



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NY/2010/020/  
UNAT/1623  
Judgment No.: UNDT/2011/046  
Date: 9 March 2011  
Original: English

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**Before:** Judge Marilyn J. Kaman

**Registry:** New York

**Registrar:** Santiago Villalpando

HALLAL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
George Irving

**Counsel for Respondent:**  
Tamara Shockley, UNICEF

## **Introduction**

1. The Applicant contests the decision of the Executive Director of the United Nations Children’s Fund (“UNICEF”) to separate him without notice following a recommendation to do so by the Joint Disciplinary Committee (“the JDC”). The JDC found that the Applicant had committed a serious act of misconduct on the grounds that he had engaged in sexual harassment of a United Nations Volunteer (“the Complainant”). The Applicant originally was charged with two separate incidents of misconduct involving two different complainants, but only the misconduct charge involving the Complainant in this case was pursued. This resulted in the decision to separate the Applicant without notice, which is the subject of the instant appeal.

## **Facts**

2. Following an extensive professional engineering career, including some 15 years of service with several United Nations entities such as UNICEF, the Office of the High Commissioner for Refugees, the World Health Organization and the United Nations Development Programme, the Applicant was appointed by UNICEF as Construction Project Officer in Banda Aceh, Indonesia, in April 2007.

3. On 9 October 2007, the Applicant and the Complainant, a recently-recruited United Nations Volunteer with the Site Monitoring Construction Unit, drove to several schools to monitor project sites, among these was the ‘SDN Cot Meuraja’ school project.

4. According to the later-written complaint of the Complainant dated 13 November 2007, while inspecting the bathrooms (“the disabled toilet”) of one of the schools (SDN Cot Meuraja), the Applicant “wrapped his arms, crossed on [the Complainant’s] shoulder, reached [her] breast and pressed/grip them.” The Complainant then stated therein: “I was too shocked to do anything and too

embarrassed to shout for help. All I could say was say ‘HEY’ and he retorted, ‘WHY NOT?’ and I said, ‘NO, NO, NO’.”

5. The Complainant did not immediately raise the incident with the Applicant at the project site. During the drive to the next site, the Complainant wrote a description in her notebook of the incident that had just occurred.

6. After returning home on 9 October 2007, the Complainant wrote an email to the Applicant at around 11pm, which she entitled “Sexual Harassment”, and stated that she was formally documenting the incident. She described (in part):

3. May [sic] back turned towards the disabled toilet and I was busy inspecting inside it.

4. All of a sudden I felt someone embracing me and pressing my breast. I was too stunned to do anything and too embarrassed to shout for help.

5. All I could say was “HEY” and you retorted “WHY NOT?”

6. I was feeling so violated, angry and cheap and I wanted to lash back at you right there and then but my professionalism got the better of me and I went on with the inspection ... .

7. While the car was moving to SDN 55, I was almost speechless because I wanted to burst into tears.

...

9. I consulted with a friend who works with OIOS [the Office of Internal Oversight Services] and she advised me to refer this matter with the [Human Resources] here. She also furnished me with a copy of the UN regulations on Sexual Harassment.

10. Your actuations [sic], fall within the purview of sexual harassment as defined in AI/ST/SGB/379:

“Any unwelcome sexual advance ... or physical conduct of a sexual nature, when it interfere [sic] with work, is made a condition of employment or creates intimidating, hostile or offensive work environment.”

11. I was advised to write you and to demand that you STOP this actuation – otherwise, I shall make sure that you will be meted out the highest penalty for sexually harassing me.

12. I also demand a written apology from you with the promise that you will never, never do this to me again effective immediately.

7. On 10 October 2007, at 7:52am, the Applicant replied to the Complainant's email (mistakenly addressing it to "Nora") stating, "I am very sorry. I did not mean what you have mentioned, let's discuss." On 10 October 2007, at 7:55am, the Applicant wrote another email to the Complainant, apologising for getting her name wrong, stating that the incident was a misunderstanding and that he was sorry.

8. The Applicant then called the Complainant and she agreed to meet him at the canteen that morning. They, in fact, did meet and they discussed together what had occurred. During the substantive hearing, the Applicant and the Complainant gave differing accounts of what had transpired during the meeting. At the very least, it appears uncontradicted that the Applicant and the Complainant came to an understanding that the matter would be handled between themselves only, on a private basis.

9. Notwithstanding the understanding between the Applicant and the Complainant to handle the matter on a private basis, on 11 October 2007 the Applicant forwarded the series of emails dated 10 October 2007 between himself and the Complainant (referenced in paras. 6 and 7 above) to Mr. Edouard Beigbeder, Chief of Field Office, UNICEF Banda Aceh, and Mr. Alaa Al-Alami, Operations Manager, UNICEF Banda Aceh. Since the Chief of Field Office was not in Banda Aceh at the time, the Chief of Field Office forwarded the correspondence to Ms. Ingrid Kolb-Hindarmanto, Planning Officer, UNICEF Banda Aceh, and requested her to meet with the Applicant and the Complainant.

10. On 22 October 2007, a preliminary investigation panel consisting of the Planning Officer, the Operations Manager and Ms. Marianne Kelly, Human Resources Officer, met with the Applicant and the Complainant.

11. On 13 November 2007, the Complainant submitted a formal written complaint of sexual harassment to the Human Resources Officer.

12. On 15 November 2007, Mr. Gianfranco Rotigliano, Representative, UNICEF Jakarta, submitted the Complainant's sexual harassment complaint to

Mr. Steven Allen, Director, Division of Human Resources, UNICEF's New York headquarters ("NYHQ").

13. On 7 December 2007, the Applicant responded to the written complaint of sexual harassment.

14. On 14 January 2008, the Director, Division of Human Resources, UNHQ, issued Terms of Reference to Ms. Colette Turmel, Chief of Operations, UNICEF, Indonesia, Jakarta, and to Mr. Jeffe Frei Christensen, Human Resources Specialist, UNICEF NYHQ, regarding the Complainant's written complaint dated 13 November 2007.

15. The Terms of Reference specifically mandated the Chief of Operations and the Human Resources Specialist to conduct an investigation into the Complainant's complaint pursuant to UNICEF's administrative instruction entitled *Working with Respect in the UNICEF Workplace, UNICEF's Policy on Preventing Harassment, Sexual Harassment and Abuse of Authority*, CF/AI/2005/017, dated 16 December 2005. The Terms of Reference stated:

In conducting this investigation, you are requested to:

- ensure that both parties are given equal opportunity to share their concerns with you;
- obtain written and signed statements from both staff members;
- interview all persons who can provide relevant factual information on the case;
- obtain written and signed statements from all staff members interviewed.

In conducting the investigation, you are requested to ensure that:

- you are guided by the principles of fairness and objectivity;
- bias or prejudice does not influence you;
- that all information obtained during the investigation shall be treated with utmost confidentiality.

Upon completion of the investigation you should prepare a report with recommendations and conclusions to be forwarded to the Director, Division of Human Resources. The report should include specific advice as to whether or not the allegations raised against [the Applicant] are substantiated and supported by the evidence.

16. In January 2008, the appointed investigation team went to Banda Aceh and investigated the sexual harassment complaint. As part of the investigation, both the Applicant and the Complainant were interviewed by the investigation team, as well as Ms. Anne Njuguna, Human Resources Officer, and a witness, Mr. Sabirin (first name not indicated), identified as a “teacher” or “caretaker” who may have witnessed the incident in question.

17. On 6 February 2008, the formal investigation team issued its final report, concluding “we believe that [the Applicant] sexually harassed the Complainant as described above”.

18. By a letter dated 5 March 2008 from the Director of the Division of Human Resources, the Applicant was charged with misconduct. The letter described the charge concerning the Complainant as follows (a second charge of misconduct contained in the letter is omitted):

You engaged in sexual harassment by your unwelcome sexual advances and touching in an inappropriate manner of [the Complainant], UNV Site Monitoring, Construction Unit, UNICEF Banda Aceh, Indonesia, that caused her offence and humiliation which created an intimidating, hostile, and offensive work environment in violation of UNICEF’s Administrative Instruction, *Working with Respect in the UNICEF Workplace, UNICEF’s Policy on Preventing Harassment, Sexual Harassment and Abuse of Authority*, (CF/AI/2005/017), dated 16 December 2005.

The letter concluded that:

The action described in the charges above, indicates serious violations of the basic requirements of international civil servants to uphold the highest standards of conduct in the performance of their duties. On this basis, the Executive Director has decided to charge you with allegations of misconduct.

19. On 5 May 2008, UNICEF informed the Applicant that his case would be referred to an *ad hoc* JDC, as per the UNICEF Human Resources Policy and Procedure Manual, Chapter 15, section 5, on JDCs.

20. The *ad hoc* JDC issued its recommendation on 24 June 2008. On 26 June 2008, UNICEF informed the Applicant that the *ad hoc* JDC had unanimously recommended to the Executive Director of UNICEF that the Applicant be separated from service without notice.

4.1 The ad-hoc JDC agree with the findings of the formal investigation report. The ad-hoc JDC also note that [the Complainant] has been consistent all along on her account of the incident and that she has documented the incident in her notebook and more importantly at night via email which she sent to [the Applicant] .

...

4.6 The ad-hoc JDC took note of [the Applicant's] response to [the Complainant's] email of 9 October 2007, advising him that she is formally documenting the incident of sexual harassment and requesting that he discontinue the behaviour. In his email response he says "I am very sorry. I did not mean what you have mentioned, let's discuss. Best Kazeem". The ad-hoc JDC finds that [the Applicant's] reaction to this email is inconsistent with [the Applicant's] later statement ...where he states that "he collapsed, he was shocked by it."

...

## 6. AD-HOC RECOMMENDATIONS

6.1 In summary, in the opinion of the ad-hoc JDC, a substantial case has been made against [the Applicant]. The ad-hoc JDC does not find that there are other material issues that require or warrant further investigation and/or clarification. On the basis of our review, the unanimous opinion of the ad-hoc JDC is that the events alleged by the complainant occurred. Accordingly, the Committee concurs with the conclusion of the Final Investigation Report and the Administration's charge letter that [the Applicant] sexually harassed [the Complainant] and committed a serious act of misconduct.

6.2 In deliberating the recommended disciplinary action, the ad-hoc JDC took into account [the Applicant's] career with the UN and the grave consequences of these charges on [the Applicant's] reputation and well being and therefore unanimously recommend [the Applicant] be separated from service without notice.

21. On 26 June 2008, the Executive Director of UNICEF informed the Applicant that he had decided to accept the recommendation of the *ad hoc* JDC.

22. On 28 August 2008, the Applicant filed an application against this decision with the former Administrative Tribunal.
23. On 1 January 2010, the case was transferred to the Dispute Tribunal.

**Applicable law**

24. Former staff regulation 1.2 (f) provides:

(f) While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

25. Former staff rule 101.2(d) provides:

*Specific instances of prohibited conduct*

(d) Any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited.

26. Former staff rule 110.3 provides:

(a) Disciplinary measures may take one or more of the following forms:

...

(vii) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3; ... .



27. UNICEF CF/AI/2005/017 provides:

...

*Sexual Harassment*

8. Any unwelcome sexual advance, request for a sexual favour, verbal or physical contact or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offense 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. ... Sexual harassment may also occur outside the workplace and/or outside working hours.

...

**Issues**

28. In *Abu Hamda* 2010-UNAT-022, the United Nations Appeals Tribunal held that a tribunal in a disciplinary case is required to consider: (1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts legally amount to misconduct under [the applicable] staff regulations and rules; and (3) whether the disciplinary measure applied was disproportionate to the offence (at para. 25; see also *Haniyah* 2010-UNAT-024, para. 31).

29. Thus, the Tribunal considers the issues before it to be the following:

- a. Whether the facts on which the disciplinary measure was based have been established;
- b. Whether the established facts legally amounted to serious misconduct under the applicable staff regulations and rules;
- c. Whether the Executive Director's decision to separate the Applicant from service was a valid exercise of her discretionary authority and whether the Applicant was afforded due process; and

d. Whether the disciplinary measure imposed was proportionate to the misconduct.

## **Consideration**

### *Burden of proof*

30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

31. Where a *prima facie* case of misconduct has been established, the burden is on the Applicant to provide satisfactory evidence justifying the conduct in question (see UN Administrative Tribunal Judgment No. 1023, *Sergienko* (2001)). In *Abu Hamda* 2010-UNAT-022, at para. 20, the Appeals Tribunal stated:

Abu Hamda failed to produce any evidence to show that the decision was biased, improperly motivated, or flawed by procedural irregularity or error of law.

32. Thus, it is for the staff member who is challenging a decision of the Administration to show sufficient grounds to interfere in the disciplinary measure. In other words, the staff member is required to produce evidence to show that the Administration's decision was biased, improperly motivated or flawed by procedural irregularity or error of law.

33. UNDT/2010/185 *M'Bra* similarly states the role of a tribunal in disciplinary cases (at paras. 58–59):

The Tribunal's task in disciplinary matters is to review the evidence, and decide whether the evidence was such that the discretion can be said to have been properly and judiciously exercised. Broad as it is, no discretion can be exercised in a vacuum.

It is for an applicant challenging the decision reached through the exercise of discretion to establish the grounds for the challenge. This

does not mean that he bears the burden of establishing his innocence. Rather he must bring in sufficient facts and reasons to convince the Tribunal why the decision should be set aside. To that end, all that an Applicant is required to do is to point at weaknesses or procedural flaws. Once the applicant has done this, the burden is on the respondent to satisfy the Tribunal that the evidence in support of the charge or charges is capable of belief and that the discretion was properly exercised on such evidence.

*Have the facts on which the disciplinary measure is based been established?*

34. The facts on which the disciplinary measure is based involve the events that occurred on 9 October 2007 at the SDN Cot Meuraja school project and which involved the Applicant and the Complainant, a recently-recruited United Nations Volunteer with the Site Monitoring Construction Unit, UNICEF Banda Aceh, Indonesia.

35. At the substantive hearing, the Tribunal received testimony from the Complainant; from the Applicant; from Ms. Turmel, a member of the two-member Banda Aceh formal investigation team, and from Ms. Carolyn Mitchell, a member of the *ad hoc* JDC. The Tribunal also had before it the entire case file, including annexes, as well as exhibits received at the substantive hearing.

36. The Applicant generally presents two attacks on the evidence presented in this case: (1) that so-called conflicting versions of events have been elicited, which conflict is to be resolved in favour of the Applicant; and (2) that the Complainant's "subjective" belief that she was the subject of an improper advance does not render a legally-sufficient finding of serious misconduct against the Applicant in the form of sexual harassment warranting summary dismissal. Each of these arguments will be addressed in turn.

37. In his legal challenge to the evidence presented in this case, the Applicant focuses on the Complainant and contends that her version of what took place contained numerous discrepancies that have never been adequately resolved, that the Complainant had exercised "prevarication" over her own statements and had

displayed ambivalence over the Complainant's attempts to privately resolve the matter at the canteen and then proceeding with a formal complaint several weeks later. The Applicant also criticises the Banda Aceh formal investigation team and the *ad hoc* JDC for their alleged failure to take into account other, external evidence, such as the account given by the teacher/caretaker Mr. Sabirin.

38. The Applicant's criticisms of the evidence in this case simply are unfounded, for: (a) the Complainant's version of events has remained consistent from the time of her initial complaint through her testimony to the Tribunal; (b) the Complainant's version of events has been analysed independently by three different investigating bodies (the UNICEF managers in Banda Aceh who conducted a preliminary investigation in October 2007, the formal investigation team in January 2008, and the JDC in 2008), all of which found the Complainant's version of events to be true; (c) the Complainant's version of events is corroborated by physical evidence in the form of her notebook description, in the form of emails sent to the Applicant, and by the layout of the project site itself; (d) the Applicant's differing versions of events renders him not at all credible (set out below); and (e) the testimony of the teacher/caretaker actually weakened the Applicant's case, rather than strengthening it.

39. The Tribunal itself heard the Complainant's testimony by telephone link and assessed her credibility. Her testimony continued to be consistent with her previous statements made during the preliminary and formal investigations that the Applicant engaged in sexual harassment through an unwelcome sexual advance. The Complainant's statements made throughout the investigation of the incident reveal the following:

- a. At the project site the Applicant "gripped" the Complainant on her breasts and that she was too shocked to say or do anything then;
- b. During the drive to the next site, the Complainant wrote in her notebook a description of the incident that had occurred at the school site;

c. During the evening of 9 October 2007 the Complainant wrote an email to the Applicant entitled “Sexual Harassment”—the description of which was consistent with the notation in her notebook;

d. On 10 October 2007 the Complainant informed the UNICEF Human Resources Officer, UNICEF Banda Aceh, and on 16 October 2007 the UNICEF Planning Officer, UNICEF Banda Aceh, the details of the sexual harassment incident—information that again was consistent with her notebook and eventual formal sexual harassment complaint;

e. The Complainant testified about the incident to a preliminary investigation panel on 22 October 2007—testimony that, again, was consistent with the facts in her notebook and with her eventual formal sexual harassment complaint;

f. On 13 November 2007 the Complainant wrote a formal written complaint with the same version of events described in her notebook and version given to the UNICEF [human resources] managers investigating the incident;

g. The Complainant testified to the Banda Aceh formal investigation team regarding the incident, which yet again was consistent with the details previously given.

*Applicant’s testimony*

40. The Tribunal heard the testimony of the Applicant. Many difficulties were noted in the Applicant’s testimony, and these discrepancies (as well as the Applicant’s general lack of credibility) do not render his version of events credible:

Whether the Applicant touched the Complainant

a. Throughout the entire investigation, the Applicant admitted to touching the Complainant at the project site, but claimed he only touched her “shoulder”. During the substantive hearing, however, the Applicant testified

that he did not touch the Complainant at all. Such inconsistent statements show that Applicant's version of events is not credible and cannot be believed;

The need for an apology

b. The day after the incident, the Applicant apologised to the Complainant—if the Applicant had not touched the Complainant in an inappropriate manner, why did he then apologise to her the next day? What would be the reason for an apology, if the Applicant did not engage in unacceptable behaviour towards her? The Applicant testified that he forwarded the Complainant's email to his senior manager, the Chief of Field Office. If the Applicant did not "touch" the Complainant, why would the Applicant initiate the involvement of his senior managers, who are obligated to respond to sexual harassment complaints? Although the Applicant had agreed with the Complainant at the canteen to handle the matter privately between them, it was the Applicant himself who initiated the actions which involved UNICEF senior management and which escalated the situation. Upon hearing that other UNICEF staff members had become aware of the incident through the Applicant, the Complainant felt obligated to submit a formal sexual harassment complaint to have her position known to management;

A conspiracy against the Applicant involving outside vendors

c. During the substantive hearing, the Applicant testified that the Complainant's complaint was based on a conspiracy against him either involving the UNICEF Banda Aceh Office or outside vendors. The Applicant did not proffer any evidence to support this defence and this part of the testimony should be disregarded. It is discussed further below at paragraph 65.

*Other testimony*

41. The Tribunal heard testimony from Ms. Turmel, one of the investigators from the Banda Aceh formal investigation team. She testified as to the procedures of the investigation and the interview process of the witnesses. She stated that the Complainant “described precisely” what had occurred and that she had provided “a lot of details”. The team interviewed the teacher/caretaker Mr. Sabirin; Ms. Turmel noted that Mr. Sabirin did not notice whether the Applicant had touched the Complainant and that he did not speak English, so he would not have understood any conversation between the Applicant and the Complainant at the project site. The physical layout and her accurate description of the disabled toilet corroborated the Complainant’s version of events.

42. The Banda Aceh formal investigation team had “no doubt” that the Complainant’s version of events was true, and that the Applicant’s version was untrue, as the Applicant needed to be prompted and changed his interview statements several times. Ms. Turmel and Mr. Christensen, the other investigator, concluded that Applicant had sexually harassed the Complainant.

43. The Tribunal also heard the testimony of Ms. Mitchell, former Chairperson of the *ad hoc* JDC constituted to review the allegations of misconduct against the Applicant. Ms. Mitchell stated that the *ad hoc* JDC took note that the Complainant had been consistent throughout her account of the incident and that she documented the incident in her notebook and that night via email to the Applicant. The *ad hoc* JDC noted the contradictory evidence reported by Applicant. The *ad hoc* JDC agreed with the findings of the formal investigation report. Ms. Mitchell noted that the *ad hoc* JDC could have recommended summary dismissal for the Applicant. However, considering the Applicant’s service to the Organization and his reputation, the *ad hoc* JDC nevertheless recommended a less severe disciplinary measure of separation from service without notice, which entitled the Applicant to some financial entitlement.

44. The Tribunal finds that, based on the testimony at the substantive hearing and based on the entire file evidence in this case, the facts, on which the disciplinary measure was based, have been established.

*Did the established facts amount to serious misconduct under the applicable staff regulations and rules?*

45. The Applicant's second challenge to the evidence in this case is both factual and legal: the Applicant contends that the Complainant was erroneous in her subjective "belief" that she was the victim of sexual harassment and that what occurred did not amount to a violation of sexual harassment as set out in the UNICEF Sexual Harassment Policy (CF/AI/2005/017).

46. The UNICEF Sexual Harassment Policy defines sexual harassment as:

[a]ny unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another. Sexual harassment may occur when it ... creates an intimidating, hostile, or offensive environment. It can include a one-time incident ... Sexual harassment may also occur outside the workplace ... .

47. The Applicant relies upon what he terms "the problem of subjectivity" and quotes the former UN Administrative Tribunal Judgment No. 707, *Belas-Gianou* (1995):

IX. A belief in good faith that one has been the victim of sexual harassment, however strongly held, does not automatically mean ... that sexual harassment occurred ... . Sexual harassment would become self-defined by anyone claiming in good faith to be a victim.

48. The facts of *Belas-Gianou*, however, are not similar to the case before the Tribunal and the Applicant, as well, has only provided the Tribunal with a partial quote from the judgment, omitting relevant language that would eliminate *Belas-Gianou* as persuasive authority.



49. In *Belas-Gianou*, the conduct complained of included visits to the complainant's office unrelated to her work responsibilities, unsolicited discussion with her of the manager's personal life, "frequent sexual innuendos", and the use of personal terms of endearment. Given arguably ambiguous conduct for the purposes of ST/AI/379 (Procedures for dealing with sexual harassment) of 29 October 1992, the former UN Administrative Tribunal there was concerned with whether the conduct in question constituted actual sexual harassment under ST/AI/379, and it is in that context that the former Administrative Tribunal's comments were made regarding a victim's "strongly held" belief in sexual harassment. Because of the ambiguous nature of the conduct complained of in *Belas-Gianou*, the former Administrative Tribunal observed that it was required to carefully examine claims of alleged sexual harassment to ensure that they are soundly based.

50. Unlike *Belas-Gianou*, the Applicant's conduct in the case before this Tribunal was unambiguous and has been clearly established: the reaching across the Complainant's shoulders and "gripping" her breasts in the workplace clearly constitutes an "unwelcome sexual advance, 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" as defined in the UNICEF Sexual Harassment Policy.

51. Under the UNICEF Sexual Harassment Policy, it is clear that the subjective belief of the victim *must* be taken into account in determining whether sexual harassment, as defined, has occurred. Under the UNICEF Sexual Harassment Policy, a victim's perceptions are both valid and necessary to determine that the conduct in question was sexual in nature and has caused offense and humiliation. The Policy prohibits "unwelcome sexual advance[s]", which only can be ascertained against the perceptions of the person experiencing the behavior. Similarly, the Policy announces a prohibition against "behavior of a sexual nature that might reasonably be expected to or be perceived to cause offense or humiliation to another". As the facts of this case amply demonstrate, the Complainant here was greatly offended and humiliated

by the Applicant's actions towards her. The Tribunal only could evaluate the criteria of offense and humiliation by eliciting testimony on those points from the Complainant. The "problem of subjectivity" claimed by the Applicant to be a problem in this case is not a problem at all, and perceptions of a victim are not to be dismissed as being irrelevant in a case of sexual harassment.

52. The Applicant has tried to explain away his conduct in this case by alternately contending that the Complainant misunderstood his actions or that, culturally, he had a different understanding of his actions. At the merits hearing, the Applicant stated, "I have a habit of touching people when I talk to them", as if that would justify his actions. The Tribunal unequivocally rejects such an interpretation, for as a United Nations employee, the Applicant surely was aware of his obligation under former staff regulation 1.2(f) that he was to conduct himself at all times in a manner befitting his status and should not engage in any activity that is incompatible with the proper discharge of his duties.

53. Furthermore, under former staff rule 101.2(d), the Applicant was charged with knowing that "[a]ny form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited".

54. Thus, the Applicant's defense of the "problem of subjectivity" (on the part of Complainant) and his own defence of cultural differences both fail.

55. The Tribunal wishes to emphasise that, in sexual harassment cases, credible oral victim testimony alone may be fully sufficient to support a finding of serious misconduct, without further corroboration being required. Indeed, in this particular case where the Complainant has provided such reliable and credible oral testimony, the Tribunal would be justified in rendering its judgment relying on this oral testimony alone. It is not always the situation in sexual harassment cases that corroboration exists in the form of notebook entries, email communications, or other similar documentary evidence, and the absence of such documents should not

automatically render a complaining victim's version as being weak or meaningless. As is always the case, any witness testimony should be evaluated to determine whether it is believable and should be credited as establishing the true facts in a case.

56. The Tribunal nevertheless observes that, in this case, the Complainant's account has been verified by the three investigating bodies that looked into the matter which independently assessed the Complainant's statement of facts, as well as her credibility. When measured against the Applicant's version of events, in particular his weak and unconvincing testimony, the Complainant's statement of facts is fully established as being true.

57. By any objective measure, the Applicant's conduct in this case was prohibited by UNICEF rules and regulations and amounts to serious misconduct.

58. The Tribunal finds that the established facts amounted to serious misconduct under the UNICEF Sexual Harassment Policy.

*Was the UNICEF Executive Director's decision to separate the Applicant a valid exercise of her discretionary authority?*

Was the Applicant afforded due process?

59. Under *Abu Hamda*, it is a general principle of administrative justice that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law. As a normal rule, tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality or procedural impropriety. *Abu Hamda* found the former UN Administrative Tribunal Judgment No. 941, *Kiwanuka* (1991), to be of persuasive authority.

60. Discretionary authority may be subject to review and reversal if it is shown to be based on a mistake of fact, a lack of due process, or if it is arbitrary or motivated by prejudice or other extraneous factors (see the former UN Administrative Tribunal

Judgment No. 707, *Belas-Gianou* (1995) at para. XVI, and the former UN Administrative Tribunal Judgment No. 490, *Liu* (1990) at para. IV).

61. Under *Doleh* 2010-UNAT-025, decision-makers enjoy a wide discretionary area of judgment.

62. The Applicant claims that neither the Banda Aceh formal investigation team nor the *ad hoc* JDC undertook an unbiased examination and evaluation of the evidence. The Applicant contends that the *ad hoc* JDC should have held hearings, interviewed witnesses, or asked further questions or sought additional documentation.

63. Witness testimony from those charged with the responsibility for the formal investigation and the *ad hoc* JDC confirmed that investigation processes and procedures were followed. By the time the matter went to the *ad hoc* JDC, witnesses for the Respondent gave credible evidence as to the reasoning behind the decision not to take further witness testimony, i.e., that the individuals involved had already given sufficient evidence to prove the charges against the Applicant.

64. The Tribunal finds that the *ad hoc* JDC process was reasonable. The *ad hoc* JDC was under no obligation to take steps, such as holding hearings or interviewing witnesses, if it reasonably considered that such steps were not necessary. As to whether the *ad hoc* JDC acted appropriately, this was supported by its Chairperson, who explained why the *ad hoc* JDC came to the conclusions it did.

65. In support of this claim that the Executive Director's decision to separate the Applicant was not a valid exercise of her discretionary authority, the Applicant made submissions related to the purported pressure placed on him by local senior managers and consultants due to his role in procurement, which had already engendered an "animus" towards him and made him the possible target of retaliation. However, the Applicant failed to establish a nexus between the sexual harassment of the Complainant and the alleged retaliation in a procurement process. The Tribunal does not find the retaliation argument as relevant to the instant matter.

66. The Respondent has satisfied the Tribunal that the evidence in support of the misconduct charge is capable of belief and that the discretion to separate the Applicant was properly exercised on the basis of the evidence.

67. The Applicant has failed to provide any evidence of illegality, irrationality or procedural impropriety regarding Executive Director's decision to separate the Applicant.

Was the disciplinary measure imposed proportionate to the misconduct?

68. The Applicant asks the Tribunal to consider the proportionality of the disciplinary measure and refers to the "overzealous application" of a zero-tolerance policy.

69. The Appeals Tribunal in *Sanwidi* 2010-UNAT-084 provides:

47. ... we hold that the UNDT, in exercising judicial review, may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on the ground that the disciplinary measure is not proportionate to the misconduct. The UNDT is not bound by the jurisprudence of the former Administrative Tribunal, although in appropriate cases its judgments concerning disciplinary proceedings may have non-binding persuasive value. However, while exercising judicial review, due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of the Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard.

70. Separation without notice is proportionate to a finding of serious misconduct on the grounds of sexual harassment according to UNICEF's practice, particularly with regard to staff rule 101.2(d), which is a prohibition on harassment.

71. Notably, Ms. Mitchell, a member of the *ad hoc* JDC, testified in essence that the principle of proportionality has, in fact, been applied as to the Applicant: the *ad hoc* JDC specifically took into account that the Applicant had a family and a good performance history and decided to recommend separation without notice (rather than

the more severe measure of summary dismissal), so that the Applicant would receive repatriation benefits—which are substantial.

72. Since the *ad hoc* JDC specifically considered alternate sanctions, since it rendered a lesser sanction that the Applicant could have been given, and since the Applicant did not receive the most severe sanction that could have been given to him (summary dismissal without notice), the Tribunal finds that the disciplinary measure imposed was proportionate to the misconduct that the Applicant engaged in.

### **Conclusion**

73. The Applicant’s claim is rejected in its entirety.

*(Signed)*

Judge Marilyn J. Kaman

Dated this 9<sup>th</sup> day of March 2011

Entered in the Register on this 9th day of March 2011

*(Signed)*

Santiago Villalpando, Registrar, New York