detail what had occurred. Several statements by the complainants describe strikingly similar events: Touching of arm, shoulder, chest and groin, combined with the use of language with sexual content. Their description of the man who had touched them and spoken to them proves that they were referring to [the Applicant]: They identified his appearance, first name, and the tent he was living in when staying at the camp site. ... While investigated only now, several of the allegations were raised previously at the time the incidents took place to the respective supervisors of the camp staff. This reporting of incidents at different times in the past, while not submitted to the UN formally at that time, provides further credibility to the statements, and rules out that the allegations were fabricated. Finally, the nature and frequency of the incidents has caused the camp staff to be highly irritated and angry. This anger seems to be genuine and poses a significant risk for [the Applicant's] personal safety, which led to him being evacuated from Juba.
>
> The investigation could not find any reason as to why the Security Guards and Waiters would fabricate the complaints made [sic] of inappropriate touching made against [the Applicant]. In addition, the investigation revealed evidence that the reason why the Security Guards wanted to physically hurt [the Applicant] was related to the humiliation and anger from them being inappropriately touched.

43. The Applicant attacked the findings and conclusions of the investigation report, arguing it failed to include inconsistencies in the Complainants' accounts and the evidence generally. The Dispute Tribunal agreed with the Applicant and found there were several "material omissions" in the investigation report. The UNDT also criticized the investigation report for relying on the statements of the Complainants and their supervisors, the AFEX Camp Manager and S1.[15] The

[15] The SEA Consultant interviewed the AFEX Camp Manager, Ms. Khavere, and S1, who both stated that they learned of C3's complaint on the evening of 19 June 2006, and C3 was quite angry. Ms. Khavere also stated that "[s]ome of her staff had complained of a similar incident with the same

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 for the Complainants' inability to be consistent in their accounts especially with regard to times and dates. She continually referred to their poverty, their war-torn country and the place of power dynamics between poor waiters and an international staff member. ...[17]

person. Her staff had given her this report as a result of story of another concerning a humanitarian worker being deported for acts of homosexuality with a local person."

[16] Para. 91.

[17] Para. 96.

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 harassment as:

> Any unwelcome sexual advance, request for sexual favor, 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 the victims or offenders. Sexual harassment may also occur outside the workplace and/or outside working hours.

50. The UNDT concluded that the charges, even if proved, did not come within paragraph 8's definition of sexual harassment, stating:

> ... ...
>
> (c) ... 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. ... [T]hey, 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.[19]

51. The UNDT erred in law and fact resulting in a manifestly unreasonable decision in concluding that CF/AI/2005-017 did not apply to incidents between the Applicant and the non-UNICEF staff at the residential tent camp. The UNDT interpreted CF/AI/2005-017 too narrowly and without recognition that the residential tent camp where the Applicant resided was part of his duty station in South Sudan, and individuals employed by companies operating or providing services to the residential tent camp come within the protection of CF/AI/2005-017 in that they provide services to UNICEF.

52. In light of the UNDT's conclusion that the charges, if proved, did not violate CF/AI/2005-017, the UNDT had a duty to consider whether the charges, if proved, violated the other provisions with which the Applicant was charged. Its failure to do so was an error of law.

[19] Para. 123.

53. The then-applicable Staff Rule 101.2(d) provided: "Any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse in the workplace or in connection with work is prohibited." For the reasons discussed above, this Tribunal concludes the Applicant's conduct also violated Staff Rule 101.2(d).

54. Paragraph 20 of the Standards of Conduct provides: "Harassment in any shape or form is an affront to human dignity and international civil servants must avoid it. They should not engage in any form of harassment and must be above any suspicion of it. ..." This prohibition clearly applies to all kinds of harassment; thus, it encompasses sexual harassment. And this prohibition clearly is not limited to harassment in the workplace; thus, it includes harassment outside the workplace. The Applicant's conduct was in violation of paragraph 20 of the Standards of Conduct. Staff Regulation 1.2(b) requires staff members to uphold the "highest standards" of integrity. Sexual harassment prohibited by paragraph 20 of the Standards of Conduct is the antithesis of upholding the "highest standards" of integrity. Thus, the Applicant's violation of paragraph 20 of the Standards of Conduct constitutes misconduct, which may be subject to disciplinary action.

The Applicant's Misconduct Warrants Summary Dismissal

55. Then-applicable Staff Regulation 10.2 provided that the Secretary-General "may impose disciplinary measures on staff members whose conduct is unsatisfactory" and that he "may summarily dismiss a member of the staff for serious misconduct".

56. Sexually harassing four young men by improperly touching them constituted serious misconduct. That cannot be disputed. Thus, grounds existed under Staff Regulation 10.2 to summarily dismiss the Applicant. Moreover, summary dismissal was proportionate to the nature of the serious misconduct established in the present case, according to accepted legal principles. Thus, the UNDT made an error of law in failing to affirm the summary dismissal of the Applicant on the grounds he committed serious misconduct.

57. This Tribunal should vacate the UNDT Judgment.

Judgment

58. The appeal is affirmed and the UNDT Judgment is vacated.

Original and Authoritative Version: English

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

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

Entered in the Register on this 24th day of May 2013 in New York, United States.

(*Signed*)

Weicheng Lin, Registrar