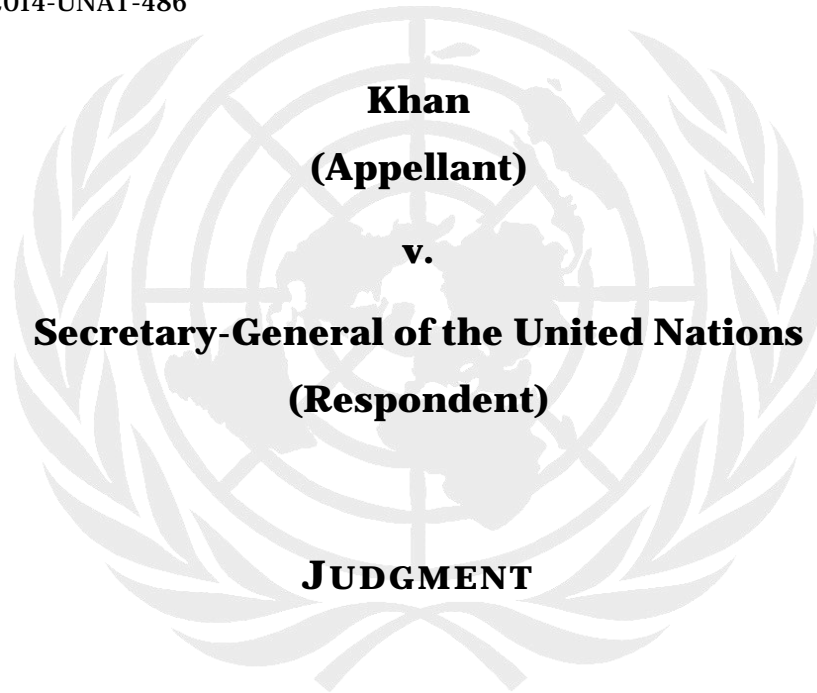




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-486



Before:	Judge Rosalyn Chapman, Presiding Judge Richard Lussick Judge Inés Weinberg de Roca
Case No.:	2014-561
Date:	17 October 2014
Registrar:	Weicheng Lin

Counsel for Appellant:	Salim U. Shaikh
Counsel for Secretary-General:	John Stompor

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Alamgeer Khan of Judgment No. UNDT/2013/140, issued by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 12 November 2013, in the case of *Khan v. Secretary-General of the United Nations*. Mr. Khan filed his appeal on 3 February 2014, and the Secretary-General filed his answer on 14 April 2014.

Facts and Procedure

2. Mr. Khan joined the World Food Programme (WFP) on 15 July 2008, and shortly thereafter was given a fixed-term contract as Logistics Officer and Head of the Sub-Office (SO) in Quetta, Pakistan. The staff under his supervision included Ms. T. R., an office assistant (receptionist), Ms. A. A., a finance assistant, Mr. I. A., a logistics assistant, Mr. R. I., another logistics assistant, Ms. S. A., an information and communications technology (ITC) assistant, and Mr. Z. A., another ITC assistant.

3. On 22 December 2009, three female staff members (Ms. T. R., Ms. A. A. and Ms. S. A.) in the SO in Quetta made written, signed complaints to Dr. Kamran Ahmad, Staff Counselor Asia, alleging sexual harassment, harassment and abuse of authority against Mr. Khan. On the same date, Dr. Ahmad forwarded these complaints to the Office of Inspections and Investigations (OSI).

4. On 29 December 2009, the Director of WFP's Human Resources Division (D/HRD) sent Mr. Khan a letter advising him that he was under investigation for improper conduct and sexual harassment, in violation of WFP's Policy on Harassment, Sexual Harassment and Abuse of Authority (ED 2007/003) (Harassment Policy) and that he was immediately being placed on administrative leave with pay pending the investigation in accordance with Staff Rule 10.4. She noted that the leave was expected to end 31 March 2010, but could be extended. Further, she advised Mr. Khan that under the Staff Rules he could challenge this decision. Mr. Khan did not file a request for management evaluation of the decision to place him on administrative leave with pay.

5. In January 2010, additional female and male staff members assigned to the SO in Quetta made written complaints about Mr. Khan's conduct.

6. The OSI, in consultation with WFP's Pakistan Country Office in Islamabad (CO), conducted interviews in Quetta with the complainants in January 2010.

7. On 7 April 2010, the OSI advised Mr. Khan in writing that he was being investigated for violating WFP's Harassment Policy, as well as WFP's Directive Pertaining to Usage of Network Services and Internet (Directive). Mr. Khan was informed of complaints by the following WFP staff members: (i) Ms. A. A. (sexual harassment); (ii) Ms. H. G., a Field Monitor (sexual harassment); (iii) Ms. M. K., a Field Monitor (sexual harassment); (iv) Ms. S. K., a Field Monitor (sexual harassment); (v) Ms. T. R. (sexual harassment); (vi) Ms. S. A. (sexual harassment and abuse of authority); (vii) Mr. I. A. (harassment); (viii) Mr. R. I. (harassment); and (ix) Mr. Z. A. (abuse of authority).

8. The OSI interviewed Mr. Khan in April 2010. In May 2010, the OSI interviewed WFP staff members in SO Quetta and CO and also interviewed witnesses identified by Mr. Khan, including persons he previously worked with at the World Health Organization in Pakistan. The OSI interviewed more than 40 witnesses and examined documentary and physical evidence.

9. On 14 June 2010, the OSI issued its Investigation Report, in which it concluded that "it is more probable than not" that Mr. Khan violated WFP's Harassment Policy by: sexually harassing Ms. T. R. and Ms. A. A.; harassing Messrs. I. A. and R. I.; and abusing his authority regarding Ms. S. A. and Mr. Z. A. Based on these conclusions, the Investigation Report recommended that administrative or disciplinary action should be taken against Mr. Khan and "[c]areful consideration should be given as to whether [his] future service at WFP in any capacity would be in the best interest of the organization".

10. On 6 August 2010, the D/HRD sent Mr. Khan a "charging memorandum", with the Investigation Report attached, and Mr. Khan acknowledged receiving the documents on 12 August 2010. The charging memorandum alleged that Mr. Khan had: (i) "[s]olicited a sexual relationship with [Ms. T. R.] in exchange for renewing her employment contract with WFP"; (ii) "[s]olicited a sexual relationship with [Ms. A. A.] in exchange for renewing her employment contract with WFP"; (iii) "[s]tated to [Mr. I. A.] in the presence of other staff members[,] 'don't tell your father how to fuck your mother' or words [to] that effect, which [Mr. I. A.] found to be offensive"; (iv) "[s]houted at [Mr. R. I.] in the presence of other staff members, behaviour that [Mr. R. I.] found to be offensive"; (v) "[d]irected [Ms. S. A.] to

tutor [his] children during working hours in the Quetta SO or at [his] private residence and upon her refusal threatened to terminate her employment contract with WFP, thereby abusing [his] authority as the head of the Quetta SO”; (vi) “[d]irected [Mr. Z. A.] to access and monitor the ... email account[s] of [Mr. S. R. and [Ms. T. R.] in violation of the WFP Directive ... thereby abusing [his] authority as the Head of the Quetta SO and [Mr. Z. A.’s] direct supervisor”; and (vii) “[d]irected [Mr. Z. A.] to access and monitor the telephone records of [Ms. T. R.], thereby abusing [his] authority as the Head of the Quetta SO and [Mr. Z. A.’s] direct supervisor”.

11. The charging memorandum advised Mr. Khan that the charges were related to the breach of: (i) Staff Regulation 1.2(a) and Staff Rules 1.2(e) and 10.1; (ii) WFP’s Harassment Policy, paras. 6, 7, 8 and Annex I-b; (iii) the Standards of Conduct for the International Civil Service, para. 20; (iv) Directive, paras. 14, 44 and 45; and (v) Directive on Intern Programme, paras. 10 and 19. Mr. Khan was further advised that disciplinary action against him could be initiated and, due to the gravity of the charges, he could be dismissed without notice and without termination indemnities under Staff Rule 10.2(a)(viii). Finally, Mr. Khan was advised to respond to the charging memorandum and Investigation Report within ten working days.

12. On 20 September 2010, Mr. Khan filed a lengthy response to the charging memorandum and Investigation Report. He denied that the charges were true and suggested instead that there was a “conspiracy” against him by some of the WFP staff, based on his Punjabi ethnicity, and Dr. Ahmad had animus toward him and instigated the staff action against him.

13. On 30 November 2010, the D/HRD sent Mr. Khan a letter separating him from service with compensation in lieu of notice and without termination indemnity. The Agency found that, as charged, Mr. Khan had engaged in *quid pro quo* sexual harassment of Ms. T. R. and Ms. A. A. It further found that, as charged, he had harassed Messrs. I. A. and R. I. by publically using offensive language and publically shouting, respectively. Additionally, the Agency found that, as charged, Mr. Khan had abused his authority as Head of the Quetta SO by: (1) directing Ms. S. A. to tutor his children during working hours or at his private residence and upon her refusal, threatening to terminate her employment contract with WFP; (2) directing Mr. Z. A. to access and monitor the e-mail accounts of Mr. S. R. and Ms. T. R. in violation of the Directive; and (3) directing Mr. Z. A. to access and monitor the

telephone records of Ms. T. R.. The Agency concluded that the foregoing conduct by Mr. Khan was in violation of WFP's Harassment Policy, which prohibited sexual harassment, harassment and abuse of authority, and that Mr. Khan had "failed to meet the high standard of personal conduct expected of employees in a supervisory position". Noting that the sexual harassment of Ms. T. R. "is sufficient, on its own, to support the disciplinary measure", the Agency opined that separation from service for multiple violations of WFP's Harassment Policy is clearly an appropriate sanction.

14. On 21 February 2011, Mr. Khan, represented by counsel, filed an application before the UNDT challenging the decision to separate him from service. Dozens of annexes were attached to the application. Mr. Khan sought rescission of the decision, his reinstatement with entitlements from the date of separation, an award of two years' net base salary, compensation for irreparable moral damages, and compensation for financial loss. Further, he requested the "initiation of disciplinary measure on perjury against the complainants and breach of the standard of conduct by Dr. ... Ahm[a]d and his accomplice." On 30 March 2011, the Agency filed its reply, with dozens of annexes attached thereto.

15. On 5 October 2012, the parties filed a Joint Stipulation regarding the facts and documentary evidence, pursuant to Order No. 174 (NY/2012). In the Joint Stipulation, Mr. Khan waived his right to an oral hearing under Article 16(2) of the Dispute Tribunal Rules of Procedure, stating it "will not ... serve any useful purpose at this stage". However, in the event the UNDT ordered an oral hearing, Mr. Khan reserved his right to cross-examine the Agency's witnesses and to call his own witnesses.

16. On 26 July 2013, the parties filed their closing submissions, pursuant to Order No. 170 (NY/2012).

17. On 12 November 2013, the UNDT issued Judgment No. UNDT/2013/140 denying Mr. Khan's application. The UNDT concluded that Mr. Khan had sexually harassed Ms. T. R. and Ms. A. A. in violation of WFP's Harassment Policy and in breach of proper behavior for an international civil servant. The UNDT also concluded that Mr. Khan harassed Mr. R. I. by publically shouting at him. Additionally, the UNDT concluded that Mr. Khan abused his authority when he brought his daughter to the SO in Quetta as an "intern" and directed Ms. S. A. to tutor her in the work place and at his home, under threat that her employment with WFP would be terminated unless she did as directed. Finally, the

UNDT concluded that Mr. Khan also abused his authority when he directed Mr. Z. A. to check Mr. S. R.'s and Ms. T. R.'s e-mail and Ms. T. R.'s telephone calls, under threat that his employment with WFP would be terminated unless he did as directed. Further, the UNDT concluded that, based upon the these findings, grounds existed to discipline Mr. Khan for violating Staff Regulations, Staff Rules and WFP's Harassment Policy. Finally, the UNDT determined that the discipline of separation from service was proportionate in light of Mr. Khan's supervisory position and, contrary to being an effective supervisor, because his conduct created a hostile work environment for the staff at the SO in Quetta.

Submissions

Mr. Khan's Appeal

18. Mr. Khan does not agree with the background information and sequence of events as presented by the Dispute Tribunal, and he cites specific paragraphs in the Judgment that he alleges are erroneous.

19. The Dispute Tribunal failed to consider or weigh countervailing evidence and documentary proof and ignored his version of events. It also failed to review and analyze the authenticity of the complaints or the consistency, corroborative value and persuasiveness of the evidence. Moreover, it either overlooked or ignored the documentary evidence of the Investigation Report. It drew erroneous inferences from a false deposition supported by false material evidence. In other words, the Dispute Tribunal exceeded its jurisdiction by stepping into the shoes of the Administration and becoming the advocate for the Administration.

20. The Dispute Tribunal also failed to judiciously consider the procedural flaws during the disciplinary proceedings. In this connection, Mr. Khan submits that the investigation examined 40 witnesses, including those no longer in the service of the Organization, without offering him an opportunity to participate in their examination or to confront those witnesses despite his request. He was kept on administrative leave, a *de facto* disciplinary suspension, for 11 months in violation of his due process rights, adversely affecting his reputation, during which period he was deprived of access to email, equipment, UN ID card and security advisories. While he was provided with the Investigation Report, the initial fact finding mission report was not shared with him despite his request.

21. Mr. Khan submits that his “separation from service was not warranted by the evidence advanced to OSI which was of little probative value and the so-called facts and evidence relative to alleged charges were not solidly established. Elements of doubt, inconsistencies and contradictions to each other did exist and that the Judgment of the UNDT was full of errors of law, errors of facts and procedural flaws.” (Emphasis in original.)

22. Mr. Khan requests that the Appeals Tribunal vacate the UNDT Judgment, rescind the contested decision and reinstate him, and award him unspecified monetary compensation for moral and career damage and order “initiation of disciplinary measure on perjury against the complainants and breach of the standard of conduct by Dr. Kamran Ahmad and his accomplices”.

The Secretary-General’s Answer

23. The UNDT correctly concluded that the facts established sexual harassment by clear and convincing evidence. The statements by Ms. T. R. and Ms. A. A. show ongoing sexual harassment coupled with threats to their employment with WFP unless they submitted. Ms. T. R.’s statements were corroborated by Ms. A. A., who detailed several instances of sexual harassment coupled with threats by Mr. Khan that were similar to those submitted by Ms. T. R. Ms. T. R.’s statements were also corroborated by two other female staff members, to whom she confided about Mr. Khan’s overtures. Additionally, Ms. T. R.’s and Ms. A. A.’s statements were further corroborated by other female staff members in the SO in Quetta, who experienced similar requests for “friendship” from Mr. Khan. Mr. Khan’s efforts to discredit Ms. A. A. as a poor performing employee are to no avail in that a supervisor in Islamabad stated her performance was satisfactory.

24. The UNDT correctly concluded that the facts established harassment by clear and convincing evidence. The statements of Mr. R. I., who said he was humiliated by Mr. Khan shouting at him after he had reported to Mr. Khan about another staff member subjecting him to offensive comments, demonstrate verbal abuse, which is a form of harassment.

25. The UNDT correctly concluded that the facts established abuse of authority by clear and convincing evidence. The statements of Ms. S. A. show that Mr. Khan demanded that she tutor his children and threatened to deny her leave and to terminate her employment with WFP if she did not comply. Mr. Khan admitted that he brought his daughter to the SO

in Quetta and that he asked Ms. S. A. to supervise her. Abuse of authority is also supported by Mr. Z. A.'s statements, in which he stated that Mr. Khan directed him to access and monitor other staff members' email and telephone records and threatened his job unless he complied. The UNDT aptly found that Mr. Khan's allegation that Mr. Z. A. had a bad motive in making his statements was not supported by the evidence. Additionally, the UNDT correctly found that Mr. Khan's claims of clan bias by Ms. S. A. and Mr. Z. A. were without merit.

26. The UNDT correctly concluded that the established facts amounted to misconduct, as a matter of law. Sexual harassment, harassment and abuse of authority are prohibited by Staff Regulation 1.2(a), Staff Rule 1.2(e) and WFP's Harassment Policy, paragraphs 4, 6-8 and Annex I-B.

27. The UNDT correctly concluded that the disciplinary measure of separation from service is proportionate to the nature of the misconduct. Sexual harassment is particularly venal misconduct justifying separation from service -- especially when the staff member was the victims' supervisor, as Mr. Khan was.

28. The UNDT correctly concluded that there were no procedural irregularities warranting a rescission of the decision to separate Mr. Khan from service. The Agency complied with Staff Rule 10.3(a) and gave Mr. Khan written notice of the charges and an opportunity to respond after completion of the investigation - which he did. Moreover, Mr. Khan was given ample opportunity during the investigation to give his version of the events and to produce evidence. He identified witnesses to be interviewed, and the OSI interviewed those individuals. Mr. Khan was given all documents in a timely manner, including the Investigation Report and supporting evidence (including the staff members' interviews). Mr. Khan availed himself of an attorney at an early stage of the process.

29. Mr. Khan has not established that the UNDT made any errors warranting a reversal of the Judgment. The UNDT correctly found that WFP's Harassment Policy provided for complaints to be given to Mr. Ahmad, the Staff Counselor. Additionally, the UNDT correctly found that Mr. Khan was advised that he could seek management evaluation or review of the decision to place him on administrative leave with pay, pursuant to Staff Rule 11.2(a), but he did not do so. Thus, he was precluded from contesting that decision before the UNDT and is precluded on appeal. Finally, Mr. Khan had no legal right to cross-examine the complainants during the investigative stage of the proceedings, although he could have during the

prosecutorial stage. However, he did not request to do so during that stage. Thus, there were no procedural errors, as the UNDT correctly determined.

Considerations

30. Mr. Khan requests that the Appeals Tribunal hold an oral hearing because the “[v]olumes of documents ... presented ... demand orderly presentation by the Appellant/Representative that necessitates elaboration ... in person”. This Tribunal does not agree. Grounds do not exist to grant Mr. Khan’s request for an oral hearing under Article 18(1) of the Appeals Tribunal Rules of Procedure. Thus, the Mr. Khan’s request is denied.

31. Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration.¹ In this context, the UNDT must “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”.²

32. “[T]he Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.”³ When termination is a possible sanction, the “misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.⁴

¹ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

² *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302; *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; *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018.

³ *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.

⁴ *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 2.

Were the Facts Established by Clear and Convincing Evidence?

Ms. T. R. and Ms. A. A.

33. The UNDT properly required the Agency to establish by clear and convincing evidence the facts supporting its decision to separate Mr. Khan from service, as set forth in the separation letter dated 30 November 2010.

34. The evidence shows that Mr. Khan offered Ms. T. R. his “friendship” and asked for her “friendship,” which she understood to mean a sexual relationship. In two conversations in November and December 2009, Mr. Khan demanded sex with Ms. T. R. and, when she declined, Mr. Khan threatened to end her appointment unless she had sex with him. Ms. T. R. also stated that on one occasion, Mr. Khan “kissed [her] hand” and on another occasion he “kissed [her] on the face and hugged [her]”. Such physical contact by Mr. Khan was offensive to Ms. T. R. In June 2009, Mr. Khan asked Ms. T. R. to meet him at a hotel, and suggested he had “the right to [have] sex” with her.

35. From the start of his appointment as the Head of the SO in Quetta, Mr. Khan asked Ms. A. A. for her “friendship”, which she understood to mean a sexual relationship. She refused and started avoiding Mr. Khan in different ways, such as asking another supervisor to get documents from him and refusing to go into the office on weekends. In April 2009, shortly before her wedding, Mr. Khan asked her “to meet him somewhere for [a] sexual purpose”. She refused, and after her wedding, “he called [her] into his office and said ... [‘]you didn’t meet me somewhere before your wedding, but now as the way is open you should accept my proposal.[’]”

Messrs. I. A. and R. I.

36. The UNDT refused to consider the charge of harassment based on the use of offensive language toward Mr. I. A., finding it was time-barred and not part of a continuing pattern of behavior, within the meaning of paragraph 29 of WFP’s Harassment Policy. The Secretary-General has not filed a cross-appeal raising this issue. Thus, this charge is not properly before the Appeals Tribunal.

37. The UNDT did consider the evidence offered by Mr. R. I., who stated that, on one occasion, after a conversation with a Senior Logistics Assistant (SLA) with whom he disagreed, the SLA used offensive language toward him and he told the SLA he did not appreciate that type of language. According to Mr. R. I., Mr. Khan later summoned him to his office and shouted at him that he should give respect to the SLA, and the shouting could be heard by others in the office. The UNDT found that this incident constituted harassment under WFP's Harassment Policy and Staff Regulations and Rules. The Appeals Tribunal disagrees. This isolated incident does not amount to misconduct constituting grounds to sanction Mr. Khan.

Ms. S. A. and Mr. Z. A.

38. The evidence shows that in January 2009, when Ms. S. A. asked Mr. Khan for ten days leave, to go on a pilgrimage with her family, he told her that she had to teach his son "all of his academic subjects especially computer" if she wanted him to approve the request for leave. Similarly, Mr. Khan directed Ms. S. A. to teach his son and daughter in July 2009. She taught them and another girl for three days "in the office during the official hours ... inside the server room". This prevented her from performing her usual work duties. When she was asked to teach them at his home, she "had to go [to] his home from office and come back [to the] office on official vehicle during the official hours". Ms. S. A.'s statement is corroborated by a WFP driver, who drove her to and from Mr. Khan's house. Around August 2009, Mr. Khan telephoned Ms. S. A. one night at her home and asked her: "Do you want your job or not[?] ... If yes, then you have to come regularly [to] my home to teach my children as the offices are also closed." She refused and instead found him a tutor.

39. The evidence also shows that Mr. Khan directed Mr. Z. A. to access and monitor the e-mails of Mr. S. R. and Ms. T. R. to ensure they were not making complaints about him and, similarly, to access the telephone records of Ms. T. R. for that same purpose. Mr. Z. A. also credibly stated that Mr. Khan threatened not to renew his contract with WFP when he refused to do as he was directed.

Did the Evidence Show Misconduct?

40. WFP's Harassment Policy (ED2007/003), which became effective 14 February 2007, provides:

WFP is committed to ensuring that all its workplaces are free from abuse, offensive behaviour, harassment, abuse of authority and discrimination. ... Harassment and abuse of authority of any kind is never acceptable. ... It is against WFP policy for any employee to abuse the authority delegated to her/him or to harass or intimidate any individual in the workplace. WFP will not tolerate any form of harassment or abuse of authority, whether based on age, disability, ethnic origin, gender, marital status, race, religion, sexual orientation or any other personal characteristic. WFP will also not accept any conduct that is offensive, humiliating, embarrassing or intimidating to other members of staff.

41. WFP's Harassment Policy sets forth the following definitions:

Harassment is any improper conduct by an individual that is directed at and offensive to another person in the workplace and that the individual knew, or reasonably ought to have known, would cause offence or harm to that person.

Sexual harassment includes any unwelcome sexual advance or unwanted verbal or physical conduct of a sexual nature.

Abuse of authority is when an individual improperly uses the power and authority inherent in his/her given position to endanger another person's job, undermine the person's performance in that job, threaten the person's economic livelihood, or in any way maliciously interfere with or influence a person's career.

42. On appeal, Mr. Khan does not dispute that the charges show misconduct, if proven. Instead, he claims that the complainants are not credible and are biased against him or have improper motivations for making their allegations. These defenses were correctly found to be without merit by the UNDT.

43. Clear and convincing evidence showed that Mr. Khan repeatedly sexually harassed Ms. T. R. and Ms. A. A., as the UNDT correctly found.⁵ The statements by Ms. T. R. and Ms. A. A. are corroborated by statements of other female staff members, Ms. H. G, Ms. S. K., and Ms. M. K.. And Mr. Khan's claim that Ms. A. A. made her complaint because her performance was poor and she was trying to avoid losing her job due to her poor performance is without basis, as the UNDT also correctly found.

44. Clear and convincing evidence also showed that Mr. Khan abused his authority as the Head of the SO at Quetta, as the UNDT correctly found, in that he gave directions to: (i) Ms. S. A. to tutor his son and daughter on office time, either using office facilities or in his home, upon threat of losing her job; and (ii) Mr. Z. A. to access the email accounts of two WFP staff members (Mr. S. R. and Ms. T. R.) and the telephone records of Ms. T. R., whom he feared had made complaints against him. Ms. S. A.'s statement is corroborated by the statement of a WFP driver, who drove her to Mr. Khan's house on several occasions. Mr. Khan has not shown that Ms. S. A. and Mr. Z. A. were biased against him because he is Punjabi. Additionally, in the circumstances of this case, Mr. Khan's frequent threats to staff members, i.e., that they could or would lose their jobs with WFP unless they did as he directed, is another form of abuse of authority within the meaning of WFP's Harassment Policy.

45. The above misconduct by Mr. Khan was in violation of WFP's Harassment Policy prohibiting sexual harassment and abuse of authority. It is misconduct that warrants the imposition of sanctions against Mr. Khan. In light of this conclusion, it is not necessary to determine whether the evidence showed Mr. Khan's actions also violated Staff Regulations, Staff Rules and the Code of Conduct for International Civil Servants.

Is the Sanction of Separation from Service Proportionate?

46. As a supervisor, Mr. Khan was responsible for ensuring a healthy workplace at the SO Quetta. He admitted that he was aware of WFP's Harassment Policy prohibiting sexual harassment and abuse of authority and assuring a workplace free of sexual discrimination and intimidation. Yet, his misconduct did not assure a healthy and non-discriminatory work place. To the contrary, it placed the female staff members in fear of losing their jobs unless they compromised their ethics and morals to meet his sexually motivated demands. Such

⁵ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302 (full bench); *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209.

misconduct cannot be condoned and should be dealt with harshly. The UNDT correctly found that the sanction of separation from service is proportionate because sexual harassment is serious misconduct, especially when a staff member's supervisor is the harasser.⁶

47. Mr. Khan's abuse of authority is another, separate type of misconduct or ground for sanctions. Like sexual harassment, abuse of authority by itself may be serious misconduct warranting separation from service.⁷ When abuse of authority is coupled with the sexual harassment of two female staff members, the combination clearly warrants the imposition of the harshest sanction available to the Agency. Yet, the Agency did not impose the harshest sanction on Mr. Khan; he was not summarily dismissed. Clearly, the lesser sanction of separation from service with compensation should be upheld, as the UNDT correctly concluded.

48. Finally, there are no mitigating or extenuating circumstances that would warrant a lesser sanction, as the UNDT also correctly found. To the contrary, the Investigation Report concluded that: "Mr. Khan attempted to obstruct the investigation, failed to fully cooperate, and lacked credibility". For all these reasons, the sanction of separation from service is proportionate and should be upheld.

Were There Procedural Irregularities During the Investigation?

49. The UNDT determined that "there is no evidence that the complainants manipulated the evidence ... against [Mr. Khan] during his suspension, [and] both the investigative and disciplinary proceedings in this case were conducted fairly, neutrally and in accordance with WFP's procedure and [Mr. Khan]'s due [process] rights were respected." This Tribunal agrees. As discussed below, the UNDT correctly found Mr. Khan's claims of procedural irregularities were without merit.

⁶ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209; *Jibara v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-326; *Massah v. Secretary-General of the United Nations*, Judgment No.2012-UNAT-274.

⁷ *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No.2013-UNAT-292.

50. First, Mr. Khan claims that the staff members' complaints were not receivable by the Agency because they were given to Mr. Ahmad, who forwarded them to the D/HRD. Under WFP's Harassment Policy, "[c]omplainants have the right to choose either informal or formal channels for resolving a dispute"⁸. The formal process provides that "[t]he complainant must submit a complaint in writing to the Director ADH, the Inspector General, the local human resources officer at the duty station, a peer support volunteer, a staff counsellor, or the confidential WFP Hotline operated by ODSI"⁹. "Whatever route is used, the complaint must immediately and confidentially be notified to the Director ADH."¹⁰ This process was followed, as the UNDT correctly determined. Moreover, as the UNDT also correctly found, Mr. Khan failed to prove that Mr. Ahmad had animus toward him; allegations are not the same as proof.¹¹

51. Second, Mr. Khan attacks the Administration for placing him on administrative leave during the investigation.¹² However, Staff Rule 10.4 (ST/SGB/2009/7) provides for administrative leave during the investigatory process. Moreover, based on his detailed response to the charging memorandum and Investigation Report, Mr. Khan has not shown that he was prejudiced in his ability to defend himself by being placed on administrative leave. Thus, as the UNDT correctly found, there is no merit to Mr. Khan's claim regarding administrative leave.

52. Third, Mr. Khan claims that he did not timely receive all the documentation to which he was entitled, including the witnesses' initial complaints, or have the opportunity to cross-examine the complainants. The UNDT correctly found no merit to these claims. To the contrary, in April 2010, before he was interviewed by the OSI, Mr. Khan learned of the nature of the complaints against him and the identities of the complainants. After he received the charging memorandum and Investigation Report, he was given the opportunity to respond to the charges and the evidence supporting the charges, and he did so. During the preliminary

⁸ WFP's Harassment Policy, para. 18.

⁹ *Id.*, para. 27.

¹⁰ *Id.*, para. 28.

¹¹ *Balinge v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-377, para. 16.

¹² The Secretary-General argues that Mr. Khan cannot complain about being placed on administrative leave since he did not seek management evaluation of his placement. However, this argument misses the mark. In the context of his separation from service, Mr. Khan raises the claim that his placement on administrative leave prevented him from defending himself and, thus, prejudiced him.

stage of the investigation, he had no right to cross-examine witnesses and, as the UNDT noted, he waived his right to cross-examine the witnesses during the prosecutorial stage at an oral hearing.

53. Finally, Mr. Khan claims that the investigation by OSI was not fair or was predetermined against him. As the UNDT correctly found, there is no merit to this claim. The OSI conducted a thorough investigation. It interviewed more than 40 witnesses, including Mr. Khan and witnesses he identified. And the OSI interviewed the complainants more than once and followed up on their statements by interviewing other staff members who were mentioned in their statements or who were allegedly present when the complained-of events took place. The OSI did not accept any statement at face value, but rigorously sought to verify the events. The OSI also reviewed documents, including time sheets, e-mails and telephone records, and inspected physical evidence at the SO Quetta and elsewhere.

Judgment

54. The appeal is dismissed and Judgment No. UNDT/2013/140 is affirmed.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar